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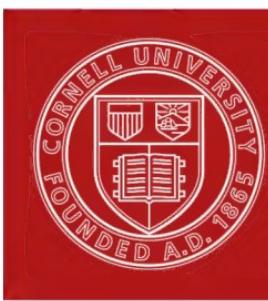
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**STREET RAILWAY REPORTS
ANNOTATED**

Report the decisions of the Federal and State Courts, with exhaustive annotations, from April, 1903, to 1906, in 3 volumes, price \$15.00. Continuations, 2 volumes a year. Price \$5.00 per volume.

A TREATISE
ON
THE LAW OF CARRIERS

AS ADMINISTERED BY THE COURTS OF THE UNITED STATES, CANADA AND ENGLAND, COVERING THE PRINCIPLES AND RULES APPLICABLE TO CARRIERS OF GOODS, PASSENGERS, LIVE STOCK, COMMON CARRIERS, CONNECTING CARRIERS, AND INTERSTATE TRANSPORTATION, AND THE METHODS AND PROCEDURE FOR THEIR ENFORCEMENT, FURNISHING A PRACTICAL GUIDE TO LITIGANTS IN THE JURISDICTIONS NAMED, AND CONTAINING THE TEXT OF

THE RAILROAD RATE ACT OF 1906

BY
DEWITT C. MOORE
of the Johnstown, New York, Bar.

ALBANY, N. Y.
MATTHEW BENDER & CO.,
1906.

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PREFACE.

The author of this volume performed the greater portion of the work necessary to the preparation of Nellis' "Street Railroad Accident Law," published in May, 1904, and was generously accorded the credit therefor by the author of that work in the preface to that volume. The favorable manner in which that publication was received by the profession led him to undertake the more laborious task of preparing this volume covering the broader field of "The Law of Carriers."

The public interest in questions concerning the rights, duties, and liabilities of common carriers in their relations to shippers and travelers, and their regulation by statutory enactments, and the increasing litigation over questions growing out of such relations, seemed to render the subject a timely one. The multitude of cases demonstrates how important and far-reaching the subject has become, and how laborious was the task involved of presenting this mass of decisions and precedents in practicable form for professional use.

It has been the chief aim of the author to furnish suitors with a practical guide in this class of litigation by as full a presentation as possible of the established principles and rules governing the various and varying phases in which controverted questions have been and may be presented for judicial adjustment. The decisions and rulings in different jurisdictions, and the reasons therefor, so far as practicable, have been set forth, and the latest as well as the earliest authorities in the different States are cited and conveniently arranged.

A chapter is devoted to Interstate Transportation, giving the decisions of the courts upon the principal questions arising in the course of the administration of the Interstate Commerce Act of 1887, and the amendments thereto. These decisions forecast to a considerable extent the probable construction that will be given by the courts to many of the provisions of the recent Act of Congress, known as the Railroad Rate Act. The full text of the new law is

given, with its many important and in many respects radical changes. The principal purposes and objects of that law are set forth, but only when the law is in actual operation can it be determined whether it will prove as effective and beneficial as those who are responsible for the legislation have urged and insisted that it would be.

In the confident belief that the work will be well received and serve a useful purpose to the profession, which will amply repay the author for the care and labor conscientiously bestowed upon it, and that its accuracy of statement and authority will be found to be what the author has aimed to make it, the volume is submitted to the consideration of the profession.

DEWITT C. MOORE.

Johnstown, N. Y., June 2, 1906.

TABLE OF CONTENTS.

CHAPTER I.

CARRIERS GENERALLY.

	Page.	
SECTION	1. Carrier defined	1
	2. Classes of carriers	1
	3. Carriage of goods a bailment.	2
	4. Private carriers	3
	5. Duties and liabilities of private carriers.	4
	6. Private carriers without hire	4
	7. When transportation is gratuitous	7
	8. When compensation is implied	9
	9. Proof of negligence	9
	10. Private carriers for hire	10
	11. Liability of private carriers for hire.....	12
	12. Special contracts increasing or diminishing liability	13
	13. Lien of the private carrier	14

CHAPTER II.

COMMON CARRIERS.

SECTION	1. What constitutes a common carrier	18
	2. The liability of the common carrier	23
	3. Liability in the carrying of live stock	28
	4. Liability where the loss or injury results from the inherent nature of the goods	29
	5. Where the loss or injury is the result of the acts of the shipper	32
	6. Where the loss or injury is the result of delay in the trans- mission of the goods	33
	7. Where the loss or injury is caused by the exercise of public authority	34
	8. Liability of carriers of passengers	35
	9. Express companies	35
	10. Railroad Companies	37
	11. Receivers and assignees of railroad company operating the road	40
	12. Trustees of mortgage bonds of railroad company	42
	13. Street railroad companies	44

TABLE OF CONTENTS.

	Page.
SECTION	
14. One railroad transporting the cars of another.....	45
15. Transportation or dispatch companies	47
16. Express freight lines	47
17. Owners of canal boats	48
18. Owners of tow boats towing water craft on the Mississippi.....	48
19. Owners of boats employed in towing other boats or vessels.....	49
20. Ferrymen	51
21. Hackmen	53
22. Proprietors of omnibuses	54
23. Proprietors of stage coaches	55
24. Palace and sleeping car companies	55
25. Pipe line for carrying oil	61
26. Wagoners	61
27. Carriers by river craft	62
28. Truckmen, Freightmen, Draymen, Cartmen, and Porters	63
29. Owners and masters of ships and steamboats or vessels	65
30. Owners of toll bridge	66
31. Canal companies	67
32. Forwarding merchants	68
33. Warehousemen and wharfingers	69
34. Postmasters, mail contractors, and mail carriers	71
35. Log-carrying, or log-driving, or boom companies	72
36. Telegraph companies	73
37. Telephone companies	78
38. Railroad company transporting a circus or menagerie	79
39. Railroad company in South Carolina only over its own line..	80
40. Railroad company carrying a dog for accommodation of passenger	80
41. Carrier under a contract exempting "river risks".....	82
42. Owners of passenger elevators	82
43. Car-switching companies	86
44. Telegraph messenger companies	86
45. An irrigation company	88
46. Transfer companies	89
47. Owners of grain elevators	90

CHAPTER III.

CARRIERS OF GOODS.—DUTIES AND LIABILITIES.

SECTION	
1. Carriers of goods	91
2. Duty of carrier to receive and carry	92
3. Must haul cars and freight of other carriers	95
4. May be compelled by mandamus	96
5. When failure or refusal to carry is legally excusable	98
6. May demand prepayment of charges	101
7. When carrier may select mode of transportation	103
8. Facilities for transportation	104

TABLE OF CONTENTS.

vii

	Page.	
SECTION	9. Special contracts for means of transportation.....	108
10.	Duty to furnish facilities declared by statute	111
11.	Must furnish suitable and safe cars	114
12.	Tender of goods by shipper	116
13.	Illegal purpose of shipper as a defense	117
14.	Proximate cause of loss or injury	118
15.	Discrimination in charges or facilities	119
16.	The rule does not require the same rates and facilities for all	122
17.	The compensation of the carrier	125
18.	Excessive charges and actions therefor	127

CHAPTER IV.

COMMENCEMENT OF CARRIER'S LIABILITY—DELIVERY TO CARRIER.

SECTION	1. Commencement of carrier's liability	130
2.	Acts constituting delivery to and acceptance by carrier	133
3.	Acceptance may be implied from proper tender	135
4.	Deposit of goods elsewhere than at regular office or depot	137
5.	Delivery to agent of carrier	139
6.	Bill of lading not essential to constitute delivery	141
7.	Bill of lading as evidence of delivery	142
8.	Loading goods on cars	143
9.	Proof of delivery to the carrier	144

CHAPTER V.

TERMINATION OF LIABILITY—DELIVERY BY CARRIER.

SECTION	1. Termination of carrier's liability.....	146
2.	Unloading and storing goods.....	149
3.	Liability for injury while goods are being unloaded.....	151
4.	Delivery must be made to the consignee or his agent.....	152
5.	Delivery may always be made to the true owner of the goods..	155
6.	Delivery to fraudulent purchaser.....	157
7.	Delivery of goods sent in care of carrier's local agent.....	158
8.	Consignor's right to change of consignee.....	159
9.	Delivery to holder of bill of lading.....	161
10.	Carrier entitled to demand bill of lading.....	166
11.	Carrier's liability to innocent purchaser of bill of lading....	167
12.	Laches of holder of bill of lading.....	167
13.	Goods received from connecting carrier.....	168
14.	Stoppage in transitu as a defense.....	169
15.	Holder of bill of lading has priority over creditors.....	170
16.	Effect of the word "notify" in a bill of lading.....	170
17.	Bill of lading attached to draft.....	171

TABLE OF CONTENTS.

	Page.
SECTION 18. Effect of bill of lading as estoppel.....	173
19. Duplicate bills of lading.....	176
20. Necessity of endorsement of bill of lading.....	177
21. Carrier's liability for misdelivery.....	178
22. Delivery to one of two persons of the same name.....	181
23. Place of delivery.....	183
24. Right of owner or consignee to change place of delivery.....	186
25. Statutory requirements as to delivery of grain.....	189
26. When place of destination is not on carrier's line.....	190
27. Time of delivery.....	191
28. When personal delivery is required.....	192
29. Delivery by carriers by water.....	194
30. Delivery where consignee refuses to receive.....	196
31. Delivery of goods sent C. O. D.....	199
32. Confusion of goods.....	203
33. Statutory penalties for refusing to deliver promptly.....	205
34. Demand of goods by consignee.....	207
35. Waiver of right of action for wrongful delivery.....	208
36. Right of carrier to demand receipts upon delivery.....	209

CHAPTER VI.

CONVERSION BY CARRIER.

SECTION 1. Conversion by carrier.....	211
2. Receiving goods from one in possession not conversion.....	216
3. Carrier not liable in conversion for mere nonfeasance.....	216

CHAPTER VII.

LIABILITY FOR LOSS OR DAMAGE.

SECTION 1. Liability of carrier for loss or damage.....	219
2. Loss or damage by act of God, vis major, or inevitable accident.....	220
3. Proximate cause of loss or injury.....	224
4. Loss or injury by the public enemy.....	225
5. Seizure under legal process.—Attachment.....	229
6. Seizure under legal process.—Garnishment.....	232
7. Seizure under police regulations.....	233
8. Duty of carrier after disaster.....	234
9. Loss or injury from inherent nature of goods.....	235
10. Care required of carrier in general.....	235

CHAPTER VIII.

LIABILITY FOR DELAY.

SECTION 1. Liability for delay in transportation.....	238
2. Liability where there is a special contract.....	242
3. Liability where there are special instructions by the shipper	245

	Page.
SECTION 4. Liability under statutes requiring prompt forwarding of freight	245
5. Delay in delivering perishable freight	246
6. Delay must have been the proximate cause of injury	248
7. Waiver of right of action for delay	249
8. Excuses for delay generally	249
9. Unusual floods and storms	251
10. Accumulation of cars and freight	252
11. Low water or freezing of water-way	253
12. Strikes by employees	254
13. Limitation of liability for delay	255
14. Carrier's duty during delay	256
15. Delay concurring with inevitable accident	256

CHAPTER IX.

LIABILITY AS WAREHOUSEMAN.

SECTION 1. Carrier's liability as warehouseman before transportation	258
2. Carrier's liability as warehouseman during transportation	260
3. Carrier's liability as warehouseman as to goods awaiting delivery.—Massachusetts rule	261
4. The New Hampshire rule.—English rule.—Origin of different rules	263
5. Conflict of laws	266
6. What is reasonable time for removal of goods generally	267
7. Time extended by failure or refusal to deliver	271
8. Notice to consignee held not essential	272
9. Necessity of notice maintained	273
10. Sufficiency of notice	275
11. Notice to consignor	275
12. Liability of connecting carriers	277
13. The burden of proof	277
14. Effect of special contract or usage on rule	278
15. Duty of carrier as warehouseman to store safely	280
16. Carrier's liability as warehouseman for negligence	281
17. Statute making railroad company liable for losses by fire	285

CHAPTER X.

LIMITATION OF LIABILITY.

SECTION 1. Limitation of carrier's liability generally	287
2. Operation and effect of limitation in general	288
3. Limitation by public notice	290
4. Limitation by special contract	294
5. Special contract must be express and will not be presumed	298
6. Contract need not be signed by shipper unless required by statute	299

TABLE OF CONTENTS.

	Page.
SECTION	
7. Where there are two contracts limiting liability.....	299
8. Conflict of oral and written agreements.....	300
9. Contract must have been fairly entered into.....	302
10. Necessity of consideration.....	302
11. Contract signed by shipper without examination.....	305
12. Contract must have been made at time of shipment.....	306
13. Contract must be legible and intelligible.....	307
14. By what law validity of contract is determined.....	308
15. Who may make special contract.....	312
16. Carrier may not limit its liability for negligence.....	313
17. The New York rule.....	319
18. Rule in Illinois and Wisconsin.....	322
19. The English and Canadian rule.....	323
20. Reasons upon which the different rules are based.....	325
21. Liabilities subject to limitation.....	327
22. Mode or form of limitation.—Bill of lading or shipping receipt.....	329
23. Limitation of time in which to bring suit.....	331
24. Requirement of notice of loss or presentation of claim within fixed time	333
25. To what damages stipulation does not apply.....	336
26. Limitation of liability as ground of defense.—Pleading.....	338
27. Limitation of liability as ground of defense.—Presumptions and burden of proof.....	338
28. Stipulation requiring claim to be made before removal of goods.	339
29. Limitation of liability to forwarder or warehouseman.....	340
30. Limitation of amount of liability.....	341
31. Stipulations that measure of damages shall be invoice value or market price at place of shipment.....	349
32. Construction of special contracts.....	351
33. When stipulations of contract inoperative.....	355
34. Fraudulent concealment or misrepresentation of value by shipper.....	355
35. Carrier's duty to inquire as to value of property.....	358
36. Shipper's duty to state value and character of goods.....	359

CHAPTER XI.

CARRIER'S RELATION TO GOODS AND AUTHORITY OF AGENTS.

SECTION	
1. Carrier's relation to goods.....	362
2. Power and authority of carrier's general freight agents.....	364
3. Powers and authority of local agents.....	367
4. Authority of other agents and employes.....	372
5. Carrier and insurance company.....	373

TABLE OF CONTENTS.

xi

CHAPTER XII.

NEGLIGENCE OF CARRIER.

	Page.
SECTION 1. General rule of liability as to negligence of carrier.....	374
2. Negligence must have been proximate cause of injury.....	377
3. Negligence in stowage of goods.....	378

CHAPTER XIII.

CONTRIBUTORY NEGLIGENCE OF SHIPPER.

SECTION 1. Contributory negligence of shipper generally.....	380
2. Defective packing or marking.....	381
3. Goods improperly loaded.....	382
4. Liability of shipper or consignee to carrier for negligence in unloading.	383
5. Liability of shipper for injury caused by goods of dangerous character.	383

CHAPTER XIV.

PRESUMPTIONS AND BURDEN OF PROOF.

SECTION 1. Presumptions and burden of proof generally.....	386
2. Presumption as to state of goods when received.....	391
3. Defense of loss by the act of God.....	391
4. Where goods lost consist of several kinds.....	392
5. Where liability is limited by special contract.....	392
6. Proof of loss by fire under contract limiting liability.....	395
7. Where carrier is merely a warehouseman.....	396

CHAPTER XV.

DAMAGES.

SECTION 1. Measure of damages in case of loss of goods.....	398
2. Interest as part of damages.....	403
3. Freight charges, advances, and attorney's fees.....	406
4. Damages where goods are only injured.....	408
5. Measure of damages in case of delay.....	410
6. Damages for refusal or failure to carry.....	417
7. Damages for refusal to deliver.....	419
8. Damages for misdelivery	419
9. Damages where goods have no market value.....	420
10. Damages for mental suffering.....	421
11. Remote and speculative damages.....	422
12. Contract of sale as measure of damages.....	423
13. Damages for loss or delay in delivery of goods intended for a specific purpose	424
14. Prospective, contingent, or possible consequences.....	426

TABLE OF CONTENTS.

CHAPTER XVI.

CARRIER'S LIEN.

	Page.
SECTION	
1. Carrier's lien for charges.....	428
2. Carrier's lien for general balance due.....	431
3. What carriers are entitled to lien.....	432
4. What property lien applies to.....	433
5. When lien attaches.....	435
6. Delivery of goods and payment of freight.....	435
7. Lien of carrier where consignee fails or refuses to receive....	436
8. Lien of the last of connecting carriers.....	437
9. Priority over other liens.....	439
10. How lien is lost, satisfied, or discharged.....	441
11. Lien waived by express agreement or stipulation inconsistent with it	445
12. How lien is enforced.....	445

CHAPTER XVII.

CONNECTING CARRIERS.

SECTION	448
1. Who are connecting carriers.....	448
2. Relation of connecting carriers to shipper and to each other. 449	449
3. Carrier not bound to carry beyond its own line.....	450
4. Delivery to succeeding carrier.....	450
5. Notice of arrival of goods.....	453
6. Duty to receive goods from connecting carrier.....	453
7. Liability for delay.....	454
8. Liability of initial carrier for loss or injury limited to its own line	457
9. Liability of initial carrier for loss or injury extends over whole route	462
10. Liability of intermediate carriers.....	464
11. Liability of terminal carrier.....	468
12. Liability for miscarriage or diversion of goods.....	469
13. Special contracts for through transportation.....	471
14. What is sufficient to establish a through contract.....	473
15. Charging and collecting entire freight in advance.....	475
16. Collection of entire charges by terminal carrier.....	476
17. Accepting goods to be transported to or delivered at a cer- tain point	477
18. Carrier as forwarder or warehouseman.....	478
19. Limitation of carrier's liability to its own line.....	479
20. When connecting carriers entitled to benefit of limitations..	484
21. What constitutes delivery to a connecting carrier.....	487
22. Notice to connecting carrier of arrival of goods.....	488
23. Presumptions and burden of proof.....	490
24. Connecting lines as partners.....	491
25. Rights of connecting carriers as to charges.....	494

CHAPTER XVIII.

CARRIERS OF LIVE STOCK.

	Page.
SECTION	
1. Carriers of live stock are common carriers.....	496
2. Duty to receive and carry.....	497
3. Duty in respect to facilities and means of transportation.....	498
4. Stock pens and yards.....	500
5. Shipper's knowledge of defects in cars.....	502
6. Duty to provide food, water, and rest for stock.....	504
7. When shipper assumes duty of caring for stock.....	505
8. Other duties in respect to transportation.....	507
9. Statutes limiting the confinement of cattle.....	508
10. Liability for loss or injury.....	509
11. Commencement and termination of liability.....	512
12. Liability for delay in transportation or delivery.....	512
13. Delivery to carrier.....	516
14. Delivery by carrier.....	516
15. Contributory negligence of owner.....	518
16. Measure of damages.....	520
17. Limitation of liability.....	522
18. Stipulations that shipper will accompany stock, load, and unload	523
19. Injuries caused by viciousness of animals, or defects in cars.	524
20. Stipulations as to claim for damages.....	525
21. Limitation of liability to a specified amount.....	527
22. Loss or injury due to carrier's negligence.....	529
23. Stipulation requiring shipper to report condition of stock...	530
24. Limitations rendered inoperative.....	531
25. Presumptions and burden of proof.....	531
26. Liability of connecting carriers	534
27. Liability for improper loading or unloading.....	536
28. Liability for animals escaping.....	537

CHAPTER XIX.

CARRIERS OF PASSENGERS.

SECTION	
1. Definition and nature of carriers of passengers.....	539
2. Relation between carrier and passenger.....	541
3. Who are passengers.....	543
4. Commencement of relation.....	545
5. Purchase of ticket.....	548
6. Entry in vehicle of carrier.....	549
7. Payment of fare.....	552
8. Termination of relation.....	554
9. Leaving the vehicle of carrier.....	556
10. After leaving vehicle of carrier.....	556
11. Stop-overs on continuous passage tickets.....	558

TABLE OF CONTENTS.

	Page.
SECTION 12. Who are not passengers.....	560
13. Limited and unlimited tickets.....	563
14. Non-transferable tickets	567
15. Persons riding gratuitously	568
16. Persons riding on passes.....	570
17. Persons riding on drover's pass.....	571
18. Persons riding on trains not generally used for passengers..	574
19. Persons riding on engine.....	575
20. Persons riding on hand cars.....	577
21. Employes of others carried under contract.—Mail clerks....	577
22. Employes of others carried under contract.—Express Messen- gers .. .	579
23. Persons riding on freight trains.....	581
24. Persons accompanying passengers.....	584
25. Employes of carrier as passengers.....	586
26. Rules and regulations of the carrier.....	588

CHAPTER XX.

DUTIES AND LIABILITIES OF CARRIERS OF PASSENGERS.

SECTION	1. Care required of carrier in general.....	594
	2. Obstructions on or near tracks.....	598
	3. Duty of railroad company to fence tracks.....	599
	4. Locomtives, cars, and appliances.....	600
	5. Improved appliances and methods.....	603
	6. Duty of inspection.....	605
	7. Liability for latent defects.....	606
	8. Negligence of persons engaged in construction or manufacture.	608
	9. Liability of carrier employing leased lines, or using cars of another company .. .	609
	10. Liability for injuries caused by inevitable accident.....	610
	11. Means and appliances for receiving and discharging pas- sengers. . . .	612
	12. Passenger carriers by stage coaches.....	615
	13. Carriers of passengers by water.....	615
	14. Carrier's liability as to employment of servants.....	616
	15. Duty to receive and transport passengers.....	619
	16. Persons who may be refused transportation.....	621
	17. When refusal to transport must be made.....	624
	18. Duty to carry passengers on freight and special trains....	624
	19. Duty of carrier to protect passenger.....	625
	20. Acts or omissions of carrier's employes.....	627
	21. The New York rule.....	630
	22. Carrier's liability for assaults by servants.....	631
	23. Liability for insult and abuse by servants.....	636
	24. Liability for expulsion by servants.....	637
	25. Liability for false arrest of passenger.....	638

	Page.
SECTION 26. Liability for acts of fellow passengers or other third persons.	641
27. Liability for assaults by passengers or other third persons..	644
28. Indecent language and conduct of fellow passengers or intruders.....	647
29. Duty to protect from acts of drunken passengers.....	647
30. Duty of carrier to sick passengers.....	649
31. Protection from accidental injuries.....	650
32. Care of carrier in the carriage of passengers.....	651
33. Management of conveyance.—Sudden jerks and jolts.....	660
34. Duty of carrier to announce stations.....	664
35. Duty of carrier to stop at stations.....	666
36. Warning of departure of trains.....	669
37. Duty to provide safe means of ingress and egress.....	670
38. Reasonable time for ingress and egress.....	674
39. Duty to warn, instruct, or inform passengers.....	679
40. Duty to assist aged, infirm, or helpless passengers.....	682
41. Duty to carry to point of destination.....	685
42. Carrying passengers beyond destination.....	687
43. Duty to carry promptly.....	690
44. Safety of passengers.....	692
45. Safety of passengers on freight and other trains.....	694
46. Duty of carrier to provide passengers with seats.....	695
47. Liability for injuries caused by collision.....	696
48. Duty of carrier for safety of sick passengers.....	700
49. Articles constituting personal baggage.....	700
50. Duty to carry baggage.....	709
51. Liability of carrier for loss or injury.....	712
52. Limitation of liability.....	716
53. Baggage checks mere receipts or vouchers.....	721
54. Commencement and termination of liability.....	722
55. Carrier's liability as warehouseman.....	726
56. Connecting carriers.....	727

CHAPTER XXI.**EJECTION OF PASSENGERS.**

SECTION 1. Ejection of passengers for failure or refusal to procure ticket or pay fare.....	731
2. Passenger entitled to reasonable time to pay fare or produce ticket.....	733
3. Extra fare when paid on train.....	733
4. Tender or payment of fare to avoid ejection.....	735
5. Ejection of intoxicated passengers.....	736
6. Ejection of disorderly passengers.....	739
7. Ejection for violation of reasonable rules of the carrier.....	740
8. Defective or invalid tickets.....	742
9. Ejection of persons riding on freight trains.....	746
10. Manner of ejection.....	747
11. Place of ejection.....	749

TABLE OF CONTENTS.

CHAPTER XXII.

LIMITATION OF CARRIER'S LIABILITY.

	Page.
SECTION 1. Limitation of carrier's liability generally.....	752
2. Essentials of contract limiting liability for negligence.....	756
3. Limitation of liability for negligence.....	759
4. The New York rule.....	763
5. The English rule.....	765
6. Limitation of liability for negligence as to particular classes of passengers	765

CHAPTER XXIII.

PRESUMPTIONS AND BURDEN OF PROOF.

SECTION 1. Presumptions as to negligence from mere proof of injury...	769
2. Acts of servants or defects in instrumentalities of transpor- tation.....	774
3. Presumption arising from collisions.....	777
4. Presumptions arising from derailment of train or car.....	778
5. Presumption arising from defects in means of transportation.	780
6. Presumption of negligence as to injuries to persons other than passengers	782
7. Reasons for presumption of negligence.....	786
8. Rebutting presumption	787
9. Other presumptions	788
10. Presumptions as to contributory negligence.....	789
11. Presumption arising from instinct of self preservation....	791
12. The burden of proving negligence.....	793
13. The burden of proof as to contributory negligence.....	795

CHAPTER XXIV.

EVIDENCE.

SECTION 1. Authority, competency, and negligence of servants.....	801
2. Condition of means of transportation.....	802
3. Evidence of other and similar accidents.....	804
4. Subsequent repairs and precautions.....	805
5. Custom or habit of carrier or passenger.....	805
6. Tickets as evidence of contract for transportation.....	806
7. Declarations and admissions of injured passengers.....	807
8. Declarations and admissions of employes.....	810
9. Declarations and conduct of other persons.....	812

CHAPTER XXV.

CONTRIBUTORY NEGLIGENCE.

	Page.
SECTION	
1. Contributory negligence must be proximate cause of injury.	814
2. Acts in disregard of warning or disobedience of carrier's rules.	815
3. Acts by permission or direction of carrier's employes.....	817
4. Sudden peril.—Acts in emergencies.....	818
5. Contributory negligence of children.....	822
6. Contributory negligence of aged or infirm persons.....	825
7. Contributory negligence of parents, guardians, or custodians..	828
8. Intoxication as evidence of contributory negligence.....	828
9. Contributory negligence as a question of law or fact.....	829
10. Traveling in violation of statute not contributory negligence.	830
11. Entering conveyance	832
12. Boarding train or car in motion.....	836
13. Place of entering cars or trains.....	843
14. Leaving conveyance	843
15. Alighting at improper place or in improper manner.....	845
16. Alighting from train or cars in motion.....	847
17. Riding in dangerous position.....	853
18. Riding on platform, steps, or running board.....	856
19. Standing up in car.....	866
20. Passing from one car to another.....	868
21. Riding with part of person projecting from window.....	870
22. Awaiting and seeking transportation.....	872
23. Standing near or between tracks and crossing intervening tracks.....	874

CHAPTER XXVI.

DAMAGES.

SECTION	
1. Compensation is the general rule as to measure of damages..	879
2. Injury aggravated by passenger's negligence or imprudence...	882
3. Injury aggravated by existing disease or injury.....	883
4. Damages for failure to carry.....	884
5. Damages for setting down passengers at place other than des- tination.	886
6. Damages for ejection or assault of passenger.....	887
7. Damages for personal injuries.....	891
8. Mental suffering as distinct cause of action or element of damage	894
9. Exemplary damages.—Malice or wilfulness.....	895
10. Exemplary damages.—Gross negligence	898
11. Exemplary damages for carrier's acts.....	899
12. Exemplary damages for acts of servants.....	900
13. Elements affecting the amount of damages.....	902
14. Excessive or inadequate damages.....	904

TABLE OF CONTENTS.

CHAPTER XXVII.

INTERSTATE TRANSPORTATION.

	Page.
SECTION	
1. Regulation of interstate transportation.....	905
2. The interstate commerce act.....	906
3. Carriers subject to the act.....	909
4. Charges must be just and reasonable.....	911
5. Unjust discrimination	914
6. Unjust discrimination in specific cases.....	918
7. Undue or unreasonable preference or advantage.....	922
8. Undue preference in particular cases.....	926
9. Equal facilities for interchange of traffic.....	928
10. Charges for long and short hauls.....	932
11. Schedules of rates, fares, and charges.....	935
12. Pooling or dividing freights or earnings.....	936
13. Interruption of continuous carriage.....	937
14. Mileage, excursion, or commutation tickets.....	938
15. Enforcement of the act.....	938
16. Railroad rate legislation.....	940

TABLE OF CASES.

(The references are to the pages.)

A.

- Aaron v. Adams Express Co., 27 Ohio L. J. 183—202.
Aaronson v. Pennsylvania R. Co., 23 Misc. Rep. (N. Y.) 666—282.
Abbe v. Eaton, 51 N. Y. 410—209.
Abbey v. Str. Stephens, 22 How. Pr. (N. Y.) 78—50.
Abbett v. Chicago, etc., R. Co., 30 Minn. 452—799.
Abbott v. Bradstreet, 55 Me. 530—713, 715.
Abbott v. Johnstown, etc., Horse R. Co., 80 N. Y. 31—97, 916.
Abbott v. Toliver, 71 Wis. 64—902, 903.
Abell v. Western Maryland R. Co., 63 Md. 433—586.
Abraham v. Western Union Tel. Co., 23 Fed. Rep. 315—74.
Abrams v. Milwaukee, etc., R. Co., 87 Wis. 485—322, 346, 504, 515, 761.
A Cargo of Hard Coal, 55 U. S. App. 181—444.
Acheson v. New York Cent. R. Co., 61 N. Y. 653—108, 125.
Ackerson v. Erie R. Co., 32 N. J. L. 254—899, 900.
Ackley v. Kellogg, 8 Cow. (N. Y.) 223—68.
Adams v. Blankenstein, 2 Cal. 413—154.
Adams v. Clark, 9 Cush. (Mass.) 215, 447.
Adams v. Hannibal, etc., R. Co., 74 Mo. 553—812, 819.
Adams v. Lancashire, etc., R. Co., L. R. 4 C. P. 739—822.
Adams v. Milwaukee, etc., R. Co., 87 Wis. 485—759.
Adams v. Missouri Pac. R. Co., 100 Mo. 555—671.
Adams v. New Jersey Steamboat Co., 151 N. Y. 163—715.
Adams v. Nashville, 95 U. S. 19—266.
Adams v. New Orleans Tow-boat Co., 11 La. 46—65.
Adams v. O'Connor, 100 Mass. 515—437.
Adams v. Scott, 104 Mass. 164—34, 229, 232, 233.
Adams v. Union Ry. Co., 80 N. Y. Supp. 264—774.
Adams v. Washington, etc., R. Co., 9 App. D. C. 26—633, 770, 777, 858.
Adams Express Co. v. Bratton, 106 Ill. App. 563—292, 533.
Adams Express Co. v. Cressop, 6 Bush (Ky.), 572—7.
Adams Express Co. v. Carnahan (Ind. App.), 63 N. E. 245—295, 303, 330, 343, 354.
Adams Express Co. v. Darnell, 31 Ind. 20—7, 24, 148, 201.
Adams Express Co. v. Fendrick, 38 Ind. 150—315, 760.
- Adams Express Co. v. Guthrie, 9 Bush (Ky.), 78—315.
Adams Express Co. v. Haynes, 42 Ill. 89—297, 755, 759, 762.
Adams Express Co. v. Harris, 120 Ind. 73—315, 343, 444, 447, 486.
Adams Express Co. v. Holmes (Pa.), 8 Cent. Rep. 155—761.
Adams Express Co. v. Holmes (Pa.), 9 Atl. 166—345, 358.
Adams Express Co. v. Hoeing, 88 Ky. 373—345.
Adams Express Co. v. Jackson, 92 Tenn. 326—252, 515.
Adams Express Co. v. McConnell, 27 Kan. 238—197.
Adams Express Co. v. McDonough, 6 Ohio Cir. Ct. Rep. 539—198.
Adams Express Co. v. Nock, 2 Duv. (Ky.) 562—93, 293, 295, 302, 755.
Adams Express Co. v. Reagan, 29 Ind. 21—315, 334, 335, 753.
Adams Express Co. v. Schlessinger, 75 Pa. St. 246—173.
Adams Express Co. v. Sharpless, 77 Pa. St. 516—317, 761.
Adams Express Co. v. Stettimers, 61 Ill. 184—290, 297, 315, 322, 343, 717, 762.
Adams Express Co. v. Walker, 26 Ky. Law. Rep. 1025—513, 529.
Adams Express Co. v. Wilson, 81 Ill. 339—462.
Addyston Pipe, etc., Co. v. United States, 175 U. S. 211—905.
Aetna Nat. Bank v. Water Power Co., 58 Mo. App. 532—143.
Aetna Ins. Co. v. Wheeler, 49 N. Y. 616—186, 246, 331, 476, 478, 479, 486, 487.
Agnew v. Steamer Contra Costa, 27 Cal. 425—30, 392, 510.
Ahlbeck v. St. Paul, etc., R. Co., 39 Minn. 424—722.
Aigen v. Boston, etc., R. Co., 132 Mass. 423—459, 464, 467, 492, 494.
Aiken v. Chicago, etc., R. Co., 68 Iowa, 363—142, 498.
Aikin v. Frankford, etc., R. Co., 142 Pa. St. 47—863.
Aiken v. Southern Pac. Co., 104 La. 162—606.
Aiken v. Western Union Tel. Co., 5 S. C. 358—74.
Aiken v. Western Union Tel. Co., 69 Iowa, 31—73.
Airey v. Pullman Palace Car Co., 50 La. Ann. 648—61.
Alair v. Northern Pac. R. Co., 63 Minn. 160—345, 527.
Alabama, etc., R. Co. v. Arnold, 80 Ala. 600—881, 898.
Alabama, etc., R. Co. v. Arnold, 84 Ala. 159—674.

TABLE OF CASES.

(The references are to the pages.)

- Alabama, etc., R. Co. v. Beardsley, 79 Miss. 417—697.
 Alabama, etc., R. Co. v. Brichetto, 72 Miss. 891—185, 252, 255.
 Alabama, etc., R. Co. v. Eichofer, 100 Ala. 224—151.
 Alabama, etc., R. Co. v. Grabfelder, 83 Ala. 200—264.
 Alabama, etc., R. Co. v. Hawk, 72 Ala. 112—56, 816.
 Alabama, etc., R. Co. v. Kidd, 35 Ala. 209—148, 151, 264, 279.
 Alabama, etc., R. Co. v. Little, 71 Ala. 611—314, 342, 388, 390, 393, 754.
 Alabama, etc., Co. v. Mt. Vernon Co., 84 Ala. 173—70, 259, 462, 488.
 Alabama, etc., R. Co. v. Moorer, 116 Ala. 642—375.
 Alabama, etc., R. Co. v. Furnell, 69 Miss. 652—898.
 Alabama R. Co. v. Schaufier, 75 Ala. 142—851.
 Alabama, etc., R. Co. v. Searles, 71 Miss. 744—114, 401.
 Alabama, etc., R. Co. v. Sparks, 71 Miss. 757—508, 515.
 Alabama, etc., R. Co. v. Stacy, 68 Miss. 463—613.
 Alabama, etc., R. Co. v. Thomas, 89 Ala. 294—314, 449, 451, 462, 470, 536.
 Alabama, etc., R. Co. v. Thomas, 93 Ala. 343—314, 474, 480, 530.
 Alabama, etc., R. Co. v. Yarbrough, 83 Ala. 238—550, 583.
 Alabama G. S. R. Co. v. Coggins, 88 Fed. 455—875.
 Alabama G. S. R. Co. v. Frazier, 93 Ala. 46—810.
 Alabama G. S. R. Co. v. Hill, 93 Ala. 514—656, 780, 803, 898, 899.
 Alabama G. S. R. v. Jones, 71 Ala. 487—602.
 Alabama G. S. R. Co. v. Sellers, 93 Ala. 9—687, 886, 887, 896, 898.
 Alabama Midland R. Co. v. Darby, 119 Ala. 531—214.
 Alabama Midland R. Co. v. Gulliford, 119 Ga. 523—600, 604, 652.
 Alabama Nat. Bank v. Mobile, etc., R. Co., 42 Mo. App. 284—167.
 Albion v. Hetrick, 90 Ind. 545—698.
 Albion Lumber Co. v. De Nebra, 72 Fed. 739—540, 587, 779.
 Albright v. Penn, 14 Tex. 290—52.
 Alcorn v. Chicago, etc., R. Co., 108 Mo. 81—282.
 Alden v. Carver, 13 Iowa, 253—428, 436.
 Alden v. New York Cent. R. Co., 26 N. Y. 102—601, 603, 606, 781.
 Alden v. Pearson, 3 Gray (Mass.), 342—388.
 Alderman v. Eastern R. Co., 115 Mass. 233—189, 172, 173.
 Aldrich v. Boston, etc., R. Co., 100 Mass. 31—282, 283.
 Aldrich v. St. Louis Trans. Co. (Mo. App.), 74 S. W. 141—596.
 Aldridge v. Great Western R. Co., 15 C. B. N. S. 582—8, 324, 483, 765.
 Alexander v. Green, 3 Hill (N. Y.), 9—13, 50.
 Alexander v. Green, 7 Hill (N. Y.), 633—18, 320, 321, 351.
 Alexander v. Louisville, etc., R. Co., 83 Ky. 689—617.
 Alexander v. Toronto, etc., R. Co., 35 U. C. Q. B. 453—757, 758.
 Alexandria, etc., R. Co. v. Brown, 17 Wall. (U. S.) 445—623.
 Alexandria, etc., R. Co. v. Herndon, 87 Va. 193—612, 805.
 Alford v. Chicago, etc., R. Co., 2 Int. Com. Rep. 771—930.
 Alfred v. Horne, 3 Stark. 136—323.
 Alkali Co. v. Johnson, L. R. 7 Exch. 267—64.
 Allam v. Pennsylvania R. Co., 183 Pa. 104—152, 262, 275, 770.
 Allan v. State Steamship Co., 132 N. Y. 91—618.
 Allday v. Great Western R. Co., 5 B. & S. 903—504.
 Allen & Lewis v. Oregon R. & Nav. Co., 98 Fed. 16—916, 933.
 Allen v. Camden, etc., Ferry Co., 46 N. J. L. 198—888.
 Allen v. Cape Fear, etc., R. Co., 100 N. C. 397—125.
 Allen v. Colart, 11 Q. B. Div. 782—358.
 Allen v. Galveston City R. Co., 79 Tex. 631—675.
 Allen v. London & S. W. R. Co., L. R. 6 W. B. 65—640.
 Allen v. Northern Pac. R. Co., 35 Wash. 221—773.
 Allen v. Sackrider, 37 N. Y. 341—4, 11, 12, 18, 63.
 Allen v. Sewall, 2 Wend. (N. Y.) 338—27, 65, 544, 569.
 Allen v. Willard, 57 Pa. St. 374—793.
 Allen v. Williams, 12 Pick. (Mass.) 297—172, 177.
 Allegeyer v. Louisiana, 165 U. S. 578—909.
 Allender v. Chicago, etc., R. Co., 37 Iowa, 264—545, 548, 551.
 Allender v. Chicago, etc., R. Co., 43 Iowa, 276—670, 683, 833.
 Allerton v. Boston, etc., R. Co., 146 Mass. 241—556.
 Alling v. Boston, etc., R. Co., 126 Mass. 121—706, 707, 708, 709.
 Allis v. Voight, 90 Mich. 125—11, 12.
 Allison v. Chicago, etc., R. Co., 42 Iowa, 274—803.
 Allyn v. Boston, etc., R. Co., 105 Mass. 77—793.
 Almand v. Georgia R. etc., Co., 95 Ga. 775—261, 285, 456.
 Almer v. Delaware, etc., Canal Co., 120 N. Y. 170—594.
 Alsager v. St. Katharine's Dock, 14 M. & W. 734—442, 445.
 Alsop v. Southern Express Co., 104 N. C. 273—94.
 Alston v. Herning, 11 Exch. 822—30.
 Altemeier v. Cincinnati, etc., R. Co., 4 Ohio N. P. 224—543.
 Althor v. Wolfe, 22 N. Y. 355—903.
 Ambach v. Baltimore, etc., R. Co., 30 Ohio L. J. 11—345.
 American Contract Co. v. Cross, 8 Bush (Ky.), 472—703.
 American District Tel. Co. v. Walker, 72 Md. 454—87.
 American, etc., R. Co. v. Baldwin, 26 Ill. 504—147, 179.
 American Express Co. v. Greenhalge, 80 Ill. 68—201.
 American Express Co. v. Hockett, 30 Ind. 250—193.
 American Express Co. v. Lesen, 39 Ill. 312—199, 200, 202.
 American Express Co. v. Ogles (Tex. Civ. App.), 81 S. W. 1023—573.

TABLE OF CASES.

xxi

(The references are to the pages.)

- American Express Co. v. Perkins, 42 Ill. 458—32.
 American Express Co. v. Robinson, 72 Pa. St. 274—194, 360.
 American Express Co. v. Sands, 55 Pa. St. 140—317, 345, 388.
 American Express Co. v. Second Nat. Bank, 69 Pa. St. 394—295.
 American Express Co. v. Smith, 33 Ohio St. 511—34, 222, 235, 240, 247, 248, 250, 251, 357, 362, 380, 610.
 American Express Co. v. Spellman, 90 Ill. 195, 455—307, 315.
 American Express Co. v. Titusville Second Nat. Bank, 69 Pa. St. 394—460, 482.
 American Hay Co. v. Bath, etc., R. Co., 85 N. Y. Supp. 341—330.
 American Ins. Co. v. Bryan, 1 Hill (N. Y.), 25, 26 Wend. (N. Y.) 563—352.
 American Insurance Co. v. Pinckney, 29 Ill. 392—35.
 American M. U. Express Co. v. Milk, 73 Ill. 224—154.
 American M. U. Express Co. v. Phillips, 29 Mich. 515—497.
 American M. U. Express Co. v. Schier, 55 Ill. 140—194, 199, 200, 295.
 American M. U. Express Co. v. Wolfe, 79 Ill. 430—194, 199, 200, 201, 277.
 American Nat. Bank v. Georgia R. Co., 96 Ga. 665—164, 439.
 American Rapid Tel. Co. v. Connecticut Teleph. Co., 49 Conn. 352—78.
 American Steamship Co. v. Bryan, 83 Pa. St. 446—66, 713, 715.
 American Steamship Co. v. Landreth, 102 Pa. St. 131—616.
 American Sugar Refining Co. v. McGheen, 96 Ga. 27—180, 196, 269, 277.
 American Transp. Co. v. Moore, 5 Mich. 368—292, 715, 757, 758.
 American Union Tel. Co. v. Doughtery, 89 Ala. 191—76.
 American Zinc, etc., Co. v. Markle Lead Works, 102 Mo. App. 158—177.
 Ames v. Belden, 17 Barb. (N. Y.) 515—12.
 Ames v. McCamber, 124 Mass. 85—267.
 Ames v. Palmer, 42 Me. 197—434.
 Ames v. Southern Pac. R. Co., 141 Cal. 728—746.
 Ames v. Waterloo, etc., R. T. Co. (Iowa), 67 N. E. 1044—792, 877.
 Anancy v. McGregor, 15 Johns. (N. Y.) 24—398, 404.
 Anacosta, etc., R. Co. v. Klein, 8 App. D. C. 75—676.
 Anchor Line v. Dater, 68 Ill. 369—297, 463, 467.
 Anchor Line v. Knowles, 66 Ill. 150—297.
 Anchor Mill Co. v. Burlington, etc., R. Co., 102 Iowa, 262—186.
 Anderson v. Atchison, etc., R. Co., 9 Mo. App. 677—531.
 Anderson v. Brooklyn Heights R. Co., 32 App. Div. (N. Y.) 266—778.
 Anderson v. Canadian Pac. R. Co., 17 Ont. Rep. 747—718, 757.
 Anderson v. Chicago, etc., R. Co., 52 N. W. (Neb.) 840—798.
 Anderson v. Foresman, Wright (Ohio), 598—5, 7, 10.
 Anderson v. Grand Trunk R. Co., 24 Ont. App. 672—872.
 Anderson v. Lake Shore, etc., R. Co. (Ind. App.), 59 N. E. 396—530.
 Anderson v. Louisville, etc., R. Co. (Miss.), 15 So. 795—418.
 Anderson v. Northeastern R. Co., 9 W. R. 519—400.
 Anderson v. Rome, etc., R. Co., 54 N. Y. 334—812.
 Anderson v. Scholey, 114 Ind. 553—776.
 Anderson v. Toledo, etc., R. Co., 32 Iowa, 86—716.
 Anderson v. Union Terminal R. Co., 161 Mo. 411—374.
 Andrews v. Capital City, etc., R. Co., 2 Mackay (D. C.), 137—883.
 Andrews v. Dieterich, 14 Wend. (N. Y.) 31—438.
 Andrews v. Ft. Worth, etc., R. Co. (Tex. Civ. App.), 25 S. W. 1040—706.
 Andrews Soap Co. v. Pittsburgh, etc., R. Co., 3 Int. Com. Rep. 77—917.
 Andrist v. Union Pac. R. Co., 30 Fed. 345—669.
 Angle v. Mississippi, etc., R. Co., 18 Iowa, 555—284, 388.
 Angle v. Mississippi, etc., R. Co., 9 Iowa, 487—154, 280, 463.
 Anna v. Milwaukee, etc., R. Co., 67 Wis. 46—569, 754, 782, 764, 766.
 Anniston, etc., R. Co. v. Ledbetter, 92 Ala. 326—264, 271.
 Anniston Transfer Co. v. Gurley (Ala.), 18 So. 209—723.
 Anon v. Jackson, 2 Peake N. P. 185—294.
 Anon v. Jackson, 1 Hayw. (N. C.) 14—11, 92.
 Ansell v. Waterhouse, 2 Chit. Rep. 1, 18 E. C. L. 227—27, 542.
 Anthony Salt Co. v. Missouri Pac. R. Co., 4 Int. Com. C. Rep. 33—916.
 Appleby v. South Carolina, etc., R. Co., 60 S. C. 48—896.
 Appleby v. St. Paul City R. Co., 54 Minn. 169—744.
 Arctic, etc., Ins. Co. v. Austin, 54 Barb. (N. Y.) 559—58.
 Archer v. New York, etc., R. Co., 106 N. Y. 589—795.
 Archer v. Fort Wayne, etc., R. Co., 87 Mich. 101—858, 861.
 Armistead v. Wilde, 17 Q. B. 261—6.
 Arkansas M. R. Co. v. Canman, 52 Ark. 517—589, 601, 652.
 Arlington v. Wilmington, etc., R. Co., 6 Jones L. (N. C.) 68—179.
 Armentrout v. St. Louis, etc., R. Co., 1 Mo. App. 158—257.
 Armistead Lumber Co. v. Louisville, etc., R. Co. (Miss.), 11 So. 472—150.
 Armistead v. Shreveport, etc., R. Co., 108 La. 171—417.
 Armour v. Michigan Cent. R. Co., 65 N. Y. 111—165, 173, 309.
 Armsby v. Union Pac. R. Co., 4 Fed. 706—427.
 Armstrong v. Chicago, etc., R. Co., 62 Mo. App. 639—336, 387, 437, 501.
 Armstrong v. Chicago, etc., R. Co., 45 Minn. 85—265, 282, 334.
 Armstrong v. Grand Trunk R. Co., 18 New Bruns. 445—478.
 Armstrong v. Metropolitan St. R. Co., 23 App. Div. (N. Y.) 137—775, 779.
 Armstrong v. Missouri Pac. R. Co., 17 Mo. App. 408—412, 416, 422.
 Armstrong v. New York, etc., R. Co., 66 Barb. (N. Y.) 437—830.
 Armstrong v. United States Express Co., 159 Pa. St. 640—242, 317, 500.
 Arnold v. Halenbake, 5 Wend. (N. Y.) 33—48.

TABLE OF CASES.

(The references are to the pages.)

- Arnold v. Illinois Cent. R. Co., 83 Ill. 273
—624, 746, 753, 758.
 Arnold v. Jones, 26 Tex. 335—27, 318.
 Arnold v. Pennsylvania R. Co., 115 Pa. St.
135—511, 555.
 Arnold v. Shade, 3 Phila. (Pa.) 82—457, 473.
 Arrington v. Wilmington, etc., R. Co., 6
Jones L. (N. C.) 68—420.
 Arrington v. Texas, etc., R. Co. (Tex. Civ.
App.), 70 S. W. 551—602.
 Arrowsmith v. Nashville, etc., R. Co., 57
Fed. 165—578.
 Arthur v. Chicago, etc., R. Co., 61 Iowa,
648—204.
 Arthur v. Pullman Co., 44 Misc. Rep. (N.
Y.) 229—57.
 Arthur v. St. Paul, etc., R. Co., 38 Minn.
95—189, 264, 270, 271.
 Arthur v. The Schooner Cassius, 2 Story
(U. S.), 97—197, 445, 446.
 Ash v. Putnam, 1 Hill (N. Y.), 302—443.
 Ashbrook v. Frederick Ave. R. Co., 18 Mo.
App. 290—854, 858, 861.
 Ashenden v. London, etc., R. Co., 28 W.
R. 511—325.
 Ashmore v. Pennsylvania, etc., Co., 28 N.
J. L. 180—49, 51, 65, 288, 719, 764.
 Ashmole v. Wainwright, 2 Q. B. 837—127.
 Askew v. Gulf, etc., R. Co. (Tex. Civ.
App.), 73 S. W. 486—482.
 Associated Wholesale Grocers v. Missouri
Frac. R. Co., 1 Int. Com. Rep. 393—921,
938.
 Aston v. Heaven, 2 Esp. 533—22.
 Aston v. St. Louis Transit Co. (Mo. App.),
79 S. W. 999—603, 775.
 Atchison v. Chicago, etc., R. Co., 80 Mo.
213—500.
 Atchison, etc., R. Co. v. Brewer, 20 Kan.
669—710, 721.
 Atchison, etc., R. Co. v. Bryan (Tex. Civ.
App.), 23 S. W. 98—240, 328, 338.
 Atchison, etc., R. Co. v. Crittenden, 4
Kan. App. 512—339.
 Atchison, etc., R. Co. v. Davis, 34 Kan.
199—463, 493.
 Atchison, etc., R. Co. v. Denver, etc., R.
Co., 110 U. S. 667—85, 449, 450, 917, 929,
933.
 Atchison, etc., R. Co. v. Dickenson, 4
Kan. App. 345—734, 735.
 Atchison, etc., R. Co. v. Dill, 48 Kan. 210
—295, 297, 344, 525.
 Atchison, etc., R. Co. v. Ditmars, 3 Kan.
App. 459—338, 508, 515.
 Atchison, etc., R. Co. v. Dunn, 19 Ohio St.
162—627.
 Atchison, etc., R. Co. v. Elder, 57 Kan.
312—770, 779.
 Atchison, etc., R. Co. v. Fletcher, 35 Kan.
236—472.
 Atchison, etc., R. Co. v. Flynn, 24 Kan.
627—611.
 Atchison, etc., R. Co. v. Gants, 38 Kan.
608—551, 555, 589, 591, 666, 667.
 Atchison, etc., R. Co. v. Grant, 6 Tex.
Civ. App. 674—242, 318, 335, 492.
 Atchison, etc., R. Co. v. Headland, 18
Colo. 477—545, 563, 583.
 Atchison, etc., R. Co. v. Henry, 55 Kan.
715—627, 632, 638.
 Atchison, etc., R. Co. v. Holloway (Kan.),
80 Pac. 31—546.
 Atchison, etc., R. Co. v. Hughes, 55 Kan.
491—680.
 Atchison, etc., R. Co. v. Johnson, 3 Okla.
41—584.
 Atchison, etc., R. Co. v. Johns, 36 Kan.
769—584.
 Atchison, etc., R. Co. v. Lawler, 40 Neb.
356—242, 317, 399.
 Atchison, etc., R. Co. v. Mason, 4 Kan.
App. 391—524.
 Atchison, etc., R. Co. v. Miller, 16 Neb.
661—292, 402.
 Atchison, etc., R. Co. v. Morris, 65 Kan.
532—334.
 Atchison, etc., R. Co. v. Moore, 29 Kan.
632—310.
 Atchison, etc., R. Co. v. Reesman, 60 Fed.
370—600.
 Atchison, etc., R. Co. v. Richardson, 53
Kan. 157—481.
 Atchison, etc., R. Co. v. Roach, 35 Kan.
740—463, 472, 727, 728, 730.
 Atchison, etc., R. Co. v. Roberts, 3 Tex.
Civ. App. 370—205.
 Atchison, etc., R. Co. v. Shean, 18 Colo.
368—557, 652, 875.
 Atchison, etc., R. Co. v. Temple, 47 Kan.
7—337, 339, 526.
 Atchison, etc., R. Co. v. Thomas (Kan.),
78 Pac. 861—422, 426.
 Atchison, etc., R. Co. v. Washburn, 5
Neb. 117—283, 760, 762.
 Atchison, etc., R. Co. v. Weber, 33 Kan.
543—649, 684, 689, 700, 738, 826.
 Atchison, etc., R. Co. v. Wood (Tex. Civ.
App.), 77 S. W. 966—739.
 Atkinson v. Ritchie, 10 East, 530—109, 233.
 Atkisson v. Steamboat Castle Garden, 28
Mo. 124—208.
 Atlanta, etc., R. Co. v. Dickerson, 89 Ga.
455—847.
 Atlanta, etc., R. Co. v. Fuller, 92 Ga. 482
—550.
 Atlanta, etc., R. Co. v. Holcombe, 88 Ga.
9—670.
 Atlanta, etc. R. Co. v. Holcombe, 76 Ga.
590—92.
 Atlanta, etc., R. Co. v. Tanner, 68 Ga.
384—267, 310.
 Atlanta, etc., R. Co. v. Texas Grate Co.,
81 Ga. 602—242, 411, 476.
 Atlanta, etc., R. Co. v. Wyly, 65 Ga. 120
—786.
 Atlantic City R. Co. v. Goodin, 62 N. J.
L. 394—834, 875.
 Atlantic, etc., R. Co. v. Anderson, 118 Ga.
288—833.
 Atlantic, etc., R. Co. v. Condor, 75 Ga.
51—897, 904.
 Atlantic, etc., R. Co. v. Dunn, 19 Ohio St.
518, 162—902.
 Atlantic & P. R. Co. v. Laird, 15 U. S.
App. 248—37.
 Atlantic Ins. Co. v. Storrow, 5 Paige (N.
Y.), 285—352.
 Atlas S. S. Co. v. Columbus Land Co., 102
Fed. 358—431.
 Atwater v. Delaware, etc., R. Co., 48 N.
J. L. 55—555.
 Atwood v. Mohler, 108 Ill. App. 416—701.
 Atwood v. Reliance Transp. Co., 9 Watts
(Pa.), 37—318, 351, 755, 762.
 Auernbach v. New York Cent., etc., R. Co.,
89 N. Y. 281—559, 567, 742.
 Augusta R. Co. v. Glover, 92 Ga. 132—601.
 Augusta, etc., R. Co. v. McElmurry, 24
Ga. 75—786.
 Augusta, etc., R. Co. v. Randall, 85 Ga.
297—802.
 Augusta, etc., R. Co. v. Randall, 79 Ga.
304—807, 883, 898.

TABLE OF CASES.

xxiii

(The references are to the pages.)

- Augusta, etc., R. Co. v. Renz, 55 Ga. 726—805, 858.
 Augusta Ry. & Elec. Co. v. Smith, 121 Ga. 29—632.
 Augusta Southern R. Co. v. Snider, 118 Ga. 146—539.
 Augusta Southern R. Co. v. Wrightsville, etc., R. Co., 74 Fed. 522—929.
 Ault v. Cowan, 20 Pa. Super. Ct. 616—774.
 Austin v. Great Western R. Co., L. R. 2 Q. B. 442—569, 620.
 Austin v. Manchester, etc., R. Co., 10 C. B. 454—6.
 Austin v. St. Louis, etc., Packet Co., 15 Mo. App. 197—45.
 Austin, etc., R. Co. v. Slator, 7 Tex. Civ. App. 344—112.
 Avery v. Galveston, etc., R. Co., 81 Tex. 243—825.
 Avery v. New York Cent., etc., R. Co., 121 N. Y. 31—588, 590.
 Avery v. Stewart, 2 Conn. 74—203.
 Ayinger v. South Carolina R. Co., 29 S. C. 265—38, 40, 92, 93, 124, 418.
 Ayres v. Chicago, etc., R. Co., 71 Wis. 372, 75 Wis. 215—108, 112, 416, 499, 515, 617.
 Ayers v. Rochester R. Co., 156 N. Y. 104—612, 782.
 Ayers v. Western R. Corp., 14 Blatchf. (U. S.) 9—292, 352, 489.
 Ayers v. Western Union Tel. Co., 79 Me. 493—77.
 Aylward v. Smith, 2 Lowell (U. S.), 192—342.
 Aymar v. Astor, 6 Cow. (N. Y.) 266—66.
- B.
- Babcock v. Herbert, 3 Ala. 392—19, 52.
 Babcock v. Lake Shore, etc., R. Co., 49 N. Y. 491—169, 458, 471, 479, 485, 486, 728.
 Bacharach v. Chester Freight Line, 133 Pa. St. 414—198, 431.
 Backhaus v. Chicago, etc., R. Co., 92 Wis. 393—265, 270.
 Bacon v. Delaware, etc., R. Co., 143 Pa. St. 14—836.
 Bagg v. Wilmington, etc., R. Co., 109 N. C. 279—246.
 Bailey v. Citizen's R. Co., 152 Mo. 449—785.
 Baily v. De Crespinney, L. R. 4 Q. B. 185—109.
 Baily v. Damon, 3 Gray (Mass.), 92—435.
 Bailey v. Quint, 22 Vt. 474—441.
 Bailey v. Hudson River R. Co., 49 N. Y. 70—159.
 Bailey v. Shaw, 24 N. H. 297—362, 412.
 Bailey v. Tacoma Tract. Co., 16 Wash. 48—558.
 Bainbridge v. Union Tract. Co., 206 Pa. St. 71—863.
 Baird v. St. Louis, etc., R. Co., 41 Fed. 592—205, 207.
 Fairley v. Gladstone, 3 M. & S. 205—431.
 Bajus v. Syracuse, etc., R. Co., 103 N. Y. 312—600.
 Baker v. Brimson, 9 Rich. L. (S. C.) 201—394.
 Baker v. Kansas City, etc., R. Co., 91 Mo. 152—110, 365.
 Baker v. Louisville, etc., R. Co., 10 Lea (Tenn.) 308—118, 497.
 Baker v. Manhattan R. Co., 118 N. Y. 533—867.
 Baker v. Missouri Pac. R. Co., 34 Mo. App. 98—760.
 Baker & Penniston v. Chicago, etc., R. Co. (Minn.), 97 N. W. 650—366.
- Baldraff v. Camden, etc., R. Co., 2 Fed. Cas. 507—718.
 Baldwin v. Collins, 9 Rob. (La.) 468—292, 360.
 Baldwin v. Barney, 12 R. I. 392—831.
 Baldwin v. Grand Trunk R. Co., 64 N. H. 596—751.
 Baldwin v. Liverpool, etc., Steamship Co., 74 N. Y. 125—355, 358, 360.
 Baldwin v. London, etc., R. Co., 9 Q. B. Div. 582—410, 416.
 Baldwin v. United States Tel. Co., 45 N. Y. 744—74, 77.
 Baldwin v. American Express Co., 23 Ill. 197—35, 150, 194, 463.
 Ballentine v. North Missouri R. Co., 40 Mo. 491—106, 247, 258, 495, 515.
 Ballou v. Farnum, 9 Allen (Mass.), 47—42, 43.
 Ballou v. Earle, 17 R. I. 441—295, 297, 344, 761.
 Ball v. Wabash, etc., R. Co., 83 Mo. 574—817, 514, 530, 532, 760.
 Baltimore & Ohio R. Co. v. Griffith, 159 U. S. 603—790.
 Baltimore & O. R. Co. v. Kane (Md.), 13 Atl. 387—838.
 Baltimore City Pass. Ry. Co. v. Baer, 90 Md. 97—676.
 Baltimore City Pass. R. Co. v. Kemp, 61 Md. 74—884, 894.
 Baltimore City P. R. Co. v. McDonnell, 43 Md. 534—822, 824.
 Baltimore City Pass. R. Co. v. Wilkinson, 30 Md. 224—591.
 Baltimore, etc., R. Co. v. Bambrey (Pa.), 16 Atl. 67—744, 745.
 Baltimore, etc., R. Co. v. Barger, 80 Md. 31, 23—543, 635, 636.
 Baltimore, etc., R. Co. v. Brady, 32 Md. 333—292, 297, 316, 394, 753, 756, 758, 760, 762.
 Baltimore, etc., R. Co. v. Blocher, 27 Md. 277—592, 627, 637, 901.
 Baltimore, etc., R. Co. v. Breinig, 25 Md. 378—541, 595, 653.
 Baltimore, etc., R. Co. v. Casom, 72 Md. 377—777.
 Baltimore, etc., R. Co. v. Carr, 71 Md. 135—590, 592, 880, 884, 886, 895, 902.
 Baltimore, etc., R. Co. v. Campbell, 36 Ohio St. 647—463, 717, 720, 728, 755, 761.
 Baltimore, etc., R. Co. v. Cox, 66 Ohio St. 276—374.
 Baltimore, etc., R. Co. v. Davis (Pa.), 12 Atl. 335—229.
 Baltimore, etc., R. Co. v. Diamond Coal Co., 61 Ohio St. 242—122.
 Baltimore, etc., R. Co. v. Fox, 113 Ill. App. 180—497, 523, 532.
 Baltimore, etc., R. Co. v. Green, 25 Md. 72—194, 264, 473.
 Baltimore, etc., R. Co. v. Hubbard, 25 Ohio Cir. Ct. Rep. 477—403, 527, 530.
 Baltimore, etc., R. Co. v. Kane (Md.), 17 Atl. 1032—668.
 Baltimore, etc., R. Co. v. Kane, 69 Md. 11—680, 801, 837.
 Baltimore, etc., R. Co. v. Keedy, 75 Md. 320—236.
 Baltimore, etc., R. Co. v. Leapley, 65 Md. 571—680, 846.
 Baltimore, etc., R. Co. v. McCarney, 12 Ohio C. C. 543—580.
 Baltimore, etc., R. Co. v. McDonald, 68 Ind. 316—729.
 Baltimore, etc., R. Co. v. McLaughlin, 73 Fed. 519—759.

TABLE OF CASES.

(The references are to the pages.)

- Baltimore, etc., R. Co. v. Morshead, 5 W. Va. 233—236.
 Baltimore, etc., R. Co. v. Noell, 32 Gratt. (Va.) 394—597, 780, 781.
 Baltimore, etc., R. Co. v. Norris, 17 Ind. App. 189—748.
 Baltimore, etc., R. Co. v. Nugent, 86 Md. 349—374, 655.
 Baltimore, etc., R. Co. v. O'Donnell, 49 Ohio St. 489—211, 212, 227, 230, 233, 234, 239, 240, 218, 415, 419.
 Baltimore, etc., R. Co. v. Pennsylvania R. Co., 18 Am. & Eng. R. Cas. 511—97.
 Baltimore, etc., R. Co. v. Pixley, 61 Ind. 22—687.
 Baltimore, etc., R. Co. v. Pumphrey, 59 Md. 390—180, 241, 399, 422, 423.
 Baltimore, etc., R. Co. v. Ragsdale, 14 Ind. App. 406—315, 334, 343.
 Baltimore, etc., R. Co. v. Rainbo, 16 U. S. App. 277—540.
 Baltimore, etc., R. Co. v. Rathbone, 1 W. Va. 87—294, 318.
 Baltimore, etc., R. Co. v. Ross, 105 Ill. App. 54—322, 526.
 Baltimore, etc., R. Co. v. Schumacher, 29 Md. 168, 176—282, 459.
 Baltimore, etc., R. Co. v. Skeels, 3 W. Va. 556—319, 762.
 Baltimore, etc., R. Co. v. State, 60 Md. 449—580.
 Baltimore, etc., R. Co. v. State, 29 Md. 252—604.
 Baltimore, etc., R. Co. v. State, 72 Md. 36—578.
 Baltimore, etc., R. Co. v. State, 63 Md. 135—551, 552, 653, 772, 780.
 Baltimore, etc., R. Co. v. Swann, 81 Md. 400—770.
 Baltimore, etc., R. Co. v. Voight, 176 U. S. 498—580, 766.
 Baltimore, etc., R. Co. v. Wightman, 29 Gratt. (Va.) 431—780, 781, 788.
 Baltimore, etc., R. Co. v. Whittington, 30 Gratt. (Va.) 809—798.
 Baltimore, etc., R. Co. v. Whitacre, 35 Ohio St. 627—798, 799, 800.
 Baltimore, etc., R. Co. v. Wilkens, 44 Md. 11—174, 494.
 Baltimore, etc., R. Co. v. Worthington, 21 Md. 275—587, 780.
 Baltimore, etc., Express Co. v. Cooper, 66 Miss. 558—337.
 Baltimore, etc., Steamboat Co. v. Brown, 54 Pa. St. 77—460, 472.
 Baltimore, etc., Turnpike Road v. Boone, 45 Md. 344—588.
 Baltimore, etc., Turnpike Road v. Cason, 72 Md. 377—771.
 Baltimore, etc., Turnpike Road Co. v. Leonhardt, 66 Md. 72—70, 816, 830.
 Baltimore Steam Packet Co. v. Smith, 23 Md. 402—708, 730.
 Baltimore Tract. Co. v. State, Ringgold, 78 Md. 409—561, 685, 827, 840.
 Bamberg v. South Carolina R. Co., 9 S. C. 61—30, 407, 510.
 Bank v. Brown, 9 Wend. (N. Y.) 234—33, 341.
 Bank v. Champlain Transp. Co., 16 Vt. 52—154.
 Bank of Batavia v. New York, etc., R. Co., 106 N. Y. 195—165, 173.
 Bank of Columbia v. Lawrence, 1 Pet. (U. S.) 578—72.
 Bank of Commerce v. Bissell, 72 N. Y. 615 —166.
 Bank of Kentucky v. Adams Express Co., 93 U. S. 174—35, 36, 287.
 Bank of Orange v. Brown, 3 Wend. (N. Y.) 158—18, 569.
 Bank of Oswego v. Doyle, 91 N. Y. 42—285.
 Bank of Rochester v. Jones, 4 N. Y. 501—160, 177, 178.
 Bancroft v. Boston, etc., R. Corp., 97 Mass. 275—833, 874.
 Bancroft v. Merchants Despatch Transp. Co., 47 Iowa 262—47, 486, 489.
 Bankard v. Baltimore, etc., R. Co., 34 Md. 197—316, 393, 534.
 Bansmer v. Toledo, etc., R. Co., 25 Ind. 434—129, 193, 262, 285.
 Barber v. Broadway, etc., R. Co., 10 Misc. Rep. (N. Y.) 109—562.
 Barber v. Broadway, etc., R. Co., 9 Misc. Rep. (N. Y.) 20—808.
 Barber v. Meyerstein, L. R. 4 H. L. 317 —167.
 Barber v. South Eastern R. Co., 34 L. T. N. S. 67—380.
 Barclay v. Cuculla of Gana, 3 Doug. 389 —226.
 Bard v. Pennsylvania Tract. Co., 76 Pa. St. 97—854.
 Barden v. Boston, etc., R. Co., 121 Mass. 426—866, 867.
 Bardwell v. Mobile, etc., R. Co., 63 Miss. 574—818.
 Barker v. Coflin, 31 Barb. (N. Y.) 556—558, 564.
 Barker v. Central Park, etc., R. Co., 151 N. Y. 237—700.
 Barker v. Dinsmore, 72 Pa. St. 427—157.
 Barker v. Havens, 17 Johns. (N. Y.) 234—428.
 Barker v. New York Cent. R. Co., 24 N. Y. 599—680.
 Barker v. Ohio River R. Co., 51 W. Va. 428—873.
 Barksdull v. New Orleans & C. R. Co., 23 La. Ann. 180—825.
 Barnard v. Kobbe, 54 N. Y. 516—229.
 Barnard v. Philadelphia, etc., R. Co., 60 Md. 555—771.
 Barnes v. Marshall, 18 Q. B. 785—102, 103.
 Barnett v. London, etc., R. Co., 5 H. & N. 604—313.
 Barney v. Burnsteinbinder, 64 Barb. (N. Y.) 212—383, 384.
 Barney v. Oyster Bay, etc., Steamship Co., 67 N. Y. 301—614, 619, 622, 740.
 Barney v. Prentiss, 4 Har. & J. (Md.) 317—291, 755.
 Barre v. Railway Co., 155 Pa. 170—825.
 Barron v. Eldridge, 100 Mass. 455—70, 132, 259, 261.
 Barron v. Illinois Cent. R. Co., 1 Biss. (U. S.) 453—693.
 Barrett v. Great Northern R. Co., 87 E. C. L. 423—113.
 Barrett v. Third Ave. R. Co., 45 N. Y. 628—652, 698.
 Barrett v. Indianapolis, etc., R. Co., 9 Mo. App. 226—492.
 Barrett v. Pullman Palace Car Co., 51 Fed. 796—56, 58.
 Barry v. Boston, etc., R. Co., 172 Mass. 109—846.
 Barry v. Third Ave. R. Co., 51 App. Div. (N. Y.) 385—641.
 Barry v. Union Tract. Co., 194 Pa. St. 577 —661.
 Barry v. Union Ry. Co., 94 N. Y. Supp. 449—560.

TABLE OF CASES.

XXV

(The references are to the pages.)

- Barter v. Wheeler**, 49 N. H. 9—41, 42, 260, 312, 317, 465, 492, 493, 727, 753.
Barth v. Kansas City Elev. R. Co., 142 Mo. 535—547, 676.
Barth v. Houghton Co. St. R. Co. (Mich.), 93 N. W. 620—777.
Bartholomew v. St. Louis, etc., R. Co., 53 Ill. 227—196, 727.
Bartholomew v. New York Cent., etc., R. Co., 102 N. Y. 716—148, 867.
Bartlett v. New York, etc., Ferry, etc., Co., 57 N. Y. Super. Ct. 348—552, 618, 854.
Bartlett v. Western Union Tel. Co., 62 Me. 209—73, 77.
Bartlett v. Pittsburgh, etc., R. Co., 94 Ind. 281—227, 255, 287, 343.
Bartlett v. Steamboat Philadelphia, 32 Mo. 256—193.
Bartlett v. Carnley, 6 Duer (N. Y.), 194—435.
Bartley v. Georgia R. Co., 60 Ga. 182—604.
Bartley v. Metropolitan St. Ry. Co., 148 Mo. 124—661, 663, 777.
Bartram v. McKee, 1 Watts (Pa.), 39—126, 447.
Bass v. Chicago, etc., R. Co., 36 Wis. 450, 458—590, 591, 628, 696, 740.
Bass v. Chicago, etc., R. Co., 42 Wis. 654—810, 900.
Bass v. Cleveland, etc., Ry. (Mich.), 105 N. W. 151—554.
Bass v. Concord St. R. Co. (N. H.), 46 Atl. 1056—613.
Bass v. Glover, 63 Ga. 745—166, 210.
Bassett v. Connecticut River R. Co., 145 Mass. 129—260, 261, 285.
Bassett v. Los Angeles Tract. Co., 133 Cal. 1—776, 777.
Bassett & Stone v. Aberdeen Coal & Mining Co. (Ky.), 88 S. W. 318—51.
Basnicht v. Atlantic, etc., R. Co., 111 N. C. 592—70, 71, 259, 274, 283.
Bastard v. Bastard, 2 Show. 81—102.
Bates v. Chicago, etc., R. Co., 60 Wis. 298—232, 233.
Bates v. Old Colony R. Co., 147 Mass. 255—753, 766.
Bates v. Pennsylvania R. Co., 2 Int. Com. Rep. 715—156, 916, 923.
Bates v. Stanton, 1 Duer (N. Y.), 79—229.
Battle v. Columbia, etc., R. Co., 70 S. C. 328—703, 704, 723.
Batton v. South, etc., Alabama R. Co., 77 Ala. 591—647.
Batson v. Donovan, 4 B. & Ald. 21—102, 341, 356, 360.
Baugh v. McDaniel, 42 Ga. 641—473.
Baughman v. Louisville, etc., R. Co., 94 Ky. 150—345.
Baumbach v. Gulf, etc., R. Co., 4 Tex. Civ. App. 650—197.
Baumann v. New York, etc., R. Co., 35 Misc. Rep. (N. Y.) 223—413.
Baxendale v. Bristol, etc., R. Co., 11 C. B. N. S. 787—121.
Baxendale v. Eastern Counties R. Co., 4 C. B. N. S. 78—124.
Baxendale v. Great Eastern R. Co., 10 B. & S. 212—299, 325.
Baxendale v. London, etc., R. Co., L. R. 10 Exch. 35—464.
Baxley v. Tallahassee, etc., R. Co. (Ala.), 29 So. 451—110.
Baxter v. Dominion Tel. Co., 37 U. C. Q. B. 470—74.
Bayles v. Diamond St. Omnibus Co., 173 Pa. St. 378—810.
Bayles v. Kansas, etc., R. Co., 13 Colo. 181—123.
Bayley v. Manchester, etc., R. Co., L. R. 8 C. P. 148—629, 639.
Bain v. Steamship Co., 3 Wall. Jr. (C. C.) 223—405.
Beach v. Parmeter, 23 Pa. St. 197—611.
Beach v. Raritan, etc., R. Co., 37 N. Y. 468—48.
Beacham v. Portsmouth Bridge (N. H.), 40 Atl. 1066—832.
Beal v. South Devon R. Co., 3 H. & C. 341—6, 323, 324.
Bean v. Sturtevant, 8 N. H. 146—35, 55.
Beaver v. Rapids R. Co., 119 Mich. 512—808.
Beaumont v. Canadian Pac. R. Co., 5 Montreal L. R. Super. Ct. 255—43.
Beaver v. Grand Trunk R. Co., 20 Ont. App. 476—555.
Beaver v. Pittsburgh, etc., R. Co., 3 Int. Com. Rep. 564—917.
Beard v. Conn. & Pass. R. R. Co., 48 Vt. 101—613.
Beard v. Illinois C. R. Co., 79 Iowa, 518—115, 467, 491.
Beard v. St. Louis, etc., R. Co., 79 Iowa, 527—115, 463.
Beardslee v. Richardson, 11 Wend. (N. Y.) 25—5, 9.
Beardsley v. Minneapolis St. R. Co., 54 Minn. 504—810.
Beatty v. Central Iowa R. Co., 58 Iowa, 242—221.
Beauchamp v. International, etc., R. Co., 56 Tex. 239—666.
Beck v. Evans, 16 East, 244—12, 31, 323.
Becker v. Halligatin, 86 N. Y. 167—149, 177.
Becker v. Great Eastern R. Co., L. R. 5 Q. B. 241—706.
Becker v. Lincoln Real Estate, etc., Co., 174 Mo. 246—85.
Becker v. Western Union Tel. Co., 11 Neb. 87—78.
Beckford v. Crutwell, 5 C. & P. 242—823.
Beckman v. Shouse, 5 Rawle (Pa.), 179—11, 55, 291, 293, 318, 753, 755, 762.
Beckwith v. Cheshire R. Co., 143 Mass. 68—732.
Beckwith v. Frisbie, 32 Vt. 559—48, 254, 257.
Beddell v. City Elec. R. Co., 112 Mich. 547—808.
Bedell v. Richmond, etc., R. Co., 94 Ga. 22—244.
Bedford-Bowling Green Stone Co. v. Oman, 24 Ky. Law Rep. 2274—92.
Bedford, etc., R. Co. v. Rainbolt, 99 Ind. 551—597, 772, 780.
Beebe v. Ayres, 28 Barb. (N. Y.) 275—558, 559, 591, 741.
Beebe v. Johnson, 19 Wend. (N. Y.) 500—243.
Beecher v. Long Island R. Co., 161 N. Y. 222—834.
Beekman v. Saratoga, etc., R. Co., 3 Paige (N. Y.), 45—619.
Beers v. Boston, etc., R. Co. (Conn.), 34 Atl. 546—710.
Beers v. Wabash, etc., R. Co., 34 Fed. 244—95, 453.
Beeson v. Chicago, etc., R. Co., 62 Iowa, 173—620.
Behrens v. The Furnessia, 35 Fed. 798—692.
Beldier v. Banshaw, 200 Ill. 425—854.
Beisiegel v. New York Cent. R. Co., 40 N. Y. 9—903.
Belden v. Pullman Palace Car Co. (Tex. Civ. App.), 48 S. W. 22—56.

TABLE OF CASES.

(The references are to the pages.)

- Belfast, etc., R. Co. v. Keys, 9 H. L. Cas. 556—256, 371, 708.
 Belger v. Dinsmore, 51 N. Y. 166—35, 295, 347, 357, 361.
 Bell v. Dominion Tel. Co., 25 L. C. J. (Can.) 248—76.
 Bell v. Drew, 4 E. D. Sm. (N. Y.) 59—708.
 Bell v. Incorporated Town of Clarion, 113 Iowa, 126—702.
 Bell v. Reed, 4 Binn. (Pa.) 127—65, 392.
 Bell v. St. Louis, etc., R. Co., 6 Mo. App. 363—267.
 Bell v. Windsor, etc., R. Co., 24 Nova Scotia, 521—241.
 Bellefontaine R. Co. v. Schneider, 24 Ohio St. 670—793.
 Bellman v. New York Cent. R. Co., 42 Hun (N. Y.), 130—556, 846.
 Belt Ry. Co. v. Banicki, 102 Ill. App. 642—375, 761.
 Benbow v. North Carolina R. Co., Phil. L. (N. C.) 421—183, 185.
 Benedict v. Minneapolis & St. P. R. Co., 90 N. W. 360—860.
 Bennett v. American Express Co., 83 Me. 236—231, 234, 288, 906.
 Bennett v. Byram, 38 Miss. 17—24, 187, 253.
 Bennett v. Dutton, 10 N. H. 481—292, 540, 542, 619, 620, 654.
 Bennett v. Drew, 3 Bosw. (N. Y.) 355—421.
 Bennett v. Flyaw, 1 Fla. 451—19, 65.
 Bennett v. Lycoming, etc., Ins. Co., 67 N. Y. 278—268.
 Bennett v. Lake Shore, etc., R. Co., 6 Am. & Eng. R. Cas. 391—192.
 Bennett v. Manhattan, etc., R. Co., 95 E. C. L. 707—113.
 Bennett v. Missouri Pac. R. Co., 46 Mo. App. 656—487, 489.
 Bennett v. New Jersey R., etc., Co., 36 N. J. L. 225—699.
 Bennett v. New York, etc., R. Co., 57 Conn. 422—873.
 Bennett v. Northern Pac. Express Co., 12 Or. 49—159, 335.
 Bennett v. Peninsular, etc., Steamboat Co., 6 C. B. 785—540.
 Bennett v. Railroad Co., 7 Phila. (Pa.) 11 555.
 Benson v. Baltimore Traction Co., 77 Md. 535—544.
 Benson v. Gray, 154 Mass. 391—577.
 Benson v. New Jersey R., etc., Co., 9 Bosw. (N. Y.) 412—690, 882.
 Berg v. Atchison, etc., R. Co., 30 Kan. 561—463, 481.
 Bergeman v. Indiana, etc., Ry., 104 Mo. 86—810.
 Bergen County Tract. Co. v. Demarest, 62 N. J. L. 755—779.
 Bergner v. Chicago, etc., R. Co., 13 Mo. App. 499—262.
 Berje v. Texas, etc., R. Co., 37 La. Ann. 468—24, 94, 238.
 Bermel v. New York, etc., R. Co., 172 N. Y. 639—348, 351, 352.
 Bernstein v. Weir, 40 Misc. Rep. (N. Y.) 635—349, 372.
 Berry v. Cooper, 28 Ga. 543—393, 760.
 Berry v. Utica Belt Line St. R. Co., 76 App. Div. (N. Y.) 490—338.
 Berry v. Utica, etc., St. Ry. Co., 181 N. Y. 98—599.
 Berry v. West Virginia, etc., R. Co., 44 W. Va. 538—265, 267, 268.
 Etthea v. Northeastern R. Co., 26 S. C. 99—503.
 Bethman v. Old Colony R. Co., 155 Mass. 352—845.
 Betts v. Chicago, etc., R. Co., 92 Iowa, 343—499.
 Betts v. Farmers Loan, etc., Co., 21 Wis. 80—319, 503, 523, 538.
 Bevis v. Baltimore, etc., R. Co., 26 Mo. App. 19—56, 60.
 Bickford v. Metropolitan Steamship Co., 109 Mass. 151—230.
 Biddle v. Bond, 6 B. & S. 224—156, 363.
 Bigelow v. Chicago, etc., R. Co., 104 Wis. 109—110, 117, 368.
 Bigelow v. Heaton, 4 Den. (N. Y.) 496—441, 443.
 Bignold v. Waterhouse, 1 M. & S. 255—323.
 Bills v. New York Cent. R. Co., 84 N. Y. 5—506.
 Bingham v. Lamping, 26 Pa. St. 340—153.
 Bingham v. Rogers, 6 W. & S. (Pa.) 495—293, 294, 317, 717, 755, 762.
 Binns v. Pigot, 9th C. & P. 208—446.
 Bird v. Cromwell, 1 Mo. 81—31.
 Bird v. Georgia R. Co., 72 Ga. 655—169, 207, 438, 439, 447, 471.
 Bird v. Great Northern R. Co., 28 L. J. Exch. 3—780.
 Birkett v. Willan, 2 B. & Ald. 356—193, 323.
 Birney v. New York, etc., Tel. Co., 18 Md. 341—73, 78.
 Birney v. Wabash, etc., R. Co., 20 Mo. App. 470—402.
 Birmingham v. Rochester, etc., R. Co., 137 N. Y. 13—596, 607, 608, 609, 610.
 Birmingham Ry., etc., Co. v. Baird, 130 Ala. 334, 350—628, 635.
 Birmingham Ry., etc., Co. v. Bynum, 139 Ala. 389—547, 652.
 Birmingham Ry., etc., Co. v. James, 121 Ala. 120—661, 858.
 Birmingham Ry., etc., Co. v. Mason, 1 St. Ry. Rep. 1—628, 639.
 Birmingham Ry., etc., Co. v. Mullen, 138 Ala. 614—635, 636, 733.
 Birmingham Ry., etc., Co. v. Nolan (Ala.), 32 So. 715—897.
 Birmingham, etc., R. Co. v. Smith, 90 Ala. 60—674.
 Birmingham R. & E. Co. v. Weldman, 119 Ala. 547—677.
 Birmingham Union Ry. Co. v. Hale, 90 Ala. 9—808.
 Bischoff v. Schultz, 5 N. Y. Super. Ct. 757—794.
 Bishop v. St. Paul City R. Co., 48 Minn. 25—604.
 Bissell v. Huntingdon, 2 N. H. 142—364.
 Bishop v. Williamson, 11 Me. 496—71, 72.
 Bissell v. Campbell, 54 N. Y. 353—209.
 Bissell v. Michigan Southern R. Co., 22 N. Y. 259, 307—492, 546.
 Bissell v. New York Cent. R. Co., 29 Barb. (N. Y.) 602—762.
 Bissell v. New York Cent. R. Co., 25 N. Y. 442—29, 320, 327, 569, 608, 719, 752, 754, 758, 763, 764, 768.
 Bissell v. Price, 16 Ill. 408—438, 495.
 Black v. Ashley, 80 Mich. 90—264, 353, 381.
 Black v. Brooklyn City R. Co., 108 N. Y. 640—676.
 Black v. Camden, etc., R. Co., 45 Barb. (N. Y.) 40—404, 408.
 Black v. Carrollton R. Co., 10 La. Ann. 33—700.
 Black v. Chicago, etc., R. Co., 30 Neb. 197—221, 506, 510, 515.

TABLE OF CASES.

xxvii

(The references are to the pages.)

- Black v. Fitchburg R. Co.**, 139 Mass. 308—481.
Black v. Goodrich Transp. Co., 55 Wis. 319—322, 346, 389, 762.
Black v. Third Ave. R. Co., 2 App. Div. (N. Y.) 629—777.
Black v. Wabash, etc., R. Co., 111 Ill. 351—287, 297, 333, 525.
Blackman v. West Jersey & S. R. Co. (N. J.), 52 Atl. 370—811.
Blackmore v. Missouri Pac. R. Co., 162 Mo. 455—726.
Blackmore v. Toronto St. R. Co., 38 U. C. Q. B. 172—544, 562.
Blackstock v. New York, etc., R. Co., 20 N. Y. 48—33, 106, 228, 253, 255.
Blackwell v. O'Gorman Co., 22 R. I. 638—85, 835.
Blain v. Canadian Pac. Ry. Co. (Can.), 5 Ont. Law Rep. 334—649.
Blair v. Erie R. Co., 66 N. Y. 313—321, 579, 751, 752, 763, 765, 767.
Blair v. Milwaukee, etc., R. Co., 20 Wis. 254—600.
Blaisdell v. Connecticut River R. Co., 145 Mass. 132—260, 261, 285.
Blake v. Burlington, etc., R. Co., 78 Iowa, 57—816.
Blake v. Nicholson, 3 M. & S. 168—15.
Blakely v. Le Duc, 19 Minn. 187—131, 540.
Blakemore v. Lancashire, etc., R. Co., 1 F. & F. 76—242.
Blanchard v. Isaacs, 3 Barb. (N. Y.) 388—18, 55, 132, 139.
Blanchard v. Page, 8 Gray (Mass.), 285—160.
Blanchard v. Windsor, etc., R. Co., 10 Nova Scotia, 8—902.
Blanchett v. Holyoke St. Ry. Co., 175 Mass. 51—697.
Bland v. Adams Express Co., 1 Duv. (Ky.) 232—24, 226.
Bland v. Southern Pac. R. Co., 55 Cal. 570—736.
Bland v. Womack, 2 Murph. (N. C.) 373—5, 10.
Blank v. Illinois Cent. R. Co., 182 Ill. 332—766, 767.
Blin v. Mayo, 10 Vt. 56—149, 195.
Blitz v. Central R. Co., 76 Ga. 333—665, 856.
Blitz v. Union Steamboat Co., 51 Mich. 558—104, 236.
Bliven v. Hudson River R. Co., 36 N. Y. 403—34, 229, 230, 233, 237.
Block v. Bannerman, 10 La. Ann. 1—627, 632, 637, 690.
Block v. Fitchburg R. Co., 139 Mass. 308—492.
Block v. Harlem, etc., R. Co., 28 St. Rep. (N. Y.) 495—822.
Block v. Milwaukee St. R. Co., 89 Wis. 371—808.
Blocker v. Whittenburg, 12 La. Ann. 410—32.
Blodgett v. Abbott, 72 Wis. 516—247, 463.
Blodgett v. Bartlett, 50 Ga. 353—681.
Bloomingdale v. Memphis, etc., R. Co., 6 Lea (Tenn.), 618—179.
Blossom v. Dodd, 43 N. Y. 264—27, 291, 298, 308, 720, 754.
Blossom v. Griffin, 13 N. Y. 569, 573—69, 70, 131, 478.
Blower v. Great Western R. Co., L. R. 7 C. P. 655—499.
Blum v. Monahan, 36 Misc. Rep. (N. Y.) 179—348, 387.
Blum v. Southern Pullman Palace Car Co., 1 Flp. (U. S.) 500—56, 57, 711.
Blumenthal v. Fitchburg R. Co., 127 Mass. 322—708, 709.
Blumenthal v. Brainerd, 38 Vt. 402—25, 41, 42, 265, 269, 271, 293, 295, 318, 400, 405, 412.
Blumenthal v. Maine Cent. R. Co., 79 Me. 550—708, 709, 715.
Boards of Trade Union v. Chicago, etc., R. Co., 1 Int. Com. Rep. 608—922.
Board of Trade v. Chicago, etc., R. Co., 3 Int. Com. Rep. 233—916.
Boatmen's Savings Bank v. Western, etc., R. Co., 81 Ga. 221—173.
Boaz v. Central R. Co., 87 Ga. 463—417, 505.
Bodenham v. Bennett, 4 Price, 31—147, 180, 323.
Boehnke v. Brooklyn City R. Co., 3 Misc. Rep. (N. Y.) 49—604.
Boehl v. Chicago, etc., R. Co., 44 Minn. 191—316, 345, 388, 510, 533, 760.
Boehm v. Duluth, etc., R. Co., 91 Wis. 592—582, 747.
Boeing v. Chesapeake Beach Ry. Co., 193 U. S. 442—766.
Boeing v. Chesapeake Beach Ry. Co., 20 App. D. C. 500—570.
Boggess v. Chesapeake, etc., R. Co., 37 W. Va. 297—551, 582, 820.
Boggs v. Martin, 13 B. Mon. (Ky.) 239—442, 447.
Bohanan v. Hammond, 42 Cal. 227—23.
Bolce v. Hudson River Co., 61 Barb. (N. Y.) 611—564, 566.
Boies v. Hartford, etc., R. Co., 37 Conn. 272—388, 397.
Boise City Irrig., etc., Co. v. Clark, 131 Fed. 415—89.
Boian v. Williamson, 2 Bay (S. C.), 551—71, 72.
Boland v. Missouri R. Co., 36 Mo. 984—596.
Bolton v. Missouri Pac. R. Co., 172 Mo. 92—768.
Bomar v. Maxwell, 9 Hump. (Tenn.) 620, 621—54, 701, 702, 704, 710.
Bonce v. Dubuque St. R. Co., 53 Iowa, 278—53, 653, 795.
Bonner v. Blum (Tex. Civ. App.), 25 S. W. 60—703, 705.
Bonner v. De Mendoza, 4 Tex. App. Civ. Cas. sec. 234—714.
Bonner v. Grumbach, 2 Tex. Civ. App. 482—713, 770, 779, 787.
Bonner v. Marsh, 10 Smed. & M. (Miss.) 376—161, 231.
Boner v. Merchants' Steamboat Co., 1 Jones L. (N. C.) 211—24, 240.
Bonner v. Mayfield, 82 Tex. 234—597.
Bonsteel v. Vanderbilt, 21 Barb. (N. Y.) 26—884, 886.
Book v. Chicago, etc., R. Co., 84 Mo. App. 76—750.
Booker v. Reilly, 82 N. Y. Supp. 1008—433.
Boon v. Steamboat Belfast, 40 Ala. 184—353.
Boone v. Oakland Trans. Co. (Cal.), 73 Pac. 243—811, 813, 853.
Boorman v. American Express Co., 21 Wis. 152—291, 295, 319, 346.
Booth v. Missouri, etc., R. Co. (Tex. Civ. App.), 37 S. W. 168—470.
Booth v. Terrell, 16 Ga. 20—364.
Bordeaux v. Erie R. Co., 8 Hun (N. Y.), 579—734.
Bork v. Norton, 2 McLean (U. S.), 422—222.

TABLE OF CASES.

(The references are to the pages.)

- Boscowitz v. Adams Express Co., 93 Ill. 523—297, 359, 360, 762.
 Bosley v. Baltimore, etc., R. Co. (W. Va.), 46 S. E. 613—530, 531.
 Boson v. Sanford, 2 Salk. 440—65.
 Bosqui v. Sutro Ry. Co., 131 Cal. 390—655, 657.
 Bosqui v. Sutro R. Co., 63 Pac. 682—774.
 Boss v. Providence, etc., R. Co., 15 R. I. 149—654, 800, 845.
 Boston v. Chesapeake, etc., R. Co., 36 W. Va. 318—589.
 Boston v. Pennsylvania Co., 116 Fed. 235—451.
 Boston & A. R. Co. v. Brown, 177 Mass. 65—615.
 Boston & M. R. Co. v. Sullivan, 177 Mass. 230—615.
 Boston Chamber of Commerce v. Lake Shore, etc., R. Co., 1 Int. Com. Rep. 754—923, 924.
 Boston, etc., R. Co. v. Boston, etc., R. Co., 1 Int. Com. Rep. 571.
 Boston, etc., R. Co. v. Chipman, 146 Mass. 107—555.
 Boston, etc., R. Co. v. Ordway, 140 Mass. 610—370.
 Boston, etc., R. Co. v. Proctor, 1 Allen (Mass.) 267—565.
 Boston, etc., R. Co. v. Shanly, 107 Mass. 568—100, 383, 384.
 Boston Fruit, etc., Exch. v. New York, etc., R. Co., 3 Int. Com. Rep. 493—910, 913, 935.
 Bostwick v. Baltimore, etc., R. Co., 45 N. Y. 712—256, 306, 313, 327.
 Bowell v. Hudson River R. Co., 5 Bosw. (N. Y.) 699—752, 758, 762, 763.
 Bowsworth v. Union R. Co., 1 St. Ry. Rep. 757—643, 657.
 Botts v. Wabash R. Co. (Mo. App.), 80 S. W. 976—530.
 Bouker v. Long Island R. Co., 89 Hun (N. Y.) 202—99.
 Bourne v. Gatliff, 33 E. C. L. 364—194, 275.
 Bowden v. Fargo, 2 Misc. Rep. (N. Y.) 551—387.
 Bowden v. San Antonio, etc., R. Co. (Tex. Civ. App.), 25 S. W. 937—424.
 Bowen v. Lake Erie Tel. Co. (Ohio), 1 Am. L. Reg. 685—76.
 Bowen v. New York Cent. R. Co., 18 N. Y. 408—542, 594, 604, 607, 612, 652, 697, 699, 774, 778, 787, 795.
 Bowie v. Baltimore, etc., R. Co., 1 Mc-Arthur (D. C.), 94—136, 536, 516.
 Bowie v. Buffalo, etc., R. Co., 7 U. C. C. P. 191—265, 272.
 Bowler v. Toledo, etc., R. Co., 10 Ohio C. C. 272—709.
 Bowler, etc., Co. v. Toledo, etc., R. Co., 3 Ohio Dec. 41—703, 708.
 Bowles v. Rome, etc., R. Co., 46 Hun (N. Y.), 324—777.
 Bowman v. Chicago, etc., R. Co., 125 U. S. 479—906.
 Bowman v. Hilton, 11 Ohio, 303—66, 437, 438, 447, 477.
 Bowman v. Teall, 23 Wend. (N. Y.) 306—12, 48, 65, 222.
 Bowring v. Wabash R. Co., 90 Mo. App. 324—528.
 Boyce v. Anderson, 2 Peters (U. S.), 150—28, 540.
 Boyce v. California Stage Co., 25 Cal. 460—776, 893.
 Boyce v. Manhattan Ry. Co., 118 N. Y. 314, 319—665, 671, 672.
 Boyd v. Dubois, 3 Campb. 133—30.
 Boyd v. Spencer, 103 Ga. 828—219, 564.
 Boyden v. Fitchburg R. Co., 70 Vt. 125—333.
 Boylan v. Hot Springs R. Co., 132 U. S. 146—555.
 Boyle v. Case, 18 Fed. 880—903.
 Boyles v. Texas, etc., R. Co. (Tex. Civ. App.), 86 S. W. 936—601.
 Brackett v. Edgerton, 14 Minn. 174—401.
 Brackett v. McNair, 14 Johns. (N. Y.) 170—417.
 Bradburn v. Great Western R. Co., L. R. 10 Exch. 1—904.
 Bradford v. South Carolina R. Co., 7 Rich. L. (S. C.) 201—460, 492.
 Bradford v. South Carolina R. Co., 10 Rich. L. (S. C.) 221—494.
 Brady v. Manhattan R. Co., 127 N. Y. 46—672.
 Brady v. Pennsylvania R. Co., 2 Int. Com. Rep. 78—912.
 Bradley v. Chicago, etc., R. Co. (Wis.), 68 N. W. 410—422.
 Bradley v. Lehigh Val. R. Co., N. Y. Law J. March 10, 1906—373.
 Bradley v. New York, etc., R. Co., 21 Conn. 294—95.
 Bradley v. Ohio River, etc., R. Co., 126 N. C. 735—374.
 Branley v. South Eastern R. Co., 12 C. B. N. S. 74—124.
 Bradley v. Second Ave. R. Co., 8 Daly (N. Y.), 289—829.
 Bradley v. Second Ave. R. Co., 90 Hun (N. Y.), 419—860, 861.
 Bradley v. Waterhouse, M. & M. 154—356.
 Bradshaw v. Irish Northwestern R. Co., 7 Ir. R. C. L. 252—150, 265, 274.
 Bradshaw v. Railroad Co., 135 Mass. 407—743.
 Bradwell v. Mobile, etc., R. Co., 63 Miss. 574—852.
 Bradwell v. Pittsburgh Ry. Co., 139 Pa. St. 404—798.
 Brainard v. Nassau Electric R. Co., 44 App. Div. (N. Y.) 613—857, 868.
 Braithwaite v. Aikin, 1 N. D. 455—187.
 Branch v. Wilmington, etc., R. Co., 88 N. C. 573—239, 246, 256, 317, 370, 761.
 Branch v. Wilmington, etc., R. Co., 77 N. C. 347—105, 245.
 Brand v. New Jersey Steamboat Co., 10 Misc. Rep. (N. Y.) 128—275, 282.
 Brand v. Schenectady, etc., R. Co., 56 N. Y. 44—616.
 Brandenstein v. Douglass, 105 Ga. 845—366.
 Brandt v. Bowlby, 2 B. & Ad. 932—400.
 Brandt v. Northern Pac. R. Co., 22 Ont. Rep. 645—464.
 Brass v. Maitland, 6 El. & Bl. 471—30, 100, 383.
 Brass v. North Dakota, 153 U. S. 391—61, 90.
 Brasher v. Denver, etc., R. Co., 12 Colo. 384—155, 157.
 Brassell v. New York Cent., etc., R. Co., 84 N. Y. 241—668, 875.
 Brauer v. Oceanic Steam Nav. Co., 34 Misc. Rep. (N. Y.) 127—422, 426.
 Braun v. Webb, 65 N. Y. Supp. 668—59.
 Brawley v. Watson 2 Bond (U. S.), 356—50.

TABLE OF CASES.

xxix

(The references are to the pages.)

- B**raymer v. Seattle R., etc., Co., 35 Wash. 346—732.
Brazie v. St. Louis Transit Co. (Mo.), 76 S. W. 708—853.
Breakneck Canal Nav. Co. v. Pritchard, 6 T. R. 750—13.
Breed v. Mitchell, 48 Ga. 533—198, 386.
Breen v. St. Louis Transit Co., 102 Mo. App. 479, 108 Mo. App. 443—732, 749, 889.
Breen v. New York Cent., etc., R. Co., 109 N. Y. 297—773, 787, 871.
Breen v. Texas, etc., R. Co., 50 Tex. 43—559, 566, 732.
Breese v. United States Tel. Co., 48 N. Y. 132, 141—73, 79.
Brehme v. Dinsmore, 25 Md. 328—290.
Brehme v. Adams Express Co., 25 Md. 328—294, 316.
Brehm v. Great Western R. Co., 34 Barb. (N. Y.) 256—780, 787.
Brennan v. Fair Haven, etc., R. Co., 45 Conn. 284—862.
Brennen v. St. Louis, 92 Mo. 488—282.
Bremer v. Pleiss, 121 Wis. 61—835.
Brettherton v. Wood, 3 Brod. & B. 54, 7 E. C. L. 345—542, 544, 619.
Brewer v. New York, etc., R. Co., 124 N. Y. 59—348, 579, 752, 757, 765, 767.
Brewer v. Central of Ga. R. Co., 84 Fed. 258—124.
Brevig v. Chicago, etc., R. Co., 64 Minn. 168—560, 584.
Bricker v. Campbell, 132 Pa. 1—545.
Briddon v. Great Northern R. Co., 28 L. J. Exch. 51—240, 251, 515.
Bridge v. Johnson, 5 Wend. (N. Y.) 350—127.
Bridge v. Oshkosh, 71 Wis. 363—808.
Bridges v. Asheville, etc., R. Co., 27 S. C. 462—310, 312.
Bridges v. North London R. Co., L. R. 7 H. L. 213—665, 673, 828, 847.
Bridgeman v. The Steamboat Emily, 18 Iowa, 509—411.
Brien v. Bennet, 8 C. & P. 724—547, 549.
Briggs v. Boston, etc., R. Co., 6 Allen (Mass.), 246—68, 169, 313, 437, 438, 439, 446.
Briggs v. Grand Trunk R. Co., 24 U. C. Q. B. 510—559, 565.
Briggs v. Minneapolis, 52 Minn. 36—738, 827.
Briggs v. New York, etc., R. Co., 28 Barb. (N. Y.) 515—216, 254, 413, 416.
Briggs v. New York Cent. R. Co., 72 N. Y. 26—786.
Briggs v. Taylor, 28 Vt. 180—6, 375, 762.
Briggs v. Vanderbilt, 19 Barb. (N. Y.) 346—884.
Brignoli v. Chicago, etc., R. Co., 4 Daly (N. Y.), 182—597, 780, 891, 902.
Brightman v. Union St. R. Co., 167 Mass. 113—824.
Britt v. Grand Trunk R. Co., 20 U. C. C. P. 440—363.
Brimmer v. Illinois Cent. R. Co., 101 Ill. App. 198—774, 794.
Brint v. Dale, 2 M. & Rob. 80, 8 C. & P. 207—18, 63, 87.
Brinegar v. Louisville & N. R. Co., 24 Ky. L. Rep. 1973—867.
Brintnall v. Saratoga, etc., R. Co., 32 Vt. 665—460, 466, 489, 491.
Bristol, etc., R. Co. v. Collins, 5 H. & N. 969—463.
Bristol v. Rensselaer, etc., R. Co. 9 Barb. (N. Y.) 158—102, 159.
Bristol v. Wilsmore, 1 B. & S. 514—43.
British Columbia, etc., Co. v. Nettleship, L. R. 3 C. P. 499—70, 405, 412.
British, etc., Ins. Co. v. Gulf, etc., R. Co., 63 Tex. 475—373.
Britten v. Barnaby, 21 How. (U. S.) 527—435, 436, 442, 443.
Britten v. Atlanta, etc., Air Line Co., 88 N. C. 536—589, 590, 591, 592, 619, 623, 644.
Broadwell v. Butler & Co., 6 McLean (U. S.), 296—253, 268.
Brock v. Gale, 14 Fla. 523—314, 706.
Brockway v. American Express Co., 168 Mass. 257—35.
Brockway v. Lascala, 1 Ed. Sel. Cas. (N. Y.) 135—652, 679, 846.
Brodie v. Northern R. Co., 6 Ont. Rep. 180—483.
Brokaw v. New Jersey R., etc., Co., 32 N. J. L. 328—637, 640.
Bromley v. Birmingham M. R. Co. (Ala.), 11 So. 341—790.
Broodnox v. Baker, 94 N. C. 675—52.
Brooke v. Grand Trunk R. Co., 15 Mich. 332—564.
Brooke v. New York, etc., R. Co., 108 Pa. St. 529—164, 165, 173, 310.
Brooke v. Pickwick, 4 Bing. 218—54, 360.
Brooks v. Boston, etc., R. Co., 135 Mass. 21—875, 848, 849.
Brooks v. Dinsmore, 3 St. Rep. (N. Y.) 587—386.
Brockstone v. Westcott Express Co., 29 Misc. Rep. (N. Y.) 634—214.
Brown v. Adams Express Co., 15 W. Va. 812—288, 290, 293, 297, 394, 755.
Brown v. Adams, 3 Tex. App. Civ. Cas. sec. 390—421.
Brown v. Atlanta, etc., R. Co., 19 S. C. 39—134, 137, 282, 285.
Brown v. Canadian Pac. R. Co., 3 Manitoba L. Rep. 496—724.
Brown v. Chicago, etc., R. Co., 80 Wis. 162—848.
Brown v. Chicago, etc., R. Co., 54 Wis. 342—879, 883, 886.
Brown v. Chicago, etc., R. Co., 51 Iowa, 235—689, 749, 750.
Brown v. Congress, etc., St. R. Co., 49 Mich. 153—771, 775, 793.
Brown v. Camden, etc., R. Co., 83 Pa. St. 316—310, 312, 355, 360, 711, 712.
Brown v. Clayton, 12 Ga. 580, 584—247, 428.
Brown v. Clegg, 63 Pa. St. 51—49, 51.
Brown v. Collins, 53 N. H. 442—610.
Brown v. Cunard S. S. Co., 16 N. E. 717—350.
Brown v. Dennison, 2 Wend. (N. Y.) 593—68.
Brown v. Eastern R. Co., 11 Cush. (Mass.) 97—718, 720, 755, 756.
Brown v. European, etc., R. Co., 58 Me. 384—825.
Brown v. Grand Trunk R. Co., 54 N. H. 535—284, 285.
Brown v. Great Western R. Co., 52 L. T. N. S. 622—875.
Brown v. Georgia, etc., R. Co., 119 Ga. 88—885.
Brown v. Hannibal, etc., R. Co., 66 Mo. 589, 588—627, 627, 808, 883, 889.
Brown v. Hodgson, 4 Taunt. 189—363.
Brown v. Houston, 114 U. S. 622—905.
Brown v. Kansas City, etc., R. Co., 38 Kan. 634—592.
Brown v. Kendall, 6 Cush. (Mass.) 296—610.

TABLE OF CASES.

(The references are to the pages.)

- Brown v. Louisville, etc., R. Co., 36 Ill. App. 140—305, 313, 789.
 Brown v. Memphis, etc., R. Co., 7 Fed. 51—620, 739, 740.
 Brown v. Memphis, etc., R. Co., 4 Fed. 37, 51—590, 731, 903.
 Brown v. Missouri, etc., R. Co., 64 Mo. 536—560, 573.
 Brown v. Mott, 22 Ohio St. 149—193, 463.
 Brown v. New York Cent., etc., R. Co., 75 Hun (N. Y.), 355—54.
 Brown v. New York Cent. R. Co., 34 N. Y. 404—604, 607, 608, 652, 699.
 Brown v. New York Cent. R. Co., 32 N. Y. 597—698, 809.
 Brown, etc., Co. v. Pennsylvania Co., 63 Minn. 546—186, 277, 470.
 Brown v. Piper, 91 U. S. 37—493.
 Brown v. Pontiac, etc., R. Co. (Mich.), 94 N. W. 1050—517.
 Brown v. Powell D. S. Coal Co., L. R. 10 C. P. 562—175.
 Brown v. Rapid Ry. Co. (Mich.), 90 N. W. 290—555, 732, 897.
 Brown v. Scarbora, 97 Ala. 316—549, 588, 855.
 Brown v. Washington & G. R. Co., 25 Wash. L. Rep. 404—838.
 Brown v. Weir, 95 App. Div. (N. Y.) 78—413.
 Browne v. Johnson, 29 Tex. 43—397.
 Browne v. Raleigh, etc., R. Co., 108 N. C. 34—589, 836.
 Brownell v. Columbus, etc., R. Co., 4 Int. Com. Rep. 285—916, 917, 919.
 Brownell v. Pacific R. Co., 47 Mo. 239—809.
 Browning v. Belford, 83 App. Div. (N. Y.) 144—432.
 Browning v. Goodrich Transp. Co., 78 Wis. 391—389, 402, 487.
 Browning v. Long Island R. Co., 2 Daly (N. Y.), 117—335.
 Bryan v. Chicago, etc., R. Co., 63 Iowa, 464—635, 636.
 Bryan v. Memphis, etc., R. Co., 11 Bush. (Ky.) 597—742.
 Bryan v. Missouri Pac. R. Co., 32 Mo. App. 228—753, 762, 766.
 Bryant v. American Tel. Co., 1 Daly (N. Y.), 575—76.
 Bryant v. Chicago, etc., R. Co., 53 Fed. 997—545, 587, 788.
 Bryant v. Clifford, 13 Metc. (Mass.) 138—204, 364.
 Bryant v. Rich, 106 Mass. 180—617, 618, 626, 632.
 Bryant v. Southwestern R. Co., 68 Ga. 805—314, 464, 506, 530.
 Brune v. Brooklyn City R. Co., 5 Misc. Rep. (N. Y.) 327—856, 859.
 Bruhl v. Coleman, 113 Ga. 1102—158.
 Brulard v. The Alvin, 45 Fed. 766—687.
 Brunswick, etc., R. Co. v. Gall, 56 Ga. 322—653.
 Brunswick, etc., R. Co. v. Ponder, 117 Ga. 63—646.
 Brusch v. St. Paul City R. Co., 52 Minn. 512—809, 858, 861.
 Brush v. Sabula, etc., R. Co., 43 Iowa, 554—316.
 Bruty v. Grand Trunk R. Co., 32 U. C. Q. B. 66—701.
 Buchanan v. Northern Pac. R. Co., 3 Int. Com. Rep. 665—911.
 Bucher v. Cheshire R. Co., 125 U. S. 555—311, 833.
 Bucher v. Fitchburg R. Co., 131 Mass. 156—831.
 Bucher v. Long Island R. Co., 161 N. Y. 222—875.
 Bucher v. New York Cent., etc., R. Co., 98 N. Y. 128—666, 674, 680, 686, 687, 848, 849, 851.
 Buck v. Manhattan R. Co., 15 Daly (N. Y.), 550—660, 770.
 Buck v. Pennsylvania R. Co., 150 Pa. St. 170—317, 376, 388, 389, 393, 395.
 Buck v. Peoples St. R., etc., Co., 46 Mo. App. 555—569.
 Buck v. Peoples St. R., etc., Co., 108 Mo. 179—547, 582.
 Buckbee v. Third Ave. R. Co., 64 App. Div. (N. Y.) 360—603, 821.
 Buckner v. Fitchburg R. Co., 131 Mass. 156—555.
 Buckeye Pipe Line Co. v. Fee, 15 Ohio C. C. 637—186.
 Buckland v. Adams Express Co., 97 Mass. 124—35, 36, 287, 292, 756.
 Buckland v. New York, etc., R. Co. (Mass.) 62 N. E. 955—607.
 Buckley v. Great Western R. Co., 18 Mich. 121—264.
 Buckley v. Old Colony R. Co., 161 Mass. 26—557.
 Buckman v. Levi, 3 Campb. 414—136, 138.
 Buckmaster v. Great Eastern R. Co., 23 L. T. N. S. 471—691.
 Budd v. New York, 143 U. S. 517—61, 90.
 Budd v. United Carriage Co., 25 Or. 314—776.
 Budgett v. Binnington, 1 Q. B. 35—255.
 Buddy v. Wabash, etc., R. Co., 20 Mo. App. 206—262, 388.
 Buel v. New York Cent. R. Co., 31 N. Y. 314—819.
 Buesching v. Gaslight Co., 73 Mo. 229—779.
 Buesching v. St. Louis Gaslight Co., 6 Mo. App. 85—771.
 Buffalo, etc., R. Co. v. O'Hara (Pa.), 8 Am. & Eng. R. Cas. 317—753.
 Buffalo, etc., R. Co. v. O'Hara (Pa.), 11 Am. L. R. 554—571, 573.
 Buffet v. Troy, etc., R. Co., 40 N. Y. 168—546, 547, 549, 552.
 Bulkley v. Naumkeag Steam Cotton Co., 24 How. (U. S.) 386—144.
 Bullard v. American Express Co., 107 Mich. 695—125.
 Bullard v. Boston, etc., R. Co., 64 N. H. 27—804.
 Bullard v. Delaware, etc., R. Co., 21 Pa. Super. Ct. 583—703, 712.
 Bullard v. Northern Pac. R. Co., 10 Mont. 168—906, 920.
 Bullock v. Delaware, etc., R. Co., 60 N. J. L. 24—818.
 Bullock v. White Star S. S. Co., 30 Wash. 448—611, 885.
 Bumblear v. United Tract. Co., 198 Pa. 198—860.
 Bunting v. Hogsett, 139 Pa. St. 363—697.
 Burbridge v. Kansas City Cable R. Co., 36 Mo. App. 669—875.
 Burckle v. Eckhart, 3 N. Y. 132—310.
 Burgess v. Stowe, 10 Detroit Leg. N. 434—84.
 Burgevin v. New York Cent., etc., R. Co., 29 Barb. (N. Y.) 473—724.

TABLE OF CASES.

XXXI

(The references are to the pages.)

- Burke v. Chicago, etc., R. Co., 108 Ill. App. 565—554, 653.
 Burke v. Concord R. Corp., 61 N. H. 160—492.
 Burke v. Missouri Pac. R. Co., 51 Mo. App. 491—581, 591, 625, 747.
 Burke v. Seventh Ave., etc., R. Co., 49 Barb. (N. Y.) 529—823.
 Burke v. South Eastern R. Co., 5 C. P. Div. 1—296.
 Burke v. United States Express Co., 87 Ill. App. 506—236.
 Burke v. Withersbee, 98 N. Y. 562—605.
 Burlington, etc., R. Co. v. Arms, 15 Neb. 69—265, 272.
 Burlington, etc., R. Co. v. Northwestern Fuel Co., 31 Fed. 652—918.
 Burlington, etc., R. Co. v. Rose, 11 Neb. 117—624, 746, 747.
 Burlington, etc., R. Co. v. Spearman, 12 Iowa, 117—95.
 Burnell v. New York Cent. R. Co., 45 N. Y. 184—39, 181, 387, 719, 724, 726, 727, 728.
 Burnell v. Raleigh, etc., R. Co., 94 N. C. 451—103, 142, 377, 387.
 Burnham v. Cape Vincent Seed Co., 142 N. Y. 169—164.
 Burnham v. Grand Trunk, etc., R. Co., 63 Me. 298.
 Burnham v. Wabash Western R. Co., 91 Mich. 523—556.
 Burns v. Cork, etc., R. Co., 13 Ir. C. L. R. 543—609.
 Burns v. Bellefontaine, etc., R. Co., 50 Mo. 139—858, 859.
 Burnett v. Great North, etc., R. Co., L. R. 10 App. 147—667.
 Burnett v. Lynch, 5 B. & C. 589—880.
 Bur v. Pennsylvania R. Co. (N. J.), 44 Atl. 845—869.
 Burrell v. North, 2 C. & K. 681—145.
 Burrit v. Rench, 4 McLean (U. S.), 325—23, 407.
 Burroughs v. Grand Trunk R. Co., 67 Mich. 351—235, 486.
 Burroughs v. Norwich, etc., R. Co., 100 Mass. 26—69, 367, 459, 481, 493.
 Burrows v. Erie R. Co., 63 N. Y. 560, 556—830, 847, 852.
 Bur v. Douglass Co. St. R. Co., 83 Wis. 229—603, 775.
 Burts v. Buffalo, etc., R. Co., 24 N. Y. 274, 269—364, 458, 471.
 Burton v. Davis, 15 La. Ann. 448—610.
 Burton v. Ringrose, 63 Hun (N. Y.), 163—414.
 Burton v. Wilkinson, 18 Vt. 186—229.
 Burton Stock Car Co. v. Chicago, etc., R. Co., 1 Int. Com. Rep. 329—917, 931.
 Bush v. Barnett, 96 Cal. 202—769, 776, 787.
 Bush v. Northern Pac. R. Co., 3 Dak. 444—402.
 Bush v. St. Louis, etc., R. Co., 3 Mo. App. 62—157, 180, 182.
 Business Men's Assoc. v. Chicago, etc., R. Co., 2 Int. Com. Rep. 41—912, 932.
 Bussey v. Memphis, etc., R. Co., 4 McCrary (U. S.), 405—106, 107, 253, 450, 473.
 Bussey v. Mississippi Val. Transp. Co., 24 La. Ann. 165—49.
 Buston v. Pennsylvania R. Co., 119 Fed. 808—479, 490.
 Butcher v. London, etc., R. Co., 16 C. B. 13—764.
- Butcher's, etc., Stock Yards Co. v. Louisville, etc., R. Co., 67 Fed. 35—97, 123.
 Butler v. Basing, 2 C. & P. 613—140.
 Butler v. East Tennessee, etc., R. Co., 8 Lea (Tenn.), 32—263, 273, 274.
 Butler v. Hudson River R. Co., 3 E. D. Sm. (N. Y.) 571—39, 189, 707, 708.
 Butler v. Manhattan R. Co., 4 Misc. Rep. (N. Y.) 401—810.
 Butler v. Pittsburgh, etc., R. Co., 139 Pa. St. 195—861.
 Butler v. Steinway R. Co., 87 Hun (N. Y.), 10—829.
 Butler v. Woolcott, 2 B. & P. N. R. 64—431.
 Butt v. Great Western R. Co., 11 C. B. 140—323.
 Button v. Frink, 51 Conn. 342—793.
 Button v. Hudson River R. Co., 18 N. Y. 248—783, 790, 796, 797, 899.
 Buxton v. Northwestern R. Co., L. R. 3 Q. B. 549—600.
 Byrne v. Brooklyn City, etc., R. Co., 6 Misc. Rep. (N. Y.) 260—803.
 Byrne v. New York Cent., etc., R. Co., 83 N. Y. 620—822.
 Byrne v. Fargo, 36 Misc. Rep. (N. Y.) 548—149, 264.
 Byron v. Lynn & B. R. Co., 177 Mass. 303—601, 662.
 Buzby v. Philadelphia Traction Co., 126 Pa. St. 559—876.

C.

- Cable v. Southern R. Co., 122 N. C. 892—588.
 Cadwallader v. Grand Trunk R. Co., 9 L. C. Rep. 169—701, 703, 705.
 Cahill v. London, etc., R. Co., 100 E. C. L. 154—708, 709.
 Cahn v. Michigan Cent. R. Co., 71 Ill. 96—193, 194, 262, 281.
 Caillif v. Danvers, 1 Peake N. P. 114—13, 283.
 Cain v. Minneapolis, etc., R. Co., 37 Minn. 297—627, 638.
 Cairo First Nat. Bank v. Crocker, 113 Mass. 163—178.
 Cairus v. Robins, 8 M. & W. 258—70, 148, 284.
 Caldwell v. Erie Transfer Co., 13 Misc. Rep. (N. Y.) 37—730.
 Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282—395, 542, 594, 603, 607, 608, 781, 787, 793, 899.
 Caldwell v. Murphy, 11 N. Y. 416—809.
 Caldwell v. Murphy, 1 Duer (N. Y.), 233—542, 652.
 Caldwell v. Richmond, etc., R. Co., 89 Ga. 550—40, 540, 669, 687.
 Caldwell v. Southern Express Co., 1 Flipp. (U. S.) 25—226, 227.
 California Ins. Co. v. Union Compress Co., 133 U. S. 387—143.
 California Powder Works v. Atlantic, etc., R. Co., 113 Cal. 329—329.
 Callaway v. Mellett (Ind. App.), 44 N. E. 198—564.
 Calumet Elect. St. Ry. Co. v. Jennings, 83 Ill. App. 612—776.
 Calvin v. Jones, 3 Dana (Ky.), 376—408.
 Camden, etc., R. Co. v. Burke, 13 Wend. (N. Y.) 611, 628—22, 37, 39, 54, 542, 598, 712, 717.
 Camden, etc., R. Co. v. Bausch (Pa.), 7 Atl. 731—753, 766.

TABLE OF CASES.

(The references are to the pages.)

- Camden, etc., R. Co. v. Belknap, 21 Wend. (N. Y.) 354-54, 55, 291, 754.
 Camden, etc., R. Co. v. Baldauf, 16 Pa. St. 67-293, 317, 360, 717, 718, 755.
 Camden, etc., R. Co. v. Forsyth, 61 Pa. St. 81-460, 476, 482, 485, 486.
 Camden, etc., R. Co. v. Hoosey, 99 Pa. St. 492-696, 782, 857.
 Camp v. Hartford, etc., Steamboat Co., 43 Conn. 333-287, 294, 760.
 Camp v. Western Union Tel. Co.,^{*} 1 Metc. (Ky.) 164-73, 77, 78.
 Campe v. Weir, 28 Misc. Rep. (N. Y.) 243-387, 389.
 Campbell v. Connor, 70 N. Y. 424-440.
 Campbell v. Consol. Tract. Co., 201 Pa. 167-783.
 Campbell v. Iowa Cent. Ry. Co. (Iowa), 99 N. W. 1061-403.
 Campbell v. Los Angeles R. Co., 135 Cal. 137-815.
 Campbell v. Morse, Harper (S. C.), 468-63.
 Campion v. Canadian Pac. R. Co., 43 Fed. 775-103, 272.
 Campion v. Colvin, 3 Bing. N. Cas. 17-445.
 Canada Southern R. Co. v. International Bridge Co., L. R. 8 App. 723-124, 909.
 Canadian Pac. R. Co. v. Charbonneau, 6 Montreal L. R. Q. B. 284-483.
 Canadian Pac. R. Co. v. Johnson, 6 Montreal Q. B. 213-561.
 Canal Co. v. Jenkins, 1 Colo. App. 425-55.
 Candee v. New York, etc., R. Co., 73 Conn. 667-519, 524.
 Candee v. Pennsylvania R. Co., 21 Wis. 584-463, 729.
 Candee v. Western Union Tel. Co., 34 Wis. 471-74, 77, 78.
 Cardiff v. Louisville, etc., R. Co., 42 La. Ann. 477-584.
 Canfield v. Baltimore, etc., R. Co., 46 N. Y. Super. Ct. 238-386.
 Canfield v. Baltimore, etc., R. Co., 93 N. Y. 532-321, 387, 392.
 Canfield v. Northern R. Co., 18 Barb. (N. Y.) 586-495.
 Cantling v. Hannibal, etc., R. Co., 54 Mo. 385-81, 705.
 Cantu v. Bennett, 39 Tex. 303-118, 220, 309.
 Cantwell v. Pacific Express Co., 58 Ark. 487-241, 246.
 Capehart v. Granite Mills, 97 Ala. 353-142, 177, 406.
 Capehart v. Louisville, etc., R. Co., 3 Int. Com. Rep. 278-449, 930.
 Capehart v. Seaboard, etc., R. Co., 77 N. C. 355-334, 339.
 Caples v. Louisville, etc., R. Co., 17 Mo. App. 14-350, 401.
 Car. Co. v. Reed, 75 Ill. 125-742.
 Card v. New York, etc., R. Co., 50 Barb. (N. Y.) 39-699.
 Cardot v. Barney, 63 N. Y. 281-40.
 Carlton v. Lombard Ayres & Co., 19 App. Div. (N. Y.) 297-897.
 Carlil v. Interstate Consol. St. R. Co. (R. I.), 51 Atl. 305-656.
 Carlisle v. Missouri Pac. R. Co., 97 Mo. App. 571-128.
 Carlson v. Ocean Steam Nav. Co., 109 N. Y. 359-703.
 Carmanty v. Mexican Gulf R. Co., 5 La. Ann. 703-617.
 Carney v. Cincinnati St. R. Co., 8 Ohio S. & C. P. Dec. 587-547.
 Carpenter v. Boston, etc., R. Co., 97 N. Y. 500, 494-551, 631, 641.
 Carpenter v. Eastern R. Co. (Minn.), 60 N. W. 720-525.
 Carpenter v. New York, etc., R. Co., 124 N. Y. 53-56, 58, 705, 713, 714.
 Carpu v. London, etc., R. Co., 5 Q. B. 747-773, 780.
 Carr v. Eel River, etc., R. Co., 98 Cal. 366-674, 748, 849.
 Carr v. Lancashire, etc., R. Co., 7 Exch. 707-724.
 Carr v. Miller-Morris, Irrig., etc., Co., 105 La. 239-88.
 Carr v. Schafer, 15 Colo. 48-243.
 Carrico v. West Virginia Cent., etc., R. Co., 39 W. Va. 86-779.
 Carrico v. West Virginia, etc., R. Co., 35 W. Va. 389-599, 870, 871.
 Carroll v. East Tennessee, etc., R. Co., 82 Ga. 452-811.
 Carroll v. Interstate Rap. T. Co., 107 Mo. 653-837, 854.
 Carroll v. Missouri Pac. R. Co., 88 Mo. App. 239-572, 753, 759.
 Carroll v. New York, etc., R. Co., 1 Duer (N. Y.), 584-817, 855.
 Carroll v. Staten Island R. Co., 58 N. Y. 126-544, 552, 555, 569, 570, 594, 607, 608, 620, 652, 660, 831.
 Carroll v. Staten Island R. Co., 8 Ohio S. & C. P. Dec. 587.
 Carroll v. Southern Express Co., 37 S. C. 452-181.
 Carruth v. Texas, etc., R. Co., 45 La. Ann. 1228-320.
 Carson v. Harris, 4 Green (Iowa), 516-467.
 Carsten v. Northern Pac. R. Co., 44 Minn. 454-567.
 Carstens v. Burleigh, 20 Wash. 233-371.
 Carswell v. Macon, etc., R. Co., 118 Ga. 826-587.
 Carter v. Columbia, etc., R. Co., 19 S. C. 20-771, 799.
 Carter v. Howe Machine Co., 51 Md. 290-640.
 Carter v. Kansas City Cable R. Co., 42 Fed. 37-769, 770.
 Carter v. Peck, 4 Sneed. (Tenn.) 203-463.
 Carter v. Towne, 98 Mass. 567-384.
 Carton v. Illinois Cent. R. Co., 59 Iowa, 148-310.
 Cartwright v. Chicago, etc., R. Co., 52 Mich. 606-672, 845.
 Cartwright v. Rome, etc., R. Co., 85 Hun (N. Y.), 517-246, 455, 465, 467.
 Cary v. Cleveland, etc., R. Co., 29 Barb. (N. Y.) 35-724, 725, 728.
 Case v. Chicago, etc., R. Co., 64 Iowa, 762-770.
 Case v. Cleveland, etc., R. Co., 11 Ind. App. 617-334.
 Casey v. St. Louis, S. W. Ry. Co. (Tex. Clv. App.), 83 S. W. 20-501.
 Casey v. New York Cent., etc., R. Co., 78 N. Y. 518-822.
 Cash v. Wabash R. Co., 81 Mo. App. 109-497, 533.
 Cashill v. Wright, 6 El. & Bl. 891-6.
 Casper v. Dry Dock, etc., R. Co., 23 App. Div. (N. Y.) 451-781.
 Caspers v. Dry Dock, etc., R. Co., 22 App. Div. (N. Y.) 156-365.

TABLE OF CASES.

xxxiii

(The references are to the pages.)

- Cass v. Boston, etc., R. Co., 14 Allen (Mass.) 448—283.
 Cassidy v. Old Colony St. R. Co. (Mass.), 68 N. E. 10—772, 877.
 Cassidy v. Angel, 12 R. I. 449—798.
 Cassilay v. Young, 4 B. Mon. (Ky.) 265—196.
 Cassio v. Brooklyn H. R. Co., 59 App. Div. (N. Y.) 617—841.
 Caswell v. Boston, etc., R. Corp., 98 Mass. 194—597, 873.
 Caterham R. Co. v. London, etc., R. Co., 26 L. J. C. P. 161—113.
 Caton v. Rumney, 13 Wend. (N. Y.) 387—46, 50.
 Cau v. Texas, etc., R. Co., 194 U. S. 427, 113 Fed. 91—304, 327.
 Cavallaro v. Texas, etc., R. Co., 110 Cal. 348—178, 264, 275.
 Caveny v. Neely, 43 S. C. 70—604, 617.
 Cawfield v. Asheville St. R. Co., 111 N. C. 597—682.
 Cayo v. Pool's Assignee, 55 S. W. (Ky.) 887—64, 432, 444.
 Cayuga Co. Nat. Bank v. Daniels, 47 N. Y. 631—160.
 Central Coal & Coke Co. v. Hartman, 111 Fed. 96—426.
 Central, etc., R. Co. v. Avant, 80 Ga. 195—247, 481.
 Central, etc., R. Co. v. Brown, 78 Md. 594—639.
 Central, etc., R. Co. v. Bryant, 73 Ga. 722—314, 505.
 Central, etc., R. Co. v. Chicago Portrait Co., 122 Ga. 11—446.
 Central, etc., R. Co. v. Miles, 88 Ala. 266, 256, 261—674, 819, 830, 848, 849, 850.
 Central, etc., R. Co. v. Morris, 68 Tex. 49—83, 102, 117.
 Central, etc., R. Co. v. Motes, 117 Ga. 922—630, 635.
 Central, etc., R. Co. v. Price, 106 Ga. 170—637.
 Central, etc., R. Co. v. Smith, 80 Ga. 526—804.
 Central Iron Works v. Pennsylvania R. Co., 2 Dauph. Co. Rep. 308—119.
 Central of Georgia Ry. Co. v. Brown, 113 Ga. 414—628, 632.
 Central of Georgia R. Co. v. Felton, 110 Ga. 597—370.
 Central of Ga. Ry. Co. v. Glascock & Warfield, 117 Ga. 938—523.
 Central of Ga. Ry. Co. v. James, 117 Ga. 832—519.
 Central of Ga. R. Co. v. Lippman, 110 Ga. 665—219, 292, 655, 661, 760.
 Central of Ga. R. Co. v. McKinney, 118 Ga. 535—816.
 Central of Ga. R. Co. v. Murphrey, 113 Ga. 514—343.
 Central of Ga. R. Co. v. Ricks, 109 Ga. 339—219.
 Central of Ga. Ry. Co. v. Rogers, 111 Ga. 865—519.
 Central Pass. R. Co. v. Kuhm, 86 Ky. 578—770, 778, 787.
 Central Pass. R. Co. v. Rose, 15 Ky. L. Rep. 209—838.
 Central R. Co. v. Brinson, 64 Ga. 475—786.
 Central R. Co. v. Combs, 70 Ga. 533—754, 885.
 Central R. Co. v. Cooper, 95 Ga. 406—211.
 Central R. Co. v. Dwight Mfg. Co., 75 Ga. 609—462.
 Central R. Co. v. Freeman, 75 Ga. 331—595, 652, 779.
 Central R. Co. v. Glass, 60 Ga. 441—689.
 Central R. Co. v. Green, 86 Pa. St. 421—623.
 Central R. Co. v. Henderson, 69 Ga. 715—557.
 Central R. Co. v. Hasselkus, 91 Ga. 382—388, 392.
 Central R. Co. v. Latcher, 69 Ala. 106—851.
 Central R. Co. v. Logan, 77 Ga. 804—417.
 Central Ry. Co. v. Peacock, 69 Md. 257—634.
 Central R. Co. v. Pickett, 87 Ga. 734—337, 497.
 Central R. Co. v. Rogers, 66 Ga. 251—402, 491.
 Central R. Co. v. Sanders, 73 Ga. 513—779.
 Central R. Co. v. Smith, 74 Md. 212—815, 656, 675.
 Central R. Co. v. Strickland, 90 Ga. 502—589, 592, 889.
 Central R. Co. v. Thompson, 76 Ga. 770—652, 674.
 Central R. Co. v. Van Horn, 38 N. J. L. 133—665, 814, 847.
 Central R. Co. v. Whitehead, 74 Ga. 441—554, 682.
 Central R. Co. v. Wolff, 74 Ga. 664—807.
 Central R., etc., Co. v. Anderson, 58 Ga. 393—261, 352, 377.
 Central R., etc., Co. v. Bayer, 91 Ga. 115—466, 491.
 Central R., etc., Co. v. Bridger, 94 Ga. 471—475.
 Central R., etc., Co. v. Georgia Fruit, etc., Exch., 91 Ga. 389—23, 255, 454, 474, 476.
 Central R., etc., Co. v. Lampley, 76 Ala. 357—19, 71.
 Central R., etc., Co. v. Perry, 58 Ga. 461—545, 551, 652, 660, 678, 832, 843.
 Central R., etc., Co. v. Sawyer, 78 Ga. 784—447.
 Central R., etc., Co. v. Skellie, 86 Ga. 686—400, 423, 474.
 Central R., etc., Co. v. Smitha, 85 Ala. 47—314, 524.
 Central Stock Yards Co. v. Louisville, etc., R. Co., 118 Fed. 113—518, 929.
 Central Texas, etc., Ry. Co. v. Holloway (Tex.), 54 S. W. 419—684.
 Central Texas, etc., R. Co. v. Smith (Tex. Civ. App.), 73 S. W. 537—697.
 Central Trust Co. v. Savannah, etc., R. Co., 69 Fed. 683—422.
 Central Trust Co. v. East Tennessee, etc., R. Co., 70 Fed. 764—272.
 Central Trust Co. v. Wabash, etc., R. Co., 39 Fed. 417—703, 707, 708.
 Central Trust Co. v. Wabash, etc., R. Co. (Mo.), 31 Am. & Eng. R. Cas. 103—458.
 Central Trust Co. v. Wabash, etc., R. Co., 31 Fed. 247—474, 727.
 Central Union Teleph. Co. v. Bradbury, 106 Ind. 1—73.
 Central Union Teleph. Co. v. State, 128 Ind. 113—79.
 Central Vermont R. Co. v. Bateman, 26 U. S. App. 584—604.
 Central Vermont R. Co. v. Soper, 59 Fed. 879—331, 335.
 Certain Logs of Mahogany, 2 Sumn. (U. S.) 589—445.

TABLE OF CASES.

(The references are to the pages.)

- Chaffee v. Boston, etc., R. Corp., 104
Mass. 108, 115-679, 830, 876.
Chaffee v. Mississippi, etc., R. Co., 59
Miss. 182-161.
Chaffee v. Old Colony R. Co., 17 R. I. 658
-836.
Chalk v. Charlotte, etc., R. Co., 85 N.
C. 423-150, 193, 269, 270.
Chamberlain v. Chandler, 3 Mason (U.
S.) 242-637.
Chamberlain v. Lake Shore, etc., R. Co.
(Mich.), 68 N. W. 423-735.
Chamberlain v. Milwaukee, etc., R. Co.,
7 Wis. 425-771.
Chamberlain v. Pierson, 87 Fed. 420-580.
Chamberlain v. Pullman Palace Car Co.,
55 Mo. App. 474-57.
Chamberlain v. Western Transp. Co., 45
Barb. (N. Y.) 218-712.
Chamber of Commerce v. Great Northern
R. Co., 5 Int. Com. C. Rep. 71-923.
Champane v. La Cross City Ry. Co. (Wis.),
99 N. W. 334-853.
Chandler v. Belden, 18 Johns. (N. Y.), 159
-445.
Chandler v. Fulton, 10 Tex. 24-120.
Chandler v. Sprague, 38 Am. Dec. 410-175.
Chapin v. Chicago, etc., R. Co., 79 Iowa,
582-501, 531, 538.
Chapman v. Atlantic Refining Co., 108 N.
Y. 638-383.
Chapman v. Chicago, etc., R. Co., 26 Wis.
295-400, 405.
Chapman v. Erie R. Co., 55 N. Y. 579-618.
Chapman v. Great Western R. Co., 5 Q.
B. Div. 278, 42 L. T. N. S. 252-265, 269,
280, 283.
Chapman v. New Haven R. Co., 19 N. Y.
341-698.
Chapman v. New Orleans, etc., R. Co., 21
La. Ann. 224-388.
Chapman v. Railroad Co., 7 Phila. (Pa.)
204-210.
Charlebois v. Gogebie, etc., R. Co., 91
Mich. 59-375.
Charles Schlesinger Sons v. New York,
etc., R. Co., 85 N. Y. Supp. 372-153.
Charleston, etc., R. Co. v. Moore, 80 Ga.
522-356.
Charlotte, etc., R. Co. v. Wooten, 87 Ga.
203-224.
Charnock v. Texas, etc., R. Co., 113 Fed.
92-327.
Chase v. Jamestown St. R. Co., 60 Hun
(N. Y.), 582-612.
Chase v. New York Cent. R. Co., 26 N.
Y. 523-734.
Chase v. Washington Mut. Ins. Co., 12
Barb. (N. Y.) 595-373.
Chase v. Westmore, 5 M. & S. 180-445.
Chattanooga Elec. Ry. Co. v. Roddy, 105
Tenn. 666-878.
Chattanooga, etc., R. Co. v. Huggins, 89
Ga. 494-548, 652.
Chattanooga, etc., R. Co. v. Liddle, 85
Ga. 482-588, 900.
Chattanooga, etc., R. Co. v. Lyon, 89 Ga.
16-668.
Chattanooga R. T. Co. v. Venable, 105
Tenn. 460-587.
Chattock v. Bellamy, 64 L. J. Q. B. (N.
S.) 250-69.
Cheesman v. Exall, 6 Exch. 341-156.
Chelsea Jute Mills v. Britain S. S. Co.,
123 Fed. 176-152.
Chemical Co. v. Lackawanna Line (Mo.
App.), 73 S. W. 346-150.
Cheney v. Boston, etc., R. Co., 11 Metc.
(Mass.) 121-558, 591.
Cherokee, etc., Coal Co. v. Dixon, 55 Kan.
70-810.
Cherry v. Kansas City, etc., R. Co., 1
Mo. App. Rep. 253-472.
Cherry v. Kansas City, etc., R. Co., 52
Mo. App. 499-559, 748.
Chesapeake & O. R. Co. v. Clowes, 93 Va.
189-369.
Chesapeake & O. R. Co. v. Steele, 84
Fed. 93-797.
Chesapeake, etc., R. Co. v. American
Exch. Bank, 92 Va. 495-502, 506, 508, 509,
519, 537.
Chesapeake, etc., R. Co. v. Anderson, 93
Va. 650-748.
Chesapeake, etc., R. Co. v. Board, 25 Ky.
L. Rep. 1118-375, 735.
Chesapeake, etc., R. Co. v. Dodge, 23 Ky.
L. Rep. 1959-375, 762.
Chesapeake, etc., R. Co. v. Jordan, 25 Ky.
L. Rep. 574-653.
Chesapeake, etc., R. Co. v. Radbourne, 52
Ill. App. 203-115, 388, 464, 467.
Chesapeake, etc., R. Co. v. Reeves (Ky.),
11 S. W. 464-811.
Chesapeake, etc., R. Co. v. Wells, 85 Tenn.
613-590, 623.
Chesapeake, etc., Teleph. Co. v. Baltimore,
etc., Tel. Co., 66 Md. 399-79.
Chesley v. St. Clair, 1 N. H. 189-364.
Chester Nat. Bank v. Atlanta, etc., Air
Line R. Co., 25 S. C. 216-171, 172.
Chevalier v. Patton, 10 Tex. 344-377, 578.
Chevalier v. Straham, 2 Tex. 115, 118-19,
22, 25, 62, 63, 318.
Cheviot v. Brooks, 1 Johns. (N. Y.) 369-
226.
Chewning v. Ensley R. Co., 100 Ala. 493-
810, 873.
Cheyne v. Van Brunt St., etc., R. Co., 97
App. Div. (N. Y.) 56-651.
Chicago & A. R. Co. v. Dumser, 161 Ill.
190-657.
Chicago City R. Co. v. Burrell, 70 Ill.
App. 60-612.
Chicago City R. Co. v. Catlin, 70 Ill. App.
97-771.
Chicago City R. Co. v. Considine, 50 Ill.
App. 471-643.
Chicago City Ry. Co. v. Delcourt, 35 Ill.
App. 430-837.
Chicago City R. Co. v. Engel, 35 Ill. App.
490-653, 778.
Chicago City Ry. Co. v. Lewis, 5 Ill. App.
242-771, 828.
Chicago City R. Co. v. Mumford, 97 Ill.
560-675.
Chicago City R. Co. v. Schuler, 111 Ill.
App. 470-374.
Chicago City R. Co. v. Wilcox (Ill.), 24
N. E. 419-822, 824.
Chicago, etc., R. Co. v. Abels, 60 Miss.
1017-30, 316, 345, 534.
Chicago, etc., R. Co. v. Addicoat, 17 Ill.
App. 632-725.
Chicago, etc., R. Co. v. Ames, 40 Ill.
249-179, 404, 406.
Chicago, etc., R. Co. v. Arnol, 144 Ill.
261-653, 665, 674, 695, 847.
Chicago, etc., R. Co. v. Bannerman, 116
Ill. App. 100-588.
Chicago, etc., R. Co. v. Barrett, 16 Ill.
App. 17-554, 555, 626, 627, 628.

TABLE OF CASES.

XXXV

(The references are to the pages.)

- Chicago, etc., R. Co., v. Becker, 76 Ill. 25—819.
 Chicago, etc., R. Co. v. Bills, 104 Ind. 13—549, 666.
 Chicago, etc., R. Co. v. Benjamin, 63 Ill. 283—387.
 Chicago, etc., R. Co. v. Bensley, 69 Ill. 630—151, 262, 270, 281.
 Chicago, etc., R. Co. v. Bozarth, 91 Ill. App. 68—322, 323.
 Chicago, etc., R. Co. v. Brisbane, 24 Ill. App. 463—734.
 Chicago, etc., R. Co. v. Bryant, 65 Fed. 968—550, 587.
 Chicago, etc., R. Co. v. Bryan, 90 Ill. 126—619, 627, 637.
 Chicago, etc., R. Co. v. Boger, 1 Ill. App. 472—750, 751.
 Chicago, etc., R. Co. v. Boggs, 101 Ind. 522—786.
 Chicago, etc., R. Co. v. Boyce, 73 Ill. 510—702, 706, 724.
 Chicago, etc., R. Co. v. Burlington, etc., R. Co., 34 Fed. 481—95, 97, 453.
 Chicago, etc., R. Co. v. Carroll, 5 Ill. App. 201—542, 623, 653, 857.
 Chicago, etc., R. Co. v. Carroll (Tex. Civ. App.), 81 S. W. 1020—522.
 Chicago, etc., R. Co. v. Carroll, 102 Ill. App. 397, 202—794.
 Chicago, etc., R. Co. v. Carey, 115 Ill. 115—533, 791.
 Chicago, etc., R. Co. v. Carpenter, 56 Fed. 451—572.
 Chicago, etc., R. Co. v. Casey, 9 Ill. App. 632—550, 560, 576.
 Chicago, etc., R. Co. v. Champion (Ind.), 32 N. E. 874—804.
 Chicago, etc., R. Co. v. Calumet Stock Farm, 194 Ill. 9—528.
 Chicago, etc., R. Co. v. Calumet Stock Farm, 96 Ill. App. 337—529.
 Chicago, etc., R. Co. v. Casazzi, 83 Ill. App. 421—748.
 Chicago, etc., R. Co. v. Chapman, 30 Ill. App. 504—322.
 Chicago, etc., R. Co. v. Chapman, 133 Ill. 96—343, 762.
 Chicago, etc., R. Co. v. Chicago, etc., R. Co., 2 Int. Com. Rep. 721—938.
 Chicago, etc., R. Co. v. Chancellor, 60 Ill. App. 525—511.
 Chicago, etc., R. Co. v. Chisholm, 79 Ill. 584—548, 567, 889, 904.
 Chicago, etc., R. Co. v. Church, 12 Ill. App. 17—475.
 Chicago, etc., R. Co. v. Clayton, 78 Ill. 616—722.
 Chicago, etc., R. Co. v. Clough, 134 Ill. 586—819.
 Chicago, etc., R. Co. v. Conley, 6 Ind. App. 9—888.
 Chicago, etc., R. Co. v. Collins, 56 Ill. 212—791.
 Chicago, etc., R. Co. v. Colby (Neb.), 96 N. W. 145—99.
 Chicago, etc., R. Co. v. Conklin, 32 Kan. 55—708, 709, 712, 718.
 Chicago, etc., R. Co. v. Coss, 73 Ill. 334—670.
 Chicago, etc., R. Co. v. Dane, 43 N. Y. 240—110.
 Chicago, etc., R. Co. v. Davis, 159 Ill. 53—322, 351.
 Chicago, etc., R. Co. v. Davis, 54 Ill. App. 130—114.
 Chicago, etc., R. Co. v. Dewey, 26 Ill. 265—873.
 Chicago, etc., R. Co. v. Dickinson, 74 Ill. 249—389, 399, 411.
 Chicago, etc., R. Co. v. Dingman, 1 Ill. App. 164—843, 845.
 Chicago, etc., R. Co. v. Dorsey Fuel Co., 112 Ill. App. 382—429.
 Chicago, etc., R. Co. v. Drake, 33 Ill. App. 114—678, 682.
 Chicago, etc., R. Co. v. Elliott, 55 Fed. 949—833.
 Chicago, etc., R. Co. v. Erickson, 91 Ill. 613—498.
 Chicago, etc., R. Co. v. Fahey, 52 Ill. 81—710, 730.
 Chicago, etc., R. Co. v. Fairclough, 51 Ill. 106—149.
 Chicago, etc., R. Co. v. Felton, 125 Ill. 453—793, 822.
 Chicago, etc., R. Co. v. Field, 7 Ind. App. 172—550.
 Chicago, etc., R. Co. v. Fisher, 49 Kan. 460—653.
 Chicago, etc., R. Co. v. Fisher, 31 Ill. App. 36—623, 806.
 Chicago, etc., R. Co. v. Fisher, 141 Ill. 614—857.
 Chicago, etc., R. Co. v. Fisher, 66 Ill. 152—687.
 Chicago, etc., R. Co. v. Fillmore, 57 Ill. 265—811.
 Chicago, etc., R. Co. v. Flexman, 9 Ill. App. 250—617, 628.
 Chicago, etc., R. Co. v. Flexman, 103 Ill. 546—556, 635, 692.
 Chicago, etc., R. Co. v. Flagg, 43 Ill. 364—39, 625, 734, 746, 750, 888, 889, 895.
 Chicago, etc., R. Co. v. Frazer, 55 Kan. 582—554, 574.
 Chicago, etc., R. Co. v. Fuller, 17 Wall. (U. S.) 560—906.
 Chicago, etc., R. Co. v. Graham, 3 Ind. App. 28—589, 592, 734, 744.
 Chicago, etc., R. Co. v. George, 19 Ill. 518—653.
 Chicago, etc., R. Co. v. Gretzner, 46 Ill. 74—653.
 Chicago, etc., R. Co. v. Griffin, 68 Ill. 499—625, 636, 739, 883, 889.
 Chicago, etc., R. Co. v. Goldman, 46 Ill. App. 625—466.
 Chicago, etc., R. Co. v. Gustin, 35 Neb. 36—459.
 Chicago, etc., R. Co. v. Hale, 2 Ill. App. 150—427.
 Chicago, etc., R. Co. v. Halsell (Tex. Civ. App.), 61 S. W. 1241, 1243—520, 523.
 Chicago, etc., R. Co. v. Hambel (Neb.), 89 N. W. 643—766.
 Chicago, etc., R. Co. v. Harmon, 12 Bradw. (Ill. App.) 54—30, 292, 297, 343, 510, 511, 522.
 Chicago, etc., R. Co. v. Harmon, 17 Ill. App. 640—322, 350.
 Chicago, etc., R. Co. v. Harrison, 100 Ill. App. 211—556.
 Chicago, etc., R. Co. v. Hawk, 42 Ill. App. 322—322.
 Chicago, etc., R. Co. v. Hazzard, 26 Ill. 373—601, 694.
 Chicago, etc., R. Co. v. Henderson (Tex. Civ. App.), 73 S. W. 36—128.
 Chicago, etc., R. Co. v. Herring, 57 Ill. 59—889.
 Chicago, etc., R. Co. v. Hinds, 56 Kan. 75—791.

TABLE OF CASES.

(The references are to the pages.)

- Chicago, etc., R. Co. v. Hoffman, 82 Ill. App. 453—575.
 Chicago, etc., R. Co. v. Holdridge, 118 Ind. 281—888, 902.
 Chicago, etc., R. Co. v. Hoyt, 37 Ill. App. 64—273.
 Chicago, etc., R. Co. v. Johnson, 36 Ill. App. 564—80.
 Chicago, etc., R. Co. v. Jenkins, 103 Ill. 599—262.
 Chicago, etc., R. Co. v. Jennings, 190 Ill. 478—562.
 Chicago, etc., R. Co. v. Kapp (Tex. Civ. App.), 83 S. W. 233—536.
 Chicago, etc., R. Co. v. Katzenbach, 118 Ind. 174—333, 351, 401.
 Chicago, etc., R. Co. v. Kendall, 72 Ill. App. 105—262.
 Chicago, etc., R. Co. v. Klauber, 9 Ill. App. 613—858.
 Chicago, etc., R. Co. v. Koehler, 47 Ill. App. 147—836.
 Chicago, etc., R. Co. v. Landauer, 36 Neb. 642—678, 849.
 Chicago, etc., R. Co. v. Lee, 92 Fed. 318—554.
 Chicago, etc., R. Co. v. Lea, 68 Ill. 576—700.
 Chicago, etc., R. Co. v. Lewis, 145 Ill. 67—596, 597, 606, 653, 700.
 Chicago, etc., R. Co. v. Lewis, 48 Ill. App. 274—803.
 Chicago, etc., R. Co. v. Lagerkrans (Neb.), 91 N. W. 385—877.
 Chicago, etc., R. Co. v. Lowell, 151 U. S. 209—817, 845, 875.
 Chicago, etc., R. Co. v. Manning, 23 Neb. 552—222, 236, 251.
 Chicago, etc., R. Co. v. Martelle (Neb.), 91 N. W. 364—850.
 Chicago, etc., R. Co. v. McAra, 52 Ill. 296—699.
 Chicago, etc., R. Co. v. McLallen, 84 Ill. 109—589.
 Chicago, etc., R. Co. v. Mead, 206 Ill. 174—769.
 Chicago, etc., R. Co. v. Meech, 59 Ill. App. 69—893, 903.
 Chicago, etc., R. Co. v. Mehlsack, 131 Ill. 245—660.
 Chicago, etc., R. Co. v. Merrill, 48 Ill. 425—199.
 Chicago, etc., R. Co. v. Michie, 83 Ill. 428—550, 575, 584.
 Chicago, etc., R. Co. v. Mitchell (Tex. Civ. App.), 85 S. W. 286—504, 527, 530.
 Chicago, etc., R. Co. v. Mock, 88 Ill. 87—771, 793.
 Chicago, etc., R. Co. v. Montfort, 60 Ill. 175—315, 322, 462, 481, 483.
 Chicago, etc., R. Co. v. Morse, 98 Ill. App. 662—655, 662, 794.
 Chicago, etc., R. Co. v. Moss, 60 Miss. 1003—316, 345, 377, 394, 396.
 Chicago, etc., R. Co. v. New York, etc., R. Co., 24 Fed. 516—453.
 Chicago, etc., R. Co. v. Northern Line Packet Co., 70 Ill. 217—464, 467, 486.
 Chicago, etc., R. Co. v. North Western Union Packet Co., 38 Iowa, 377—429, 442.
 Chicago, etc., R. Co. v. Osborne, 52 Fed. 912—450, 907, 910, 919, 925, 935.
 Chicago, etc., R. Co. v. Owen, 21 Ill. App. 339—537.
 Chicago, etc., R. Co. v. Parks, 18 Ill. 460—590, 734, 747, 750, 897.
 Chicago, etc., R. Co. v. Peacock, 48 Ill. 253—560.
 Chicago, etc., R. Co. v. People, 105 Ill. 657—668.
 Chicago, etc., R. Co. v. People, 67 Ill. 11—121.
 Chicago, etc., R. Co. v. People, 56 Ill. 365—462.
 Chicago, etc., R. Co. v. Pennsylvania R. Co., 1 I. C. C. Rep. 86—450, 929, 930.
 Chicago, etc., R. Co. v. Pittsburgh, 123 Ill. 9—617, 626, 643, 653.
 Chicago, etc., R. Co. v. Pittsburgh (Ill.), 8 N. E. 803—623.
 Chicago, etc., R. Co. v. Pondrom, 51 Ill. 333—508, 870.
 Chicago, etc., R. Co. v. Provine, 61 Miss. 238—337.
 Chicago, etc., R. Co. v. Randolph, 53 Ill. 510—624, 666, 686.
 Chicago, etc., R. Co. v. Rielly, 40 Ill. App. 416—592, 816.
 Chicago, etc., R. Co. v. Roberts, 40 Ill. 503—750.
 Chicago, etc., R. Co. v. Rood, 163 Ill. 477—770, 772.
 Chicago, etc., R. Co. v. Sattler (Neb.), 90 N. W. 649—557, 845.
 Chicago, etc., R. Co. v. Sawyer, 69 Ill. 285—24, 262, 266, 281.
 Chicago, etc., R. Co. v. Scates, 90 Ill. 586—837.
 Chicago, etc., R. Co. v. Schuld (Neb.), 92 N. W. 162—328, 519, 523.
 Chicago, etc., R. Co. v. Scott, 42 Ill. 132—262, 282.
 Chicago, etc., R. Co. v. Scurr, 59 Miss. 456—645, 880, 895, 899.
 Chicago, etc., R. Co. v. Shea, 66 Ill. 471—24, 33, 356.
 Chicago, etc., R. Co. v. Simon, 160 Ill. 648—297.
 Chicago, etc., R. Co. v. Simon, 57 Ill. App. 502—481.
 Chicago, etc., R. Co. v. Simms, 18 Ill. App. 68—241, 334.
 Chicago, etc., R. Co. v. Smith, 46 Mich. 504—793.
 Chicago, etc., R. Co. v. Stambro, 87 Ill. 185—189, 190, 411, 420.
 Chicago, etc., R. Co. v. Stratton, 111 Ill. App. 142—742, 748.
 Chicago, etc., R. Co. v. Suffern, 27 Ill. App. 404—93.
 Chicago, etc., R. Co. v. Thompson, 19 Ill. 578—37, 39, 356.
 Chicago, etc., R. Co. v. Thrapp, 5 Ill. App. 602—105, 243, 414.
 Chicago, etc., R. Co. v. Tracy, 109 Ill. App. 563—554.
 Chicago, etc., R. Co. v. Trotter, 61 Miss. 417—793.
 Chicago, etc., R. Co. v. Trotter, 60 Miss. 442—772, 785.
 Chicago, etc., R. Co. v. Van Dresar, 12 Wis. 511—503, 524.
 Chicago, etc., R. Co. v. Warren, 16 Ill. 502—147, 198, 266.
 Chicago, etc., R. Co. v. Wallace, 66 Fed. 505—79, 329.
 Chicago, etc., R. Co. v. Weeks, 99 Ill. App. 518—546.
 Chicago, etc., R. Co. v. Western Hay & Grain Co. (Neb.), 90 N. W. 205—483.
 Chicago, etc., R. Co. v. Willard, 31 Ill. App. 435—555.

TABLE OF CASES.

xxxvii

(The references are to the pages.)

- Chicago, etc., R. Co. v. Williams, 61 Neb. 608—499.
 Chicago, etc., R. Co. v. Williams, 55 Ill. 185—590, 623, 740, 889.
 Chicago, etc., R. Co. v. Wilcox, 44 Alb. L. J. 70—822.
 Chicago, etc., R. Co. v. Wilson, 23 Ill. App. 63—883, 889, 897.
 Chicago, etc., R. Co. v. Winters, 175 Ill. 293—572.
 Chicago, etc., R. Co. v. Winfrey (Neb.), 93 N. W. 526—788, 849.
 Chicago, etc., R. Co. v. Witty, 32 Neb. 275—317, 345.
 Chicago, etc., R. Co. v. Wolcott, 141 Ind. 267—106, 112, 121, 369, 413, 450, 453.
 Chicago, etc., R. Co. v. Wood, 104 Fed. 663—554.
 Chicago, etc., R. Co. v. Woodward (Ind.), 72 N. E. 558—450, 497, 521, 532.
 Chicago, etc., R. Co. v. Woolridge, 32 Ill. App. 237—872.
 Chicago, etc., Transfer R. Co. v. Gruss, 102 Ill. App. 439—375.
 Chicago Exchange Bldg. Co. v. Nelson, 137 Ill. 334—85.
 Chicago Fifth Nat. Bank v. Bayley, 115 Mass. 228—172.
 Chicago Packing & P. Co. v. Savannah, etc., R. Co., 103 Ga. 140—181.
 Chicago Terminal Trans. Co. v. Kotoski, 199 Ill. 383—630.
 Chicago Ter. Trans. Co. v. Schmelling, 99 Ill. App. 577—554.
 Chicago Union Tract. Co. v. Crosby, 109 Ill. App. 644—773.
 Chicago Union Tract. Co. v. Mommsen, 107 Ill. App. 353—653, 775.
 Chicago, W. D. Ry. Co. v. Becker, 128 Ill. 545—807.
 Chicago, West D. Ry. Co. v. Haviland, 12 Ill. App. 561—827.
 Chicago, West Div. R. Co. v. Mills, 105 Ill. 63—674.
 Chickering v. Fowler, 4 Pick. (Mass.) 371—149, 195.
 Childs v. Digby, 24 Pa. St. 23—232, 233.
 Childs v. New York, etc., R. Co., 77 Hun (N. Y.), 539—689.
 Chilton v. St. Louis, etc., R. Co., 114 Mo. 88—589, 623.
 China Mut. Ins. Co. v. Force, 142 N. Y. 90—308.
 Chippendale v. Lancashire, etc., R. Co., 15 Jur. 1106—324.
 Choctaw, etc., R. Co. v. Hill (Tenn.), 75 S. W. 963—592, 888.
 Chollete v. Railroad Co., 26 Neb. 159—675.
 Choquette v. Southern Elec. R. Co., 80 Mo. App. 515—655, 781.
 Chouteau v. Steamboat St. Anthony, 16 Mo. 216—8.
 Chouteaux v. Leech, 18 Pa. St. 224—31, 234, 236, 460.
 Christenson v. American Exp. Co., 15 Minn. 270—35, 36, 69, 313, 316, 479, 530, 753.
 Christian v. First Div. St. Paul, etc., R. Co., 20 Minn. 21—210.
 Christie v. Griggs, 2 Campb. 79—543, 607, 781.
 Christy v. Smith, 23 Vt. 663—71, 72.
 Church v. Atchison, etc., R. Co., 1 Okl. 44—459, 466.
 Cicero & P. St. R. Co. v. Meixner, 160 Ill. 320—839.
 Cincinnati, etc., Mail Co. v. Boal, 15 Ind. 345—8.
 Cincinnati, etc., R. Co. v. Berdan, 22 Ohio Cir. Ct. R. 326—288, 296.
 Cincinnati, etc., R. Co. v. Brown, 2 Ohio Dec. 494—779.
 Cincinnati, etc., R. Co. v. Butler, 103 Ind. 31—795.
 Cincinnati, etc., R. Co. v. Carper, 112 Ind. 26—551.
 Cincinnati, etc., R. Co. v. Case, 122 Ind. 310—239, 512.
 Cincinnati, etc., R. Co. v. Cole, 29 Ohio St. 126—890.
 Cincinnati, etc., R. Co. v. Cooper, 120 Ind. 469—660, 683.
 Cincinnati, etc., R. Co. v. Disbrow, 76 Ga. 253—506.
 Cincinnati, etc., R. Co. v. Eaton, 94 Ind. 474—879, 881, 887.
 Cincinnati, etc., R. Co. v. Fairbanks & Co., 90 Fed. 467—237.
 Cincinnati, etc., R. Co. v. Gregg, 25 Ky. L. Rep. 2329—509.
 Cincinnati, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 184—907, 908, 910, 912, 922, 924, 930, 933.
 Cincinnati, etc., R. Co. v. Jackson, 22 Ky. L. Rep. 630—661.
 Cincinnati, etc., R. Co. v. Kelsey, 9 Ohio C. C. 170—770, 779.
 Cincinnati, etc., R. Co. v. Lohe (Ohio), 67 N. E. 161—591, 816, 857.
 Cincinnati, etc., R. Co. v. Marcus, 38 Ill. 219—703, 704, 708, 709.
 Cincinnati, etc., R. Co. v. McCool, 26 Ind. 140—262.
 Cincinnati, etc., R. Co. v. McMullen, 117 Ind. 439—796.
 Cincinnati, etc., R. Co. v. Nolan, 8 Ohio C. C. 347—827.
 Cincinnati, etc., R. Co. v. Pontius, 19 Ohio St. 221—481, 484, 717, 761.
 Cincinnati, etc., Ry. Co. v. Sanders & Russell, 25 Ky. Law Rep. 2333—523.
 Cincinnati, etc., R. Co. v. Skillman, 39 Ohio St. 444—689, 733, 734, 735, 749.
 Cincinnati, etc., R. Co. v. Spratt, 2 Duv. (Ky.) 4—399, 492.
 Cincinnati, etc., R. Co. v. Wagner, 15 Ohio C. C. 395—872.
 Cincinnati Chronicle Co. v. White Line Cent. Trans. Co., 1 Cinc. Sup. Ct. Rep. (Ohio) 300—426.
 Citizens' Bank v. Nantucket Steamboat Co., 2 Story (U. S.), 16—4, 20, 66, 127.
 Citizens' St. Ry. Co. v. Clark (Ind. App.), 71 N. E. 53—628, 744, 749.
 Citizens' Ry. Co. v. Craig (Tex. Civ. App.), 69 S. W. 239—655.
 Citizens' St. R. Co. v. Hoffbauer, 23 Ind. App. 614—864.
 Citizens' St. R. Co. v. Hamer (Ind. App.), 62 N. E. 778—822.
 Citizens' St. R. Co. v. Howard, 102 Tenn. 474—812.
 Citizens' St. R. Co. v. Jolly (Ind. App.), 67 N. E. 935—547, 656, 838, 842.
 Citizens' St. R. Co. v. Merl, 26 Ind. App. 284—547, 549, 841.
 Citizens' St. R. Co. v. Merl, 134 Ind. 609—44, 655.
 Citizens' St. R. Co. v. Sinclair (Tex. Civ. App.), 81 S. W. 329—600.
 Citizens' St. R. Co. v. Steen, 42 Ark. 321—596.
 Citizens' St. R. Co. v. Stoddard (Ind. App.), 37 N. E. 723—807.

TABLE OF CASES.

(The references are to the pages.)

- Citizens' St. R. Co. v. Twiname, 111 Ind. 587-44, 45, 599, 658.
 Citizens' St. R. Co. v. Willoby, 134 Ind. 563-627.
 City Bank v. Rome, etc., R. Co., 44 N. Y. 136-169, 177, 179.
 City Electric R. Co. v. Shropshire, 101 Ga. 33-748.
 City, etc., R. Co. v. Brauss, 70 Ga. 380, 368-588, 889, 898.
 City, etc., R. Co. v. Findley, 76 Ga. 311-769.
 City R. Co. v. Lee, 50 N. J. L. 438, 435-859, 862.
 City of Kansas City v. Orr (Kan.), 61 Pac. 397-831.
 City of Vicksburg v. Hennessey, 54 Miss. 291-795.
 City, etc., R. Co. v. Svedborg, 20 App. D. C. 543-769.
 Clafin v. Meyer, 75 N. Y. 260-285, 387.
 Claiborn v. Missouri, etc., R. Co., 21 Tex. Civ. App. 648-661.
 Clapp v. Hudson River R. Co., 19 Barb. (N. Y.) 461-894, 904.
 Clapp v. Stanton, 20 La. Ann. 495-43.
 Clark v. Barnell, 12 How. (U. S.) 272-65, 66, 377, 387, 393, 395.
 Clark v. Boston, etc., R. Co., 64 N. H. 323-786.
 Clark v. Brewer, 6 Gray (Mass.), 320-233.
 Clark v. Burns, 118 Mass. 275-713.
 Clark v. Chicago, etc., R. Co., 127 Mo. 210-778.
 Clark v. Durham Tract. Co., 3 St. Ry. Rep. 731-685.
 Clark v. Eastern R. Co., 139 Mass. 423-714, 725, 726.
 Clark v. Eighth Ave. R. Co., 36 N. Y. 135-860, 861.
 Clark v. Metropolitan St. R. Co., 68 App. Div. (N. Y.) 49-832.
 Clark v. Nassau Elec. R. Co., 9 App. Div. (N. Y.) 51-784.
 Clark v. Louisville & N. R. Co., 101 Ky. 34-870.
 Clark v. Lowell, etc., R. Co., 9 Gray (Mass.), 231-434.
 Clark v. Massachusetts, etc., Ins. Co., 2 Pick. (Mass.) 104-187.
 Clark v. McDonald, 4 McCord (S. C.), 223-28, 542.
 Clark v. Pacific R. Co., 39 Mo. 183-226, 257.
 Clark v. Railroad Co., 127 Mo. 210-776.
 Clark v. Spencer, 10 Watts. (Pa.) 335-398.
 Clark v. Richards, 1 Conn. 54-65.
 Clark v. St. Louis, etc., R. Co., 64 Mo. 447, 440-338, 510.
 Clark v. Union Ferry Co., 35 N. Y. 485-52.
 Clark v. Wilmington, etc., R. Co., 91 N. C. 512-732, 733, 735.
 Clarke v. Needles, 25 Pa. St. 338-69, 94, 131, 239, 245, 257, 259.
 Clarke v. Rochester, etc., R. Co., 14 N. Y. 570-29, 497, 506, 511.
 Clafin v. Boston, etc., R. Co., 7 Allen (Mass.), 341-24, 179, 189, 211.
 Clarkson v. Erie & North Shore Dispatch, 6 Ill. App. 284-44.
 Clarkson v. Edes, 4 Cow. (N. Y.) 470-428.
 Claypool v. McAlister, 20 Ill. 504-53.
 Claybrook v. Hannibal, etc., R. Co. (Tex. Civ. App.), 73 S. W. 24-565.
 Cleghorn v. New York Cent., etc., R. Co., 56 N. Y. 44-616, 899, 900.
 Clement v. New York Cent., etc., R. Co., 9 N. Y. Supp. 601-180.
 Clendaniel v. Tuckerman, 17 Barb. (N. Y.) 184-126, 148.
 Clerk v. Morgans L. & T. R. Co., 107 La. 370-632, 651.
 Clark v. Paxton, 21 Wend. (N. Y.) 153-54, 55, 290, 754.
 Cleveland v. Bangor, 87 Me. 259-832.
 Cleveland v. McClurg, 119 U. S. 454-429.
 Cleveland v. New Jersey Steamboat Co., 68 N. Y. 306-549, 552, 604, 854.
 Cleveland v. New Jersey Steamboat Co., 125 N. Y. 299-612.
 Cleveland City Ry. Co. v. Osborn, 66 Ohio St. 45-662, 774.
 Cleveland Elec. Ry. Co. v. Wadsworth, 2 St. Ry. Rep. 818-877.
 Cleveland, etc., R. Co. v. Anderson, 21 O. C. C. R. 288-595.
 Cleveland, etc., R. Co. v. Ballentine, 34 Fed. 935-374.
 Cleveland, etc., R. Co. v. Bartram, 11 Ohio St. 457-552, 558, 583, 590, 619, 624, 741, 746.
 Cleveland, etc., R. Co. v. Beckett, 11 Ind. App. 547-734, 744.
 Cleveland, etc., R. Co. v. Carey (Ind. App.), 71 N. E. 244-378.
 Cleveland, etc., R. Co. v. Clossar, 126 Ind. 348-110, 123.
 Cleveland, etc., R. Co. v. Cline, 111 Ill. App. 416-374, 375.
 Cleveland, etc., R. Co. v. Crawford, 24 Ohio St. 631-889, 533, 771, 772.
 Cleveland, etc., R. Co. v. Curran, 19 Ohio St. 1-8, 317, 571, 572, 573, 753, 762, 768.
 Cleveland, etc., R. Co. v. Drutien, 26 Ky. L. Rep. 103-310.
 Cleveland, etc., R. Co. v. Heath, 22 Ind. App. 47-372.
 Cleveland, etc., R. Co. v. Holden, 73 Ill. App. 582-430.
 Cleveland, etc., R. Co. v. Ketcham, 133 Ind. 346-569, 578.
 Cleveland, etc., R. Co. v. Kinsley, 27 Ind. App. 135-744.
 Cleveland, etc., R. Co. v. Lamm, 73 Ill. App. 592-430.
 Cleveland, etc., R. Co. v. Lindsay, 109 Ill. App. 353-374, 378.
 Cleveland, etc., R. Co. v. Manson, 30 Ohio St. 451-654, 659, 869.
 Cleveland, etc., R. Co. v. McHenry, 47 Ill. App. 301-601, 844.
 Cleveland, etc., R. Co. v. Moline Plow Co., 13 Ind. App. 225-164.
 Cleveland, etc., R. Co. v. Moneyhun, 146 Ind. 147-782, 865.
 Cleveland, etc., R. Co. v. Newell, 75 Ind. 542-597, 692, 780, 806.
 Cleveland, etc., R. Co. v. Newell, 104 Ind. 264-605, 787, 804.
 Cleveland, etc., R. Co. v. Newlin, 74 Ill. App. 638-332.
 Cleveland, etc., R. Co. v. Patton, 203 Ill. 376-520, 534.
 Cleveland, etc., R. Co. v. Perishow, 61 Ill. App. 179-103, 218.
 Cleveland, etc., R. Co. v. Perkins, 17 Mich. 296-402, 515.
 Cleveland, etc., R. Co. v. C. & A. Potts & Co. (Ind. App.), 71 N. E. 685-334, 390.
 Cleveland, etc., R. Co. v. Sargent, 19 Ohio St. 438-208, 516.
 Cleveland, etc., R. Co. v. Scott, 111 Ill. App. 234-548.
 Cleveland, etc., R. Co. v. Sutherland, 19 Ohio St. 151-903.

TABLE OF CASES.

xxxix

(The references are to the pages.)

- Cleveland, etc., R. Co. v. Troesch, 68 Ill. 545—793.
 Cleveland, etc., R. Co. v. Wade, 18 Ind. App. 346—832, 872.
 Cleveland, etc., R. Co. v. Walrath, 38 Ohio St. 461—60, 541, 601, 781.
 Cleveland, etc., R. Co. v. Wright, 25 Ind. App. 525—153.
 Clinton v. Pennsylvania R. Co., 21 W. N. C. (Pa.) 133—348.
 Clinton v. Brooklyn H. R. Co., 91 App. Div. (N. Y.) 374—842.
 Clinton v. Root, 58 Mich. 182—817, 833.
 Clotworthy v. Hannibal, etc., R. Co., 80 Mo. 220—850.
 Cloud v. St. Louis, etc., R. Co., 14 Mo. App. 136—555.
 Clow v. Pittsburg Tract. Co., 158 Pa. St. 410—770, 774, 775, 778, 780.
 Clyde v. Hubbard, 88 Pa. St. 358—460.
 Clyde Steamer Co. v. Burrows, 36 Fla. 121—24, 338.
 Coasting Co. v. Tolson, 139 U. S. 557—797.
 Coates v. Chicago, etc., R. Co., 8 S. D. 173—368.
 Coates v. United States Express Co., 45 Mo. 238—472, 492.
 Cobb v. Lindell R. Co., 149 Mo. 135—677.
 Cobb v. Illinois Cent. R. Co., 38 Iowa, 601—92, 105, 139, 241, 381, 399, 422, 423, 450.
 Cobb v. Illinois Cent. R. Co., 88 Ill. 394—106.
 Cobb v. Great Western R. Co., App. Cas. 419, C. R. 203—714, 879, 881.
 Cobban v. Downe, 5 Esp. N. P. 41—70, 139.
 Coburn v. Morgan's L. & T. R. Co., 105 La. 398—564.
 Cochran v. Dinsmore, 49 N. Y. 249—392, 395.
 Coddington v. Brooklyn, etc., R. Co., 102 N. Y. 66—542, 594, 655, 658, 697.
 Cody v. Central Pac. R. Co., 4 Sawy. (U. S.) 114—568.
 Cody v. Duluth St. Ry. Co. (Minn.) 102 N. W. 201—854.
 Cody v. New York, etc., R. Co., 161 N. Y. 317—855.
 Coe v. Louisville, etc., R. Co., 3 Fed. 775—190, 454.
 Coff v. Boston E. Ry. (Mass.) 60 N. E. 476—648.
 Coffin v. New York Cent. R. Co., 64 Barb. (N. Y.) 379, 391—296, 308, 312.
 Coggs v. Bernard, 2 Ld. Raym. 909—4, 10, 25, 26, 65, 226.
 Coggins v. Chicago, etc., R. Co., 18 Ill. App. 620—628, 635.
 Cogswell v. West St., etc., R. Co., 5 Wash. 46—44, 552, 658, 864, 893.
 Cohen v. Frost, 2 Duer (N. Y.), 335—713.
 Cohen v. Hume, 1 McCord (S. C.), 439, 444—65, 131.
 Cohen v. St. Louis, etc., R. Co., 59 Mo. App. 66—724, 727.
 Cohen v. South Eastern R. Co., 2 Exch. Div. 253—293, 712.
 Cohen v. Southern Express Co., 45 Ga. 148—236, 462.
 Cohn v. New York Cent., etc., R. Co., 6 App. Div. 196—802.
 Coline v. Chicago, etc., R. Co., 123 Iowa, 458—888.
 Cole v. Goodwin, 19 Wend. (N. Y.) 257, 251—29, 54, 55, 92, 290, 291, 294, 323, 341, 542, Cal. 323—37.
 Cole v. New York Cent. R. Co., 48 N. Y. 679—782.
 Cole v. Wabash, etc., R. Co., 21 Mo. App. 443—179.
 Cole v. Western Union Tel. Co., 33 Minn. 227—332.
 Colegrove v. New York, etc., R. Co., 20 N. Y. 492—698.
 Coleman v. Frazier, 4 Rich. (S. C.) 146—72.
 Coleman v. Georgia R., etc., Co., 84 Ga. 1—549, 585.
 Coleman v. New York, etc., R. Co., 106 Mass. 160—227, 638, 784.
 Coleman v. Riches, 16 C. B. 104—175, 370.
 Coleman v. Second Ave. R. Co., 114 N. Y. 609, 612—599, 860, 861.
 Coles v. Central R., etc., Co., 86 Ga. 251—450.
 Coles v. Louisville, etc., R. Co., 41 Ill. App. 607—306, 333, 481, 497, 525.
 Colfax Mountain Fruit Co. v. Southern Pac. Co. (Cal.), 46 Pac. 668—470.
 Colgate v. Pennsylvania Co., 102 N. Y. 120—163, 166, 169, 171.
 Coll v. Easton Trans. Co., 180 Pa. St. 613—810.
 Coll v. Toronto R. Co. (Can.), 25 Ont. App. 55—562.
 Collard v. South Eastern R. Co., 7 H. & N. 79—412, 424.
 Collender v. Dinsmore, 55 N. Y. 205—250.
 Collier v. Frankford, etc., R. Co. (Pa.), W. N. C. 477—822.
 Collett v. London, etc., R. Co., 16 Q. B. 984—542, 578, 579.
 Collier v. Swinney, 16 Mo. 484—243.
 Collins v. Alabama, etc., R. Co., 104 Ala. 390—264, 273, 275, 280, 283.
 Collins v. Boston, etc., R. Co., 10 Cush. (Mass.) 506—701, 708, 715.
 Collins v. East Tennessee R. Co., 9 Heisk. 841—786.
 Collman v. Collins, 2 Hall (N. Y.), 568—434.
 Colorado Fuel & T. Co. v. Southern Pac. Co., 6 Int. Com. Rep. 488—924.
 Colt v. McMechen, 6 Johns. (N. Y.) 160—24, 65, 387.
 Colton v. Cleveland, etc., R. Co., 67 Pa. St. 211—393, 359.
 Columbus, etc., R. Co. v. Arnold, 31 Ind. 174—586.
 Columbus, etc., R. Co. v. Bridges, 86 Ala. 448—222.
 Columbus, etc., R. Co. v. Flourney, 75 Ga. 745—191, 413, 414, 424.
 Columbus, etc., R. Co. v. Kennedy, 78 Ga. 646—220, 393, 786.
 Columbus, etc., R. Co. v. Ludden, 89 Ala. 612—264, 268, 269, 270.
 Columbus, etc., R. Co. v. Powell, 40 Ind. 37—551, 667, 668, 684, 732, 826.
 Columbus, etc., R. Co. v. Farrell, 31 Ind. 408—663, 671, 687.
 Colwell v. Manhattan R. Co., 57 Hun (N. Y.), 452—863.
 Colyar v. Taylor, 1 Coldw. (Tenn.) 372—5.
 Combe v. London, etc., R. Co., 31 L. T. N. S. 613—504, 637.
 Comer v. Columbia, etc., R. Co., 52 S. C. 36—506.
 Comer v. Stewart, 97 Ga. 403—506.
 Comly v. Pennsylvania R. Co. (Pa.) 12 Atl. 496—562.
 Commercial Club v. Chicago, etc., R. Co., 6 Int. Com. Rep. 647—923.
 Commercial Bank v. Chicago, etc., R. Co., 160 Ill. 401—172, 173.
 Commercial Bank v. Pfeiffer, 108 N. Y. 242—172.
 Com'r v. Eastern R. Co., 103 Mass. 258—95.
 Commonwealth v. Boston, etc., R. Co., 129 Mass. 542—556.

TABLE OF CASES.

(The references are to the pages.)

- Commonwealth v. Carey, 147 Mass. 60—614.
 Commonwealth v. Connecticut River R. Co., 15 Gray (Mass.), 447—710, 711.
 Commonwealth v. Power, 7 Metc. (Mass.) 596—590, 614, 740.
 Commonwealth v. Vermont, etc., R. Co., 108 Mass. 7—563.
 Compton v. Long Island R. Co., 1 St. Rep. (N. Y.) 554—667.
 Compton v. Long Island R. Co., 41 Hun (N. Y.), 642—691.
 Compton v. Shaw, 1 Hun (N. Y.), 441—428, 443.
 Compton v. Van Valkenburg, 34 N. J. L. 135—590.
 Comstock v. Affoelter, 50 Mo. 411—104.
 Concord, etc., R. Co. v. Forsyth, 59 N. H. 122—124.
 Condict v. Grand Trunk R. Co., 54 N. Y. 500—256, 320, 455, 458, 471, 473, 484.
 Condon v. Marquette, etc., R. Co., 55 Mich. 218—487, 489.
 Condran v. Chicago, etc., R. Co., 67 Fed. 522—553, 561.
 Condry v. St. Louis, etc., R. Co., 13 Mo. App. 588—660, 775, 866.
 Congar v. Galena, etc., R. Co., 17 Wis. 477—376, 470.
 Conger v. Chicago, etc., R. Co., 24 Wis. 157—33, 381.
 Conger v. Hudson River R. Co., 6 Duer (N. Y.), 375—250, 411, 511.
 Conger v. St. Paul, etc., R. Co., 45 Minn. 207—629.
 Conkey v. Milwaukee, etc., R. Co., 31 Wis. 619—250, 464, 465, 487, 488, 489.
 Connaughton v. Brooklyn, etc., R. Co., 13 Misc. Rep. (N. Y.) 403—536.
 Connell v. Chesapeake, etc., R. Co., 93 Va. 44—633, 645.
 Connell v. Mobile, etc., R. Co. (Miss.), 7 So. 344—589.
 Connelly v. Manhattan R. Co., 68 Hun (N. Y.), 456—611.
 Conner v. Citizens' St. Ry. Co., 105 Ind. 62—863.
 Connolly v. Clark, 38 Mo. App. 476—427.
 Connolly v. Crescent City R. Co., 41 La. Ann. 57—649, 689.
 Connolly v. Knickerbocker Ice Co., 114 N. Y. 107—822.
 Connolly v. New York, etc., R. Co., 158 Mass. 8—876.
 Connolly v. Warren, 106 Mass. 146—705.
 Connover v. Pacific Express Co., 40 Mo. App. 31—344.
 Conroy v. Pennsylvania R. Co., 1 Pittsb. (Pa.) 440—554, 814.
 Consol. Tract. Co. v. Scott, 58 N. J. L. 682—877.
 Consolidated Tract. Co. v. Thalheimer, 59 N. J. L. 474—663, 770, 775.
 Constable v. National Steamship Co., 154 U. S. 51—196, 340.
 Continental Pass. R. Co. v. Swain, 13 W. N. C. (Pa.) 41—775.
 Contra Costa, etc., R. Co. v. Moss, 23 Converse v. Boston, etc., R. Co., 58 N. H. 521—208.
 Converse v. Norwich, etc., Transp. Co., 33 Conn. 166—133, 138, 186, 458, 475, 488, 493.
 Conway v. New Orleans & C. R. Co., 46 La. Ann. 1429—677.
 Conwell v. Gulf, etc., R. Co., 85 Tex. 96—673.
 Conwell v. Voorhees, 13 Ohio, 523—71.
 Cook v. Boston, etc., R. Co., 113 Mass. 185—596.
 Cook v. Chicago, etc., R. Co., 81 Iowa, 551—119, 123, 915.
 Cook v. Erie R. Co., 58 Barb. (N. Y.) 312—151, 193, 279, 281.
 Cook v. Gourdin, 2 Nott & M. (S. C.) 19—131.
 Cooke v. Kansas City, etc., R. Co., 57 Mo. App. 471—502.
 Cook v. Long Island R. Co., 19 N. Y. Supp. 648—775.
 Cooley v. Pennsylvania R. Co., 40 Misc. Rep. (N. Y.) 239—885.
 Cooley v. Minnesota Transfer R. Co., 53 Minn. 327—232, 440.
 Cooney v. Pullman Palace Car Co., 121 Ala. 368—57.
 Cope v. Cordova, 1 Rawle (Pa.), 203—148, 149, 195.
 Copeland v. Metropolitan St. R. Co., 177 N. Y. 570—877.
 Cooper v. Berry, 21 Ga. 526—24, 456.
 Cooper v. Georgia Pac. R. Co., 92 Ala. 329—491.
 Cooper v. Kane, 19 Wend. (N. Y.) 386—247.
 Cooper v. London, etc., R. Co., 4 C. B. N. S. 738—123.
 Cooper v. Young, 22 Ga. 269—426.
 Coosa River Steamboat Co. v. Barclay, 89 Ala. 120—222.
 Coos Bay, etc., R. Co. v. Siglin, 34 Or. 80—214.
 Copp v. Louisville, etc., R. Co., 43 La. Ann. 511—939.
 Coppin v. Braithwaite, 8 Jur. 875—889.
 Coppock v. Long Island R. Co., 89 Hun (N. Y.), 186—752, 757, 763.
 Corbett v. Chicago, etc., R. Co., 86 N. Y. 275, 82—301, 508, 518.
 Corbett v. Twenty-third St. R. Co., 42 Hun (N. Y.) 587—639.
 Corcoran v. New York Cent., etc., R. Co., 25 App. Div. (N. Y.) 479—767.
 Cordell v. New York Cent., etc., R. Co., 75 N. Y. 330—793.
 Cork Distilleries Co. v. Great Southern, etc., R. Co., L. R. 7 H. L. Cas. 269—121, 187.
 Cork-Hill v. Camden, etc., R. Co. (N. J.), 54 Atl. 522—698.
 Corlin v. West End St. Ry. Co., 154 Mass. 197—838.
 Cornman v. Eastern Counties R. Co., 4 H. & N. 781—612.
 Cornwall v. Sullivan R. Co., 28 N. H. 161—699.
 Correll v. Baltimore, etc., R. Co., 38 Iowa, 120—786.
 Corso v. New Orleans, etc., R. Co., 48 La. Ann. 1286—408.
 Corwin v. Long Island R. Co., 2 N. Y. City Ct. Rep. 106—639.
 Corwin v. New York, etc., R. Co., 13 N. Y. 42—600.
 Costello v. 734, 700 Laths, etc., 44 Fed. 105—443.
 Costello v. Syracuse, etc., R. Co., 63 Barb. (N. Y.) 92—601.
 Costello v. Third Ave. R. Co., 161 N. Y. 317—823.
 Costikyan v. Rome, etc., R. Co., 58 Hun (N. Y.), 590—598, 602.
 Cotant v. Boone Suburban Ry. Co. (Iowa), 59 N. W. 115—595, 670.
 Cotting v. Kansas City Stock Yards Co., 82 Fed. 839—911.
 Cotting v. Stock Yards Co., 183 U. S. 79—909.

TABLE OF CASES.

xli

(The references are to the pages.)

- Coulter v. American, etc., Express Co., 56 N. Y. 585—818.
 Council Bluffs v. Kansas City, etc., R. Co., 45 Iowa, 338—905.
 County of Leavenworth v. Barnes, 94 U. S. 70—266.
 Coup v. Wabash, etc., R. Co., 56 Mich. 111—80, 310, 316, 329, 530.
 Coupland v. Housatonic R. Co., 61 Conn. 531—292, 343, 351, 360, 503, 507, 510.
 Courteen v. Kanawha Dispatch, 110 Wis. 610—289.
 Cousins v. Lake Shore, etc., R. Co., 96 Mich. 386—836, 848, 849.
 Coventry v. Great Eastern R. Co., 11 Q. B. Div. 776—176.
 Covey v. Bath, 35 N. H. 530—831.
 Covington v. Western, etc., R. Co., 81 Ga. 275—849.
 Covington v. William, Gow, 115, 5 E. C. L. 481—323.
 Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204—906.
 Covington, etc., R. Co. v. Sandford, 164 U. S. 578—912.
 Covington Stock Yards Co. v. Keith, 139 U. S. 128—500, 501, 502, 509.
 Covington Transfer Co. v. Kelly, 36 Ohio St. 86—699.
 Cowan v. Bond, 39 Fed. 54—917, 924, 928.
 Cowan v. Western Union Tel. Co. (Iowa), 98 N. W. 281—879.
 Coward v. East Tennessee R. Co., 16 Les (Tenn.), 225—344, 703, 717, 721.
 Cowell v. Simpson, 16 Ves. Jr. 275—445.
 Cowles v. Pointer, 26 Miss. 253—68.
 Cowley v. Davidson, 15 Minn. 92—405, 418.
 Cox v. Bruce, L. R. 18 Q. B. Div. 147—175.
 Cox v. Columbus, etc., R. Co., 91 Ala. 392 —199.
 Cox v. London, etc., R. Co., 3 F. & F. 77 —31, 378.
 Cox v. Norfolk, etc., R. Co., 123 N. C. 613—798.
 Cox v. Peterson, 30 Ala. 608—150, 183, 209, 254.
 Cox v. South Shore & B. St. Ry. Co. (Mass.), 65 N. E. 823—795.
 Cox v. Vermont Cent. R. Co., 170 Mass. 129—332.
 Cox v. Wilmington City R. Co. (Del.), 53 Atl. 569—793.
 Cox v. Heisley, 19 Pa. St. 243—356.
 Cox v. Lehigh Valley R. Co., 3 Int. Com. Rep. 460—908, 914, 916, 919.
 Coxon v. Great Western R. Co., 5 H. & N. 274—468, 476.
 Coxon v. North Eastern R. Co., 4 Ry. & C. T. Cas. 284—268.
 Coyle v. Western R. Corp., 47 Barb. (N. Y.) 152—139, 239.
 Crafter v. Metropolitan R. Co., L. R. 1 C. P. 300—605.
 Cragin v. Lamkin, 7 Allen (Mass.), 395—267.
 Cragin v. New York Cent. R. Co., 51 N. Y. 61, 63—29, 142, 256, 320, 505, 509, 511, 533, 629.
 Craig v. Mt. Carbon Co., 45 Fed. 448—575.
 Craig v. Childress, Peck (Tenn.), 270—22, 25, 62, 235.
 Craig v. Great Western R. Co., 24 U. C. Q. B. 504—559.
 Craighead v. Brooklyn City R. Co., 123 N. Y. 391—599.
 Crain v. Petrie, 6 Hill (N. Y.), 522—814.
 Craker v. Chicago, etc., R. Co., 36 Wis. 657, 659—629, 637, 890, 901.
- Cramer v. American Merchants U. Exp. Co., 56 Mo. 524—262.
 Crandall v. Goodrich Transp. Co., 16 Fed. 75—793.
 Cranston v. Marshall, 5 Exch. 395—884.
 Cranwell v. Ship Fanny Fosdick, 15 La. Ann. 436—24.
 Crary v. Lehigh Valley R. Co., 203 Pa. 525—768.
 Crass v. Memphis, etc., R. Co., 96 Ala. 447—440, 446.
 Cratty v. City of Bangor, 57 Me. 423—832.
 Craven v. Central Pac. R. Co., 72 Cal. 345—805.
 Craven v. International Ry. Co., 100 App. Div. (N. Y.) 157—
 Crawford v. Cincinnati, etc., R. Co., 26 Ohio St. 580—556, 589, 592.
 Crawford v. Great Western R. Co., 18 U. C. C. P. 510—456, 464, 486.
 Crawford v. Southern R. Assoc., 51 Miss. 222—459, 475, 478.
 Crawshay v. Homfray, 4 B. & Ald. 50—445.
 Cray v. Hartford F. Ins. Co., 1 Blatchf. (U. S.) 280—332.
 Craycroft v. Atchison, etc., R. Co., 18 Mo. App. 487—313.
 Cream City, etc., R. Co. v. Chicago, etc., R. Co., 63 Wis. 93—319, 351.
 Creamer v. West End St. Ry. Co., 4 Am. Electr. Cas. 476—557, 978.
 Creed v. Pennsylvania R. Co., 86 Pa. St. 139—545, 570, 582, 625.
 Cresson v. Philadelphia, etc., R. Co., 11 Phila. (Pa.) 58—555.
 Crews v. Richmond, etc., R. Co., 1 Int. Com. Rep. 703—924, 928.
 Crine v. East Tennessee, etc., R. Co., 84 Ga. 651—695.
 Crocheron v. North Shore, etc., Ferry Co., 56 N. Y. 656—604.
 Crocker v. New London, etc., R. Co., 24 Conn. 249—734.
 Croft v. Baltimore, etc., R. Co., 1 McArthur (D. C.), 492—493, 728.
 Crofts v. Waterhouse, 3 Bing. 319—22, 543, 655.
 Crommelin v. New York, etc., R. Co., 4 Keyes (N. Y.), 90—429.
 Cronan v. Crescent City R. Co., 49 La. Ann. 65—824.
 Cronk v. Wabash R. Co., 123 Iowa, 349—779.
 Cronkite v. Wells, 32 N. Y. 247—89, 140.
 Croom v. Chicago, etc., R. Co., 52 Minn. 296—622, 683, 826.
 Crosby v. Fitch, 12 Conn. 410—65, 66, 104, 222, 257.
 Crosby v. Maine Cent. R. Co., 69 Me. 418—568.
 Cross v. Graves, 4 Tex. Civ. App. Cas. sec. 99—108, 112, 301, 337, 369.
 Cross v. Kansas City, etc., R. Co., 56 Mo. App. 664—548.
 Cross v. Lake Shore, etc., R. Co. (Mich.), 37 N. W. 361—625.
 Cross v. McFadden, 1 Tex. Civ. App. 461—106, 109.
 Cross v. O'Donnell, 44 N. Y. 661, 4 Am. Rep. 721—349.
 Crossan v. New York, etc., R. Co., 149 Mass. 196—437, 439.
 Crouch v. Louisville, etc., R. Co., 42 Mo. App. 248—367, 459, 475, 476, 491.
 Crouch v. London, etc., R. Co., 14 C. B. 255—38, 92, 356, 360, 463.
 Crouch v. Great Western R. Co., 2 H. & N. 491—196.

TABLE OF CASES.

(The references are to the pages.)

- Crouch v. Great Northern R. Co., 11 Exch. 742-92.
 Crow v. Chicago, etc., R. Co., 57 Mo. App. 135-305, 511, 532.
 Crowell v. Van Bibber, 18 La. Ann. 637-177.
 Crowley v. Fitchburg, etc., R. Co., 185 Mass. 279-555, 732, 733.
 Crozier v. Boston, etc., Steamboat Co., 43 How. Pr. (N. Y.) 466-715.
 Cubbedge v. Napier, 62 Ala. 518-267.
 Crum v. Biss, 47 Conn. 592-266.
 Crump v. Davis (Ind. App.), 70 N. E. 886-653.
 Crumphley v. Hannibal, etc., R. Co., 19 S. W. Rep. (Mo.) 818-798.
 Crutcher v. Kentucky, 141 U. S. 57-905.
 Cuddy v. Horn, 46 Mich. 596-699.
 Cuff v. 95 Tons of Coal, 46 Fed. 670-442.
 Culberson v. Chicago, etc., R. Co., 50 Mo. App. 556-683.
 Culbreth v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 392-24, 150, 281, 282, 380.
 Culhane v. New York Cent., etc., R. Co., 60 N. Y. 133-814.
 Cumberland Teleph. & Teleg. Co. v. Morgan's L. & T. R. Co., 51 La. Ann. 29-93, 97.
 Cumberland Valley R. Co. v. Myers, 55 Pa. St. 288-588.
 Cumberland Valley R. Co. v. Mangans, 61 Md. 53-849.
 Cummings v. National Furnace Co., 60 Wis. 603-773.
 Cummings v. Wichita R. & L. Co. (Kan.), 74 Pac. 1104-872.
 Cummings v. Worcester, etc., St. R. Co., 166 Mass. 220-858, 859, 870.
 Cumming v. Barracouta, 40 Fed. 498-388.
 Cummins v. Dayton, etc., R. Co. (Ind.), 9 Am. & Eng. R. Cas. 36-458, 472, 474.
 Cunard S. S. Co. v. Kelly, 115 Fed. 678-143, 366.
 Cunningham v. Great Northern R. Co., 49 L. T. N. S. 394-376.
 Cunningham v. Seattle Elec. R. Co., 3 Wash. 471-629, 633, 640.
 Cunningham v. Wabash R. Co., 79 Mo. App. 524-251.
 Currie v. Mendenhall, 77 Minn. 179-661.
 Curry v. Canadian Pac. R. Co., 17 Ont. Rep. 65-681.
 Curry v. Kansas, etc., R. Co., 58 Kan. 6-928.
 Curtis v. Avon, etc., R. Co., 49 Barb. (N. Y.) 148-725.
 Curtis v. Central R. Co., 6 McLean (U. S.), 401-652, 692.
 Curtis v. Chicago, etc., R. Co., 18 Wis. 312-244.
 Curtis v. Delaware, etc., R. Co., 74 N. Y. 116-310, 706, 711, 727.
 Curtis v. Detroit, etc., R. Co., 27 Wis. 158-843.
 Curtis v. Rochester, etc., R. Co., 18 N. Y. 534-598, 601, 607, 609, 616, 774, 780, 786, 787, 793, 881, 891, 892.
 Cushing v. Breck, 10 N. H. 111-214.
 Cushing v. Breed, 14 Allen (Mass.), 376-204.
 Cushing v. Wells, 98 Mass. 550-400, 405.
 Cutler v. Rae, 7 How. (U. S.) 729-441.
 Cutler v. Winsor, 6 Pick. (Mass.) 335-66.
 Cutting v. Florida R., etc., Co., 30 Fed. 663-915, 928.
 Cutting v. Grand Trunk R. Co., 13 Allen (Mass.), 381-411, 414.
 Cutts v. Brainerd, 42 Vt. 566-318, 460, 474.
 Cuyler v. Decker, 20 Hun (N. Y.), 175-819.
- D.
- D'Arcy v. London, etc., R. Co., L. R. 9 C. P. 325-240, 319, 325.
 D'Arcy v. Westchester Elec. R. Co., 82 App. Div. (N. Y.) 263-775.
 Daggett v. Shaw, 3 Mo. 264-24.
 Dagnall v. Southern Ry. Co., 69 S. C. 110-564, 896.
 Dahl v. Railway Co., 62 Wis. 655-864.
 Dahlberg v. Minnesota St. R. Co., 32 Minn. 404-871.
 Daily v. New York, etc., R. Co., 32 Conn. 256-809.
 Dakin v. Oxley, 15 Com. B. N. S. 646-126, 447.
 Dallas, etc., R. Co. v. Beeman, 74 Tex. 291-617, 801.
 Dallas Consol. Elec. R. Co. v. Broadhurst, 68 S. W. 315-657, 775.
 Dallas Consol. Tract. Ry. Co. v. Randolph (Tex. Civ. App.), 27 S. W. 925-819.
 Dallas, etc., R. Co. v. Spicker, 61 Tex. 427-597, 799.
 Dale v. Brooklyn City, etc., R. Co., 1 Hun (N. Y.), 146-893.
 Dale v. Delaware, etc., R. Co., 73 N. Y. 468-805, 871.
 Dambman v. Metropolitan St. Ry. Co., 180 N. Y. 384-853.
 Damont v. New Orleans, etc., R. Co., 9 La. Ann. 441-848.
 Dampan v. Pennsylvania R. Co., 166 Pa. St. 520-770.
 Dana v. Fiedler, 12 N. Y. 40-404.
 Dana v. New York Cent. R. Co., 50 How. Pr. (N. Y.) 428-471.
 Danbech v. New Jersey Traction Co., 57 N. J. L. 463-550.
 Daniel v. North Jersey St. Ry. Co. (N. J.), 46 Atl. 625-620.
 Daniels v. Ballantine, 23 Ohio St. 532-257.
 Daniels v. Florida Cent., etc., R. Co., 62 S. C. 11-564, 637.
 Danville, etc., R. Co. v. Stewart, 2 Metc. (Ky.) 119-698.
 DaPonte v. New Orleans Transfer Co., 42 La. Ann. 696-89.
 Darling v. Boston, etc., R. Corp., 11 Allen (Mass.), 295-459, 476, 489, 493.
 Darling v. Younkers, 37 Ohio St. 493-10.
 Darlington v. Missouri Pac. R. Co. (Mo. App.), 72 S. W. 122-429.
 Darwin v. Charlotte, etc., R. Co., 23 S. C. 531-576.
 Davenport Nat. Bank v. Homeyer, 45 Mo. 145-178.
 Davenport v. Pennsylvania Co., 10 Pa. Super. Ct. 47-393.
 Davey v. Greenfield, etc., St. Ry. Co., 177 Mass. 106-547.
 Davey v. Mason, 41 E. C. L. 30-139.
 Davidson v. City of Portland, 69 Me. 116-832.
 Davidson v. Cornell, 132 N. Y. 228-809.
 Davidson v. Graham, 2 Ohio St. 131-230, 293, 298, 317, 753.
 Davidson v. Gwynne, 12 East, 381-31.
 Davies v. Mann, 10 Mees. & W. 546-52.
 Davis v. Button, 78 Cal. 247-37, 38, 540.
 Davis v. Cayuga, etc., R. Co., 11 How. Pr. (N. Y.) 830-545, 548, 705, 706, 722.

TABLE OF CASES.

xliii

(The references are to the pages.)

- Davis v. Central Vermont R. Co., 66 Vt. 290—257, 295, 318, 328.
 Davis v. Chautauqua Lake, etc., Assembly, 2 N. Y. St. Rep. 365—194.
 Davis v. Chicago, etc., R. Co., 93 Wis. 470—612, 571, 754.
 Davis v. Chicago, etc., R. Co., 18 Wis. 175—675.
 Davis v. Chicago, etc., R. Co., 45 Fed. 543—587.
 Davis v. Chicago, etc., R. Co., 83 Iowa, 744—718.
 Davis v. Cincinnati, etc., R. Co., 1 Disney (Ohio), 23—425.
 Davis v. Garrett, 6 Bing. 716—250.
 Davis v. Gwynne, 57 N. Y. 677—268.
 Davis v. Jacksonville S. E. Line, 126 Mo. 69—241, 272, 479.
 Davis v. Kansas City, etc., R. Co., 53 Mo. 317—695, 736.
 Davis v. Kansas City Ry. Co., 46 Mo. App. 189—798.
 Davis v. Louisville, etc., Ry. Co., 69 Miss. 136—817, 869.
 Davis v. Michigan Southern, etc., R. Co., 22 Ill. 278—701, 704, 712, 722, 730.
 Davis v. Michigan Southern, etc., R. Co., 20 Ill. 412—262.
 Davis v. North Western R. Co., 4 Jur. N. S. 1303—419.
 Davis v. New York, etc., R. Co., 1 Hilt. (N. Y.) 543—398.
 Davis v. Oregon, etc., R. Co., 8 Or. 172—544.
 Davis v. Paducah Ry. & L. Co., 24 Ky. L. Rep. 135—656, 774, 794.
 Davis v. Taft Vale R. Co., 64 L. J. Q. B. N. S. 488—121.
 Davis v. Texas, etc., R. Co., 91 Tex. 505—113.
 Davis v. Wabash, etc., R. Co., 89 Mo. 349—4, 24, 257, 388, 392, 399.
 Dawley v. Wagner Palace Car Co., 169 Mass. 315—56, 57.
 Dawson v. Chicago, etc., R. Co., 79 Mo. 296—106, 238, 240, 316.
 Dawson v. Boston, etc., R. Co., 156 Mass. 127—833.
 Dawson v. Louisville, etc., R. Co. (Ky.), 11 Am. & Eng. R. Cas. 134—636, 664, 883, 892, 894, 898.
 Dawson v. Manchester, etc., R. Co., 7 H. & N. 1037—780, 781.
 Dawson v. St. Louis, etc., R. Co., 76 Mo. 154—334, 510.
 Dawson v. St. Louis Transit Co. (Mo.), 76 S. W. 689—852.
 Day v. Brooklyn City R. Co., 12 Hun (N. Y.), 435—862.
 Day v. Highland St. Ry. Co., 135 Mass. 113—831.
 Day v. Owen, 5 Mich. 520—589, 590, 617, 623.
 Day v. Ridley, 16 Vt. 48—25, 387.
 Daylight Burner Co. v. Odlin, 51 N. H. 56—201.
 Dean v. Chicago G. R. Co., 64 Ill. App. 165, 43 Wis. 304—44, 400.
 Dean v. King, 22 Ohio St. 118—175.
 Dean v. Vaccaro, 2 Head (Tenn.), 490, 488—148, 154, 263, 274, 399.
 Debbins v. Old Colony R. Co., 154 Mass. 402—876.
 Decuir v. Benson, 27 La. Ann. 1—623.
 Defelice v. Campagnie Francaise De Navigation A. Vapeur, Cyprien Fabre & Cire, 83 App. Div. (N. Y.) 73—713.
 Degge v. American Express Co., 2 Mo. App. Rep. 904—388.
 De Kay v. Chicago, etc., R. Co., 41 Minn. 178—557, 558, 876.
 D. Klass Commission Co. v. Wabash R. Co., 80 Mo. App. 164—183, 316, 334, 344, 412.
 De LaGrange v. Southwestern Tel. Co., 25 La. Ann. 383—77.
 Delamatr v. Milwaukee, etc., R. Co., 24 Wis. 578—671, 844, 846.
 Delaney v. Hilton, 50 N. Y. Super. Ct. 341—805.
 Delaware, etc., R. Co. v. Ashley, 67 Fed. 209—572, 695, 752, 759.
 Delaware, etc., Canal Co. v. Webster (Pa.), 6 Atl. 841—852.
 Delaware, etc., R. Co. v. Daily, 37 N. J. L. 256—654.
 Delaware v. Delaware, etc., Tel. Co., 47 Fed. 633—79.
 Delaware, etc., R. Co. v. Frank (U. S. C. C. N. Y.), 110 Fed. 689—688.
 Delaware, etc., R. Co. v. Napheys, 90 Pa. St. 185—771, 787.
 Delaware, etc., R. Co. v. Trautwein, 52 N. J. L. 169—27, 620, 670, 831.
 Delaware, etc., R. Co. v. Walch, 47 N. J. L. 548—888.
 Delaware State Grange, etc., v. New York, etc., R. Co., 3 Int. Com. Rep. 554—561, 912, 913.
 De Leon v. McKernan, 25 Misc. Rep. (N. Y.) 182—885.
 Delong v. Delaware, L. & W. R. Co., 37 Hun (N. Y.), 282—808.
 Del Valle v. Steamboat Richmond, 27 La. Ann. 90—713, 715.
 De Mahy v. Morgan's Louisiana, etc., R. Co., 45 La. Ann. 1329—310, 856.
 De Menacho v. Ward, 23 Blatchf. (U. S.) 505—124.
 Deming v. Chicago, etc., R. Co., 80 Mo. App. 152—682.
 Deming v. Grand Trunk R. Co., 48 N. H. 455—109, 243, 369, 371, 424.
 Deming v. Merchants Cotton Press, etc., Co., 90 Tenn. 306—135, 303, 318, 351, 353, 378, 388, 721.
 Deming v. Norfolk, etc., R. Co., 17 Phila. (Pa.) 540—488.
 Deming v. Norfolk, etc., R. Co., 21 Fed. 25—450, 480, 485, 490, 493.
 De Mott v. Laraway, 14 Wend. (N. Y.) 225—24, 48, 147, 151.
 Denaby Main Colliery Co. v. Manchester, etc., R. Co., 11 App. Cas. 97—923.
 Denham v. Washington Water Power Co., 3 St. Ry. Rep. 879—655.
 Denison & S. Ry. Co. v. Craig (Tex. Civ. App.), 80 S. W. 865—877.
 Denman v. Chicago, etc., R. Co., 52 Neb. 140—191, 238.
 Denny v. New York, etc., R. Co., 13 Gray (Mass.), 481—48, 68, 257, 276.
 Densmore Commission Co. v. Duluth, etc., R. Co., 101 Wis. 563—237, 390.
 Denton v. Chicago, etc., R. Co., 52 Iowa, 161—235.
 Denton v. Great Northern R. Co., 5 El. & Bl. 860—243, 666, 690, 691.
 Denver Consol. Tramway v. Rush (Colo.), 73 Pac. 664—553.
 Denver, etc., R. Co. v. Andrews, 11 Colo. App. 204—611, 612.
 Denver, etc., R. Co. v. Atchison, etc., R. Co., 110 U. S. 670—454.

TABLE OF CASES.

(The references are to the pages.)

- Denver, etc., R. Co. v. Cahill, 8 Colo. App. 158—40, 390.
 Denver Consol. Elec. Co. v. Simpson, 21 Colo. 371—783, 784.
 Denver, etc., R. Co. v. De Witt, 1 Colo. App. 419—190, 416.
 Denver, etc., R. Co. v. Dwyer, 20 Colo. 132—587, 510.
 Denver, etc., R. Co. v. Fotheringham (Colo.), 68 Pac. 978—777.
 Denver, etc., R. Co. v. Frame, 6 Colo. 382—420.
 Denver, etc., R. Co. v. Roberts, 6 Colo. 333—722.
 Denver & G. R. R. Co. v. Ryan, 28 Pac. (Colo.) 79—798.
 Denver, etc., R. Co. v. Hill, 13 Colo. 35—438, 444.
 Denver, etc., R. Co. v. Hodgson, 18 Colo. 117—652.
 Denver, etc., R. Co. v. Peterson (Colo.), 69 Pac. 578—6, 375, 762.
 Denver, etc., R. Co. v. Pickard, 8 Colo. 163, 170—820, 836, 837.
 Denver Tramway Co. v. Cloud, 6 Colo. App. 445—896.
 Denver Tramway Co. v. Owens, 20 Colo. 107—674.
 Denver Tramway Co. v. Reid, 4 Colo. App. 53—657, 775, 797.
 Denver Tramway Co. v. Reid, 35 Pac. (Colo.) 269—329.
 Denver, etc., R. Co. v. Woodward, 4 Colo. 1—780.
 Deposit Co. v. Sollett, 172 Ill. 222—85.
 Derosia v. Winona, etc., R. Co., 18 Minn. 133—264, 268, 270, 272.
 De Rothschild v. Royal Mail Steam Packet Co., 7 Exch. 734—352.
 De Rozas v. Metropolitan St. R. Co., 13 App. Div. (N. Y.) 286—676.
 De Rutte v. New York, etc., Tel. Co., 1 Daly (N. Y.), 547—73.
 Derwort v. Loomer, 21 Conn. 245—292, 616, 617, 652, 754.
 De Soucey v. Manhattan R. Co., 15 N. Y. Supp. 108—406, 811.
 De Steiger v. Hannibal, etc., R. Co., 73 Mo. 33.
 Detroit Board of Trade v. Grand Trunk R. Co., 2 Int. Com. Rep. 189—922, 925.
 Detroit, etc., R. Co. v. Adams, 15 Mich. 458—307.
 Detroit, etc., R. Co. v. Curtis, 23 Wis. 152—660, 687, 833.
 Detroit, etc., R. Co. v. Farmers, etc., Bank, 20 Wis. 122—288, 475, 482.
 Detroit, etc., R. Co. v. Interstate Commerce Comm., 74 Fed. 803—450, 917, 920, 922, 925, 927, 932.
 Detroit, etc., R. Co. v. McKenzie, 43 Mich. 609—416, 456, 459, 494.
 Detroit, etc., R. Co. v. Van Steinburg, 17 Mich. 99—801.
 Devereux v. Buckley, 34 Ohio St. 16—412.
 Devine v. Railroad Co. (Iowa), 69 N. W. 1042—665.
 Dewald v. Railway Co., 44 Kan. 587—791.
 Dewire v. Boston, etc., R. Co., 148 Mass. 343—549.
 Dexter v. Syracuse, etc., R. Co., 42 N. Y. 326—701, 702, 703, 706.
 Deyo v. New York Cent. R. Co., 34 N. Y. 9—542, 594, 779, 788, 796.
 Deyo v. Virginia Midland R. Co., 19 Wash. L. Rep. (D. C.) 369—5.
- Dibble v. Brown, 12 Ga. 217—54, 65, 702, 704, 708, 712.
 Dice v. Willamett Transp., etc., Co., 8 Or. 60—557.
 Dicken v. Liverpool, etc., Co., 41 W. Va. 511—385.
 Dickens v. New York Cent. R. Co., 1 Keyes (N. Y.), 23—664.
 Dickert v. Salt Lake City R. Co., 20 Utah 394—658.
 Dickman v. Williams, 50 Miss. 500—161.
 Dickinson v. Port Huron, etc., R. Co., 53 Mich. 43—599, 584.
 Dickinson v. Winchester, 4 Cush. (Mass.) 114—70, 259.
 Dickson v. Great Northern R. Co., 18 Q. B. Div. 176—82.
 Dickson v. Hollister, 123 Pa. 421—894.
 Dickson v. Merchants' Elevator Co., 44 Mo. App. 498—162, 170.
 Dickson v. West End St. Ry. Co., 177 Mass. 365—588.
 Diebold v. Pennsylvania R. Co., 50 N. J. L. 478—562.
 Dieffenbach v. New York, etc., R. Co., 5 App. Div. (N. Y.) 91—892, 894.
 Dietrich v. Pennsylvania R. Co., 71 Pa. St. 432—559, 566, 591, 686.
 Dill v. South Carolina R. Co., 7 Rich. (S. C.) 158—38, 712.
 Dillard v. Louisville, etc., R. Co., 2 Lea (Tenn.), 288—288, 295, 298, 758.
 Dillard v. Louisville, etc., R. Co., 2 Lea (Tenn.), 299, 292—235, 754.
 Dillaye v. New York Cent. R. Co., 2 Alb. L. J. (N. Y.) 356—625.
 Dillingham v. Anthony, 73 Tex. 47—626, 633, 642.
 Dillingham v. Fischl, 1 Tex. Civ. App. 546—206, 935.
 Dillingham v. Russell, 73 Tex. 47—899, 901.
 Dillon v. Forty-second St., etc., R. Co., 28 App. Div. (N. Y.) 404—858.
 Dillon v. Manhattan R. Co., 49 Hun (N. Y.), 608—674.
 Dillon v. New York, etc., R. Co., 1 Hilt. (N. Y.) 231—458, 467.
 Dimmick v. Milwaukee, etc., R. Co., 18 Wis. 471—280, 284.
 Dimitt v. Hannibal, etc., R. Co., 40 Mo. App. 654—779, 820.
 Dininny v. New York, etc., R. Co., 49 N. Y. 546—724.
 Direct Nav. Co. v. Davidson (Tex. Civ. App.), 74 S. W. 790—812.
 Distler v. Long Island R. Co., 78 Hun (N. Y.), 252, 151 N. Y. 424—818, 837, 849.
 Dixon v. Brooklyn City, etc., R. Co., 100 N. Y. 170, 171—599, 860.
 Dixon v. Central of Georgia R. Co., 110 Ga. 173—182, 136, 437.
 Dixon v. Chicago, etc., R. Co., 64 Iowa, 531—241, 247, 250.
 Dixon v. Columbus, etc., R. Co., 4 Biss. (U. S.) 137—300, 469, 491.
 Dixon v. Richelieu Nav. Co., 15 Ont. App. 647—707.
 Dixon v. Richmond, etc., R. Co., 74 N. C. 538—491.
 Dixon v. Yates, 27 Eng. C. L. 92—156.
 Dlabola v. Manhattan R. Co., 134 N. Y. 585—652.
 Doan v. St. Louis, etc., R. Co., 38 Mo. App. 408—144, 316, 497, 533, 537, 760.
 Doane v. Russell, 3 Gray (Mass.), 382—446.

TABLE OF CASES.

xlv

(The references are to the pages.)

- Dobbin v. Michigan Cent. R. Co.**, 56 Mich. 522—509.
Dobiecki v. Sharp, 88 N. Y. 203—872, 873.
Dobson v. New Orleans, etc., R. Co., 52 La. Ann. 1127—586.
Dodge v. Boston, etc., S. Co. (Mass.), 19 N. C. 373—673.
Dodge v. Boston, etc., Steamship Co., 143 Mass. 207—557, 595, 653, 815, 844.
Dodson v. Grand Trunk R. Co., 7 Canada L. J. N. S. 263—324.
Doyle v. N. E. Insurance Co., 88 Mass. 373—226.
Donnegan v. Erhardt, 119 N. Y. 468—599.
Donohue v. Brooklyn, etc., R. Co., 53 App. Div. (N. Y.) 348—809.
Donovan v. Hartford St. R. Co., 65 Conn. 201—546, 547, 785.
Donohoe v. London, etc., R. Co., 15 W. R. 792—240.
Donoho v. Metropolitan St. Ry Co., 30 Misc. Rep. (N. Y.) 433—829.
Donovan v. Pennsylvania Co., 26 Sup. Ct. Rep. (U. S.) 91—614.
Doolan v. Midland R. Co., L. R. 2 App. 792—293, 325.
Dooley v. United States, 183 U. S. 168.
Doolittle v. Southern Ry. Co., 62 S. C. 130—857.
Doorman v. Jenkins, 2 Ad. & El. 256—10.
Doran v. East River Ferry Co., 3 Lans. (N. Y.) 105—552.
Dorff v. Brooklyn H. R. Co., 95 App. Div. (N. Y.) 82—650.
Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485—127, 290, 294, 298, 319, 325, 347, 754, 763.
Dorrah v. Illinois Cent. R. Co., 65 Miss. 14—664, 675, 880, 887, 895.
Doss v. Missouri, etc., R. Co., 59 Mo. 27—584, 669, 850.
Dotson v. Erie R. Co. (N. J.), 54 Atl. 827—872.
Doty v. Strong, 1 Pin. (Wls.) 313, 324—19, 92, 93, 116, 390.
Dougan v. Champlain Transp. Co., 56 N. Y. 1—604, 805.
Dougherty v. Chicago, etc., R. Co., 86 Ill. 467—848.
Dougherty v. Missouri Pac. R. Co., 9 Mo. App. 484—786.
Dougherty v. Missouri R. Co., 81 Mo. 325—675, 694, 772, 775.
Dougherty v. Yazoo, etc., R. Co. (Miss.), 36 So. 699—869.
Douglass v. Hannibal, etc., R. Co., 53 Mo. App. 473—416, 515.
Douglass v. Peoples Bank, 86 Ky. 176—164, 165.
Dow v. Portland Steam Packet Co., 84 Me. 490—888, 510, 533.
Dow v. Syracuse, etc., R. Co., 81 App. Div. (N. Y.) 362—570, 758, 767.
Dowd v. Alabama Ry., 47 App. Div. (N. Y.) 202—588.
Dowd v. Chicago, etc., R. Co., 84 Wls. 105—584.
Dowd v. New York, etc., R. Co., 170 N. Y. 459—795.
Dowling v. New York Cent., etc., R. Co., 90 N. Y. 671—823.
Downey v. Chesapeake, etc., R. Co., 28 W. Va. 732—592, 816, 855.
Downey v. Hendricks, 46 Mich. 498—858, 861.
Downey v. Inman Steamship Co., 2 N. Y. Supp. 659—713.
Downs v. Fromont, 4 Campb. 40—323.
Downs v. Green, 24 N. Y. 641—169.
Downs v. New York, etc., R. Co., 36 Conn. 287—555, 742.
Downs v. New York Cent., etc., R. Co., 47 N. Y. 83—807.
Dows v. Perrin, 16 N. Y. 325—169.
Dows v. Rush, 28 Barb. (N. Y.) 157—169.
Doyle v. Baltimore, etc., R. Co., 126 Fed. 841—341.
Doyle v. Fitchburg R. Co., 162 Mass. 66—587, 767.
Doyle v. Kiser, 6 Ind. 242—701, 704, 708.
Doyle v. Lynn & B. R. Co., 118 Mass. 195—831.
Drake v. Pennsylvania R. Co., 137 Pa. St. 352—591, 806, 843.
Draper v. Delaware, etc., Canal Co., 118 N. Y. 118—263, 270, 272, 278, 395.
Dresbach v. California Pac. R. Co., 57 Cal. 462—474, 488.
Dresser v. Bosanquet, 4 B. & S. 460—15.
Dresser v. West Virginia Transp. Co., 8 W. Va. 553—423.
Dresslar v. Citizens St. R. Co., 19 Ind. App. 383—770.
Drew v. Central Pac. R. Co., 51 Cal. 425—558, 591.
Drew v. Red Line Transit Co., 3 Mo. App. 495—316.
Drew v. Sixth Ave. R. Co., 26 N. Y. 49—547, 682, 684.
Drinkwater v. The Brig Spartan, 1 Ware, (U. S.), 149—445.
Driscoll v. Market St. R. Co., 97 Cal. 553—877.
Drohan v. Lumber Co., 75 Minn. 251—366.
Drummond v. Southern Pac. Co., 7 Utah, 118—568.
Dube v. Reg. 3 Can. Exch. 147—608.
Dubuque, etc., R. Co. v. Richmond, 19 Wall (U. S.), 584—669.
Duchemin v. Boston El. Ry. Co., 186 Mass. 353—547.
Dudley v. Camden, etc., Ferry Co., 13 Vroom. (N. J.) 25—52.
Dudley v. Front St. Cable R. Co., 73 Fed. 128—678.
Duff v. Budd, 3 B. & D. 177—147, 158, 188.
Duff v. Alleghany Valley R. Co., 91 Pa. St. 458—584.
Duffy v. St. Louis Transit Co. (Mo.), 78 S. W. 831—863.
Duffy v. Thompson, 4 E. D. Sm. (N. Y.) 178—702, 703, 704, 705.
Dufoit v. Gorman, 1 Minn. 301—433.
Dufur v. Boston & M. R. Co. (Vt.), 53 Atl. 1068—646.
Duggan v. Baltimore, etc., R. Co., 159 Pa. St. 248—640.
Duiney v. Wheeling, etc., R. Co., 28 Wls. 32—819.
Dunbar v. Charleston, etc., R. Co. (S. C.), 40 S. C. 884—482.
Du Laurens v. St. Paul, etc., R. Co., 15 Minn. 49—734, 736.
Duling v. Philadelphia, etc., R. Co., 66 Md. 120—591, 666.
Dun v. Seaboard, etc., R. Co., 78 Va. 645—860.
Dunbar v. Boston, etc., R. Corp., 110 Mass. 26—157, 180.
Dunbar v. Port Royal, etc., R. Co., 36 S. C. 110—460, 475, 483.
Dunlay v. Traction Co., 18 Pa. Super. Ct. 206—820.

TABLE OF CASES.

(The references are to the pages.)

- Duncan v. Maine Cent. R. Co., 113 Fed. 508-766.
 Dunham v. Boston, etc., R. Co., 46 Hun (N. Y.), 245-271.
 Dunham v. Boston, etc., R. Co., 70 Me. 164-248, 256, 411, 456.
 Dunlap v. International Steamboat Co., 98 Mass. 371-357, 701, 704, 706, 708, 709.
 Dunlap v. Northern Pac. R. Co., 35 Minn. 203-533.
 Dunlap v. Steamboat Reliance, 2 Fed. 249 -781.
 Dunlop v. Edinburgh, etc., R. Co., 16 Jur. Pt. 2, 407-691.
 Dunlop v. Munroe, 7 Cranch. (U. S.) 242.
 Dunn v. Grand Trunk R. Co., 58 Me. 187-583, 625, 695, 746, 817.
 Dunn v. Hannibal, etc., R. Co., 68 Mo. 268-339, 405, 406, 453, 504.
 Dunn v. New Haven Steamboat Co., 58 Hun (N. Y.), 461-715.
 Dunn v. New York, etc., R. Co., 99 App. Div. (N. Y.) 571-584, 585.
 Dunn v. Pennsylvania R. Co. (N. J.), 58 Atl. 164-697, 846.
 Dunn v. Pennsylvania R. Co., 20 Phila. (Pa.) 258-670, 675, 867.
 Dunn v. Seaboard, etc., R. Co., 78 Va. 645 -870.
 Dunphy v. Erie R. Co., 42 N. Y. Super. Ct. 128-558, 591.
 Dunseth v. Wade, 2 Scam. (Ill.) 285-65, 66.
 Dunson v. New York Cent. R. Co., 3 Lans. (N. Y.) 265-220, 256.
 Dunspeth v. Wade, 3 Ill. 285-393.
 Duntley v. Boston, etc., R. Co., 53 Mo. App. 473-344.
 Duntley v. Boston, etc., R. Co., 66 N. H. 263-527.
 Dunton v. Allen Line S. S. Co., 115 Fed. 250-610.
 Dupont De Nemours v. Vance, 19 How. (U. S.) 171-441.
 Durgin v. American Express Co., 66 N. H. 277-344, 361.
 Dusar v. Murgatroyd, 1 Wash. (U. S.) 17, 18-23, 401.
 Duvenick v. Missouri Pac. R. Co., 57 Mo. App. 550-303, 505.
 Dwight v. Brewster, 1 Pick. (Mass.) 50-18, 22, 55, 65, 140, 359, 550.
 Dwinelle v. New York Cent. R. Co., 120 N. Y. 117-60, 541, 543, 559, 626, 631, 633.
 Dwyer v. Gulf, etc., R. Co., 69 Tex. 707, 75 Tex. 572-166, 205, 206, 210.
 Bye v. Virginia Midland R. Co., 20 D. C. 63-680, 789.
 Dyer v. Erie R. Co., 71 N. Y. 228, 236-698, 819.
 Dyer v. Grand Trunk R. Co., 42 Vt. 441-126, 429, 447.
 Dyer v. Great Northern R. Co., 51 Minn. 345-153.
 Dyke v. Erie R. Co., 45 N. Y. 113-309, 312.
 Dysart v. Missouri, etc., R. Co., 122 Fed. 228-581.
- E.
- Eads v. Metropolitan R. Co., 43 Mo. App. 536-626, 635.
 Eagan v. Maguire, 21 R. I. 189-831.
 Eagle Packet Co. v. Defries, 94 Ill. 598-616, 782.
 Eagle v. White, 6 Whart. (Pa.) 505-337, 192, 193, 198, 240, 263.
 Earle v. Cadmus, 2 Daly (N. Y.), 237-720.
 Earnest v. Southern Express Co., 1 Woods (U. S.), 573-342, 356, 759.
 East Indian Railway v. Kalidas Mukerjee, 70 L. J. P. C. 396-44.
 East Line, etc., R. Co., v. Hall, 64 Tex. 615, 620-131, 132, 142.
 East Line, etc., R. Co. v. Smith, 65 Tex. 167-601.
 East Line, etc., R. Co. v. Rushing, 69 Tex. 306-659, 679, 684, 692, 826.
 Eastman v. Association, 65 N. H. 176-214.
 East Omaha St. R. Co. v. Godofa, 50 Neb. 906-44, 45, 656, 865.
 East Saginaw City R. Co. v. Bohn, 27 Mich. 503-828, 862.
 East St. Louis, etc., R. Co. v. Wabash, etc., R. Co., 123 Ill. 594-45, 266, 403, 467.
 East Tennessee, etc., R. Co. v. Bayliss, 75 Ala. 466-699.
 East Tennessee, etc., R. Co. v. Brumley, 5 Lea (Tenn.), 401-295, 318, 463, 482, 484.
 East Tennessee, etc., R. Co. v. Connor, 15 Lea (Tenn.), 254-347.
 East Tennessee, etc., R. Co. v. Deaver, 79 Ala. 216-699, 700.
 East Tennessee, etc., R. Co. v. Fleetwood, 90 Ga. 23-635.
 East Tennessee, etc., R. Co. v. Hale, 85 Tenn. 69-401, 412, 515.
 East Tennessee, etc., R. Co. v. Herrman, 92 Ga. 384-501, 537.
 East Tennessee, etc., R. Co. v. Holmes, 97 Ala. 332-847, 850, 851.
 East Tennessee, etc., R. Co. v. Hughes, 92 Ga. 388-818, 852.
 East Tennessee, etc., R. Co. v. Hunt, 15 Lea (Tenn.), 261-429.
 East Tennessee, etc., R. Co. v. Hyde, 89 Ga. 721-890.
 East Tennessee, etc., R. Co. v. Interstate Commerce Com., 99 Fed. 52-940.
 East Tennessee, etc., R. Co. v. Interstate Commerce Com., 181 U. S. 1-934.
 East Tennessee, etc., R. Co. v. Johnson, 85 Ga. 497-400, 411, 413, 424, 456, 462, 500.
 East Tennessee, etc., R. Co. v. Johnston, 75 Ala. 596-314, 393, 399, 510, 534.
 East Tennessee, etc., R. Co. v. Kelly, 91 Tenn. 699-263, 272, 399.
 East Tennessee, etc., R. Co. v. Lockhart, 79 Ala. 315-687, 880, 883, 886, 887, 895.
 East Tennessee, etc., R. Co. v. Maloy, 77 Ga. 237-809.
 East Tennessee, etc., R. Co. v. Massengill, 15 Lea (Tenn.), 328-668.
 East Tennessee, etc., R. Co. v. Mitchell, 11 Heisk. (Tenn.) 400-542, 654, 771.
 East Tennessee, etc., R. Co. v. Nelson, 1 Cold. (Tenn.) 272, 276-38, 92, 106, 240, 318, 463.
 East Tennessee, etc., R. Co. v. Rodgers, 6 Heisk. (Tenn.) 143-463.
 East Tennessee, etc., R. Co. v. Stewart, 13 Lea (Tenn.), 432-589, 771.
 East Tennessee, etc., R. Co. v. Whittle, 27 Ga. 535-46, 499.
 East Tennessee, etc., R. Co. v. Winters, 85 Tenn. 240-700, 738.
 East Tennessee, etc., R. Co. v. Wright, 76 Ga. 532-466.
 Eastern Counties R. Co. v. Brown, 6 Exch. 314-640.
 Eastern R. Co. v. Relief F. Ins. Co., 98 Mass. 420-373.

TABLE OF CASES.

xlvii

(The references are to the pages.)

- Eastor v. Dudley**, 78 Tex. 239—109, 112, 359.
Eaton v. Delaware, etc., R. Co., 57 N. Y. 382—545, 563, 581, 584, 624, 746, 816.
Eaton v. Neumark (C. C. S. D. N. Y.), 37 Fed. 375—203.
Eaton v. St. Louis, etc., R. Co., 12 Mo. App. 386—262.
Eau Claire Board of Trade v. Chicago, etc., R. Co., 4 Int. Com. Rep. 65—323, 955.
Erberhardt v. Metropolitan St. Ry. Co., 69 App. Div. (N. Y.) 560—663.
Echols v. Louisville, etc., R. Co., 90 Ala. 366—401, 398.
Eckerd v. Chicago, etc., R. Co., 70 Iowa, 353—845.
Ecliff v. Wabash, etc., R. Co., 64 Mich. 196—550.
Eddie v. Rider, 79 Tex. 53—589.
Eddy v. Syracuse, etc., R. Co., 50 App. Div. (N. Y.) 109—743, 897.
Eddy v. Wallace, 49 Fed. 801—671.
Edgar v. Northern R. Co., 11 Ont. App. 452—849, 852.
Edgerton v. New York, etc., R. Co., 39 N. Y. 227—543, 548, 583, 625, 779, 786.
Edgerton v. Wilmington, etc., R. Co., 115 N. C. 645—177.
Edgerly v. Union St. R. Co., 67 N. J. 312—737, 739.
Edminson v. Baxter, 4 Hayw. (Tenn.) 112—399.
Edmunds v. Merchants' Despatch Transp. Co., 135 Mass. 283—157.
Edmunson v. Pullman Palace Car Co., 92 Fed. 824—58.
Edsall v. Camden, etc., R. Co., 50 N. Y. 661—330, 351, 720.
Edson v. Weston, 7 Cow. (N. Y.) 278—10, 229.
Edwards v. Cheraw, etc., R. Co., 32 S. C. 117—159, 198.
Edwards v. Foote (Mich.), 88 N. W. 404—807.
Edwards v. London & N. W. R. Co., L. R. 5 C. P. 445—640.
Edwards v. Manufacturing Building Company (R. I.), 61 Atl. 646—656.
Edwards v. Sherratt, 1 East, 604—100, 132, 356.
Edwards v. Todd, 1 Scam. (Ill.) 462, 2 Ill. 462—126, 447.
Edwards v. White Line Transit Co., 104 Mass. 159—34, 229, 230, 234.
Eells v. St. Louis, etc., R. Co., 52 Fed. 903—311, 314, 342, 350, 759.
Egan v. A Cargo of Spruce Lath, 43 Fed. 480—441.
Eickhof v. Chicago, etc., R. Co., 77 Ill. App. 196—775, 863.
885 **Bags of Linseed**, 1 Black (U. S.), 108—448.
Eikenberry v. St. Louis Transit Co., 103 Mo. App. 442—842.
Ela v. American M. U. Express Co., 29 Wis. 611—155.
Eldridge v. Minneapolis, etc., R. Co., 32 Minn. 258—788.
Electric Car Co. v. Carson, 98 Ga. 652—769, 779.
Elgin, etc. Ry. Co. v. Bates Mach. Co., 98 Ill. App. 311—100, 475, 481.
Elgin City R. Co. v. Wilson, 56 Ill. App. 364—770, 774, 779.
Elkins v. Boston, etc., R. Co., 23 N. H. 275—19, 37, 38, 39, 63, 139, 356, 370.
Elkins v. Empire Transp. Co., 81 Pa. St. 315—345.
Elliet v. St. Louis, etc., R. Co., 76 Mo. 518—611, 788.
Ellinger v. Philadelphia, etc., R. Co., 153 Pa. St. 213—650.
Elliott v. Newport, etc., R. Co., 18 R. I. 707—771, 790, 864.
Elliott v. New York Cent., etc., R. Co., 23 St. Rep. (N. Y.) 861—752, 757, 765.
Elliott v. Russell, 10 Johns. (N. Y.) 1—65, 225.
Elliott v. Van Buren, 33 Mich. 49—794.
Elliot v. Western, etc., R. Co., 58 Ga. 454—571.
Ellis v. American Tel. Co., 13 Allen (Mass.), 232—73, 78.
Ellis v. Chicago, etc., R. Co., 120 Wis. 645, 82 Wis. 246—666, 670.
Elwell v. Skiddy, 77 N. Y. 282—358.
Ellsworth v. Chicago, etc., R. Co., 95 Iowa, 98—744, 553, 548.
Ellsworth v. Tarrt, 26 Ala. 733—493, 727.
Elmore v. Naugatuck R. Co., 23 Conn. 457, 472—458, 475.
Elmore v. Sands, 54 N. Y. 512, 515—564, 591, 806.
Elvey v. Illinois Cent. R. Co., 2 Int. Com. Rep. 804—921.
Elwood v. Chicago City Ry. Co., 90 Ill. App. 397—795.
Elwood v. Connecticut Ry., etc., Co., 47 Conn. 145—674.
Ely v. Ehle, 3 N. Y. 506—362.
Ely v. New Haven Steamboat Co., 53 Barb. (N. Y.) 207—274.
Ely v. St. Louis, etc., R. Co., 77 Mo. 34—805.
Emerson v. Burnett, 11 Colo. App. 88—810.
Emerson v. St. Louis, etc., R. Co., 111 Mo. 161—500.
Emery v. Hersey, 4 Me. 407—8, 202.
Empire Transp. Co. v. Steele, 70 Pa. St. 188—165, 173.
Empire Transp. Co. v. Wallace, 68 Pa. St. 302—104.
Empire Transp. Co. v. Wamsutta Oil Refining, etc., Co., 63 Pa. St. 14—317, 388.
Enches v. New York, etc., R. Co., 135 Pa. St. 194—830.
Engberman v. North German Lloyd S. S. Co., 84 N. Y. Supp. 201—720.
Engeseth v. Great Northern R. Co., 65 Minn. 168—338, 525.
England v. Boston, etc., R. Co., 153 Mass. 490—850, 851, 852.
England v. International, etc., R. Co. (Tex. Civ. App.) 73, S. W. 24—745.
Englehardt v. Erie R. Co., 209 Pa. 182—566.
English v. Delaware, etc., Canal Co., 66 N. Y. 454—638, 747, 749.
Ensley v. Detroit United Ry. Co. (Mich.), 96 N. W. 34—810.
E. O. Stannard Milling Co. v. White Line Cent. Transit Co., 122 Mo. 258—262, 282, 285, 254, 389.
Eppendorf v. Brooklyn City, etc., R. Co., 67 N. Y. 52, 69 N. Y. 195—678, 838.
Erie City, etc., R. Co. v. Schuester, 113 Pa. St. 413—822, 824.
Erie Despatch v. Johnson, 87 Tenn. 490—179, 211.
Erie, etc. Dispatch v. Stanley, 22 Ill. App. 459—402.

TABLE OF CASES.

(The references are to the pages.)

- Erie, etc. Transp. Co. v. Dater, 91 Ill. 195-297, 315.
 Erie R. Co. v. Littell, 128 Fed. 546-745, 749.
 Erie R. Co. v. Lockwood, 28 Ohio St. 358-288, 394, 396, 399, 405, 464, 487, 488, 489.
 Erie R. Co. v. Wilcox, 84 Ill. 239-291, 294, 297, 322, 381, 462, 481, 754, 762.
 Erskine v. Thomas, 6 Miss. 371-147.
 Erwin v. Kansas, etc., R. Co. (Mo. App.), 68 S. W. 88-661.
 Estes v. St. Paul, etc., R. Co., 7 N. Y. Supp. 863-730.
 Estill v. New York, etc., R. Co., 147 U. S. 591-407, 532.
 Etherington v. Prospect Park, etc., R. Co., 88 N. Y. 461-595.
 Etnon v. Fort Wayne, etc., R. Co., 110 Mich. 494-771.
 Eureka Springs R. Co. v. Timmons, 51 Ark. 459-37, 38, 595, 609, 779.
 Evans v. Bristol, etc., R. Co., 10 W. R. 559-193.
 Evans v. Chicago & A. R. Co., 76 Mo. App. 472-437.
 Evans v. Fitchburg R. Co., 111 Mass. 142-29, 30, 247, 510, 511, 533.
 Evans v. Gale, 17 N. H. 573-363.
 Evans v. Memphis, etc., R. Co., 56 Atl. 246-747.
 Evans v. Rudy, 34 Ark. 385-52.
 Evans v. St. Louis, etc., R. Co., 11 Mo. App. 463-567, 880, 887, 889, 898.
 Evansville, etc., R. Co. v. Androscoggin Mills, 22 Wall. (U. S.) 594-471, 475, 480, 485, 486.
 Evansville, etc., R. Co. v. Athon, 6 Ind. App. 295-60, 678.
 Evansville, etc., R. Co. v. Barnes, 137 Ind. 306-550.
 Evansville, etc., R. Co. v. Baum, 26 Ind. 70-617.
 Evansville, etc., R. Co. v. Cates, 14 Ind. App. 172-744.
 Evansville, etc., R. Co. v. Darting, 6 Ind. App. 375-632, 644.
 Evansville, etc., R. Co. v. Duncan, 28 Ind. 442-673.
 Evansville, etc., R. Co. v. Keith, 8 Ind. App. 57-4, 136.
 Evansville, etc., R. Co. v. Kevekordes (Ind. App.), 69 N. E. 1022-141, 343, 354, 528, 533.
 Evansville, etc., R. Co. v. Kyte, 6 Ind. App. 52-687.
 Evansville, etc., R. Co. v. Marsh, 57 Ind. 505-437.
 Evansville, etc., R. Co. v. Montgomery, 85 Ind. 494-401.
 Evansville, etc., R. Co. v. Smith, 65 Ind. 92-493.
 Evansville, etc., R. Co. v. Wilson, 20 Ind. App. 5-687.
 Evansville, etc., R. Co. v. Young, 28 Ind. 516-292, 506, 755.
 Everett v. Chicago, etc., R. Co., 69 Iowa, 15-749.
 Everett v. Oregon, etc., R. Co. & Utah, 340-682.
 Everett v. Saltus, 15 Wend. (N. Y.) 474-445, 446.
 Everett v. Southern Express Co., 46 Ga. 303-356.
 Everhart v. Terre Haute, etc., R. Co., 78 Ind. 292-588.
 Evershed v. London, etc., R. Co., L. R. 3 Q. B. 135-124, 193.
 Ewald v. Chicago, etc., R. Co., 70 Wis. 420-586.
 Ewart v. Kerr, 1 Rice (S. C.), 203-126, 428, 447.
 Ewart v. Street, 2 Bailey L. (S. C.) 157-25, 388.
 Exchange Fire Ins. Co. v. Delaware & Hudson Canal Co., 10 Bosw. (N. Y.) 150-167.
 Ex parte Atty. Gen., 17 N. B. (Can.) 667
 Ex parte Benson, 18 S. C. 42-38.
 Ex parte Koehler, 30 Fed. 867, 31 Fed. 315-910, 921, 933, 938.
 Ex parte Great Western R. Co., 22 Ch. Div. 470-432.
 Express Co. v. Kountze, 8 Wall. (U. S.) 342-103, 104.
 Extion v. Central R. Co., 62 N. J. L. 7-642, 874.

F.

- Fahr v. Manhattan R. Co., 9 Misc. Rep. (N. Y.) 57-836.
 Fairbank v. Cincinnati, etc., R. Co., 66 Fed. 471-354, 485.
 Fairchild v. California Stage Co., 13 Cal. 599-615, 776, 787.
 Fairchild v. Philadelphia, etc., Co., 148 Pa. 527-220, 309, 485, 776.
 Fairfax v. New York Cent., etc., R. Co., 67 N. Y. 11-387, 724.
 Fairfax v. New York Cent. R. Co., 73 N. Y. 167-704, 722, 727, 730.
 Fairmount, etc., Pass. R. Co. v. Stutler, 54 Pa. St. 375-675.
 Falson v. Alabama, etc., R. Co., 69 Miss. 569-491.
 Faith v. East India Co., 4 B. & Ald. 630-441.
 Falk v. New York, etc., R. Co., 56 N. J. L. 380-612, 670, 747.
 Falkner v. Ohio, etc., R. Co., 55 Ind. 369.
 Falke v. Second Ave. R. Co. 38 App. Div. (N. Y.) 49-778.
 Fallon v. Central Park, etc., R. Co., 64 N. Y. 13-822.
 Falls v. San Francisco, etc., R. Co., 67 Cal. 114-633.
 Falls River & M. Co. v. Pullman Palace Car Co., 4 Ohio N. P. 26-56.
 Falvey v. Georgia R. Co., 76 Ga. 597-37, 462.
 Falvey v. Northern Transp. Co., 15 Wis. 129-319, 395.
 Farber v. Missouri Pac. R. Co., 116 Mo. 81-560, 626.
 Farber v. Missouri Pac. R. Co., 129 Mo. 272-748.
 Farewell v. Grand Trunk R. Co., 15 U. C. C. P. 427-565.
 Farvo v. Michigan, 121 U. S. 230-906.
 Faris v. Brooklyn City & N. R. Co., 46 App. Div. (N. Y.) 231-658, 864.
 Farish v. Reigle, 11 Gratt. (Va.) 697-25, 601, 615, 618, 655, 776, 788, 893, 904.
 Farley v. Chicago, etc., R. Co., 42 Iowa, 234-696.
 Farley v. Cincinnati, etc., R. Co., 108 Fed. 14-541.
 Farley v. Lavary, 54 S. W. (Ky.) 840-51, 64, 219.
 Farley v. Philadelphia Traction Co., 132 Pa. St. 58-771, 772.
 Farlow v. Kelly, 108 U. S. 288-696, 871.

TABLE OF CASES.

xlix

(The references are to the pages.)

- Farlow v. San Francisco, etc., R. Co., 97 Cal. 114.
 Farmers', etc., Bank v. Champlain Transp. Co., 16 Vt. 52—195, 279, 290.
 Farmers', etc., Bank v. Champlain Transp. Co., 23 Vt. 186—33, 291, 293, 318, 341, 460, 482.
 Farmers', etc., Nat. Bank v. Logan, 74 N. Y. 388—188.
 Farmers' L. & T. Co. v. Northern Pac. R. Co., 120 Fed. 873, 83 Fed. 249—111, 141, 364, 457, 907.
 Farmers' L. & T. Co. v. Oregon R., etc., Co., 72 Fed. 1003—282.
 Farmington Mercantile Co. v. Chicago, etc., R. Co., 116 Mass. 164—491.
 Farnham v. Camden, etc., R. Co., 55 Pa. St. 53—288, 293, 295, 345, 393, 395.
 Farndon v. Boston & A. R. Co., 108 Mass. 212—868.
 Farnsworth v. New York Cent., etc., R. Co., 84 N. Y. Supp. 658—480.
 Farr v. Great Western R. Co., 35 U. C. Q. B. 534—325, 529.
 Farrant v. Barnes, 11 C. B. N. S. 553—100, 383.
 Farrar v. New Orleans, etc., R. Co., 52 La. Ann. 417—828, 932.
 Farrell v. Houston, etc., R. Co., 4 N. Y. Supp. 597—597.
 Farrell v. Richmond, etc., R. Co., 102 N. C. 390—149, 441.
 Farris v. Cass Ave., etc., R. Co., 89 Mo. 325—822, 825.
 Farwell v. Boston R. Co., 4 Metc. (Mass.) 49—544.
 Farwell v. Davis, 66 Barb. (N. Y.) 73—254.
 Fassett v. Ruerk, 3 La. Ann. 694—360.
 Fasy v. International Nav. Co., 177 N. Y. 591—321, 390.
 Fatman v. Cincinnati, etc., R. Co., 2 Disney (Ohio), 248—394, 484.
 Faucett v. Nichols, 64 N. Y. 377—284.
 Faucher v. Wilson, 68 N. H. 338—64, 235.
 Faulkner v. Chicago, etc., R. Co. (Mo. App.), 73 S. W. 927—368, 472.
 Faulkner v. Hart, 44 N. Y. Super. Ct. 471, 82 N. Y. 412—42, 263, 267, 271.
 Faulkner v. South Pac. Co., 51 Mo. 311—106, 107, 412.
 Faust v. South Carolina R. Co., 8 S. C. 118—231.
 Fay v. Davidson, 13 Minn. 523—781.
 Fay v. Parker, 53 N. H. 342—896.
 Fay v. Steamer New World, 1 Cal. 248—5.
 Fayerweather v. Phoenix Ins. Co., 118 N. Y. 324—373.
 Fearon v. Bowers, 1 Smith's L. C. 792—164.
 Fern v. West Jersey Ferry Co., 143 Pa. St. 122—692.
 Feary v. Metropolitan St. R. Co., 162 Mo. 75—604, 612, 657.
 Federal St., etc., R. Co. v. Gibson, 96 Pa. St. 83—771, 772.
 Feiber v. Manhattan Dist. Tel. Co., 3 N. Y. Supp. 116, 4 N. Y. Supp. 555—87, 199, 202.
 Feige v. Michigan Cent. R. Co., 62 Mich. 1—264, 284, 316, 340.
 Feinberg v. Delaware, etc., R. Co., 52 N. J. L. 451—501, 506, 508.
 Feitall v. Middlesex R. Co., 109 Mass. 398—773, 779, 787, 831.
 Felder v. Columbia, etc., R. Co., 21 S. C. 35—466, 492, 727, 728.
 Felderschneider v. Chicago, etc., R. Co. (Wis.), 99 N. W. 1034—768, 775.
 Fell v. Northern Pac. R. Co., 44 Fed. 248, 249—583, 895, 900, 904.
 Fellows v. The R. W. Powell, 16 La. Ann. 316—175.
 Felton v. Chicago, G. W. R. Co., 86 Mo. App. 332—645, 726.
 Felton v. McCreary, etc.; Live Stock Co., 22 Ky. L. Rep. 1068—535.
 Fenig v. New Jersey St. Ry. Co. (N. J.), 46 Atl. 802—877.
 Fenner v. Buffalo, etc., R. Co., 44 N. Y. 505—148, 193, 264, 269, 272, 274, 278, 280, 487, 489.
 Fenton v. Grand Trunk R. Co., 28 U. C. Q. B. 367—725.
 Ferguson v. Brent, 12 Md. 9—24.
 Ferrin v. Myrick, 41 N. Y. 315—43.
 Ferry v. Manhattan R. Co., 118 N. Y. 497—774.
 Fewings v. Mendenhall, 83 Minn. 237—612.
 Fibel v. Livingston, 64 Barb. (N. Y.) 179—290, 291, 294.
 Fick v. Chicago, etc., R. Co., 68 Wis. 469—628, 633.
 Field v. Chicago, etc., R. Co., 71 Ill. 458—297, 462, 481, 754.
 Field v. Newport, etc., R. Co., 3 H. & N. 409—447.
 Filebrown v. Grand Trunk R. Co., 55 Me. 462—24, 290, 293, 394, 755, 760.
 Files v. Boston, etc., R. Co., 149 Mass. 204—576, 816, 818, 855.
 Filer v. New York Cent. R. Co., 49 N. Y. 47, 666, 671, 674, 680, 830, 849, 851, 852.
 Fink v. Albany, etc., R. Co., 4 Lans. (N. Y.) 147—741, 897.
 Fink v. Ash, 99 Ga. 106—748.
 Fink v. Coe, 4 Green (Iowa), 555—617.
 Finkeldey v. Omnibus Cable Co., 114 Cal. 28—546, 838, 840.
 Finn v. Valley City St., etc., R. Co., 86 Mich. 74—675.
 Finn v. Western R. Corp., 102 Mass. 283—166, 172, 381.
 Finnegan v. Chicago, etc., R. Co., 48 Minn. 378—557.
 Finucane v. Small, 1 Esp. N. P. 315—283.
 First Nat. Bank v. Marietta, etc., R. Co., 20 Ohio St. 259—704.
 First National Bank v. North, 6 Dak. 141—810.
 First Nat. Bank v. Northern Pac. R. Co., 28 Wash. 439—161.
 First Nat. Bank v. New York Cent., etc., R. Co., 88 Hun (N. Y.), 160—167.
 First Nat. Bank v. San Antonio, etc., R. Co. (Tex.), 77 S. W. 410—212.
 Fish v. Chapman, 2 Ga. 349—13, 20, 22, 24, 62, 323, 752, 754.
 Fish v. Clark, 49 N. Y. 122—4, 12, 20, 48, 63, 92.
 Fish v. Newton, 1 Den. (N. Y.) 47—196.
 Fisher v. Boston & M. R. Co., 99 Me. 338—490.
 Fisher v. Clisbee, 12 Ill. 344—58.
 Fisher v. Geddes, 15 La. Ann. 14—139, 723.
 Fisher v. Lake Shore, etc., R. Co., 17 Ohio C. C. 491—134.
 Fisher v. Metropolitan El. R. Co., 34 Hun (N. Y.), 433—632, 890, 898, 900.
 Fisher v. Southern Pac. R. Co., 89 Cal. 399—652.
 Fisher v. West Virginia, etc., R. Co., 42 W. Va. 183—738, 782.

TABLE OF CASES.

(The references are to the pages.)

- Fisher v. West Virginia, etc., R. Co., 39 W. Va. 366—655, 659, 828, 856.
 Fishman v. Platt, 90 N. Y. Supp. 354—215.
 Fisk v. Newton, 1 Den. (N. Y.) 45—148, 193, 196, 276, 279, 436.
 Fitch v. Mason City, etc., Tract. Co. (Iowa), 100 N. W. 618—653, 773.
 Fitch v. Mason City, etc., Tract. Co., 116 Iowa, 716—803.
 Fitch v. Newberry, 1 Doug. (Mich.) 1—102, 433, 438, 447.
 Fitchburg R. Co. v. Gage, 12 Gray (Mass.), 393—124, 127.
 Fitchburg, etc., R. Co. v. Hanna, 6 Gray (Mass.), 539—70, 144, 259.
 Fitchburg R. Co. v. Nichols, 85 Fed. 954 —798, 833.
 Fitzgerald v. Adams Express Co., 24 Ind. 447—100.
 Fitzgerald v. Burrill, 106 Mass. 446—71.
 Fitzgerald v. Grand Trunk R. Co., 4 Ont. App. 601—293, 294.
 Fitzgerald v. Grand Trunk R. Co., 63 Vt. 169—119, 123, 301, 915.
 Fitzgerald v. Midland R. Co., 34 L. T. N. S. 771—667, 690.
 Fitzgibbon v. Chicago, etc., R. Co., 108 Iowa, 614—563.
 Fitzpatrick v. Bloomington City R. Co., 73 Ill. App. 516—802.
 Fitzpatrick v. Cusack, 12 L. C. R. 306—432.
 Flagg v. Manhattan R. Co., 49 N. Y. Super. Ct. 251—613.
 Flaherty v. Minneapolis, etc., R. Co., 29 Minn. 326—699.
 Flanagan v. Met. St. R. Co., 31 Misc. Rep. (N. Y.) 820—
 Flanagan v. New York, etc., R. Co., 55 Hun (N. Y.), 611—671, 674, 678.
 Flannery v. Baltimore, etc., R. Co., 4 Mackey (D. C.) 111—644.
 Flaunery v. Waterford, etc., R. Co., Ir. R. C. L. 30—787.
 Flaunt v. Lashley, 36 La. Ann. 106—48.
 Fleck v. Union R. Co., 134 Mass. 481—863.
 Fleming v. Brooklyn City R. Co., 74 N. Y. 618—562.
 Fleming v. Kansas City, etc., R. Co., 89 Mo. App. 129—697.
 Fleming v. Mills, 5 Mich. 420—93.
 Fleming v. Pittsburgh, etc., R. Co., 158 Pa. St. 130—771, 772, 780.
 Fletcher v. Boston, etc., R. Co., 1 Allen (Mass.), 9—693.
 Fletcher v. Fletcher, 7 N. H. 452—214.
 Flick v. Union R. Co., 134 Mass. 481—859.
 Flinn v. Philadelphia, etc., R. Co., 1 Houst. (Del.) 469—314, 572, 753, 754, 760, 768.
 Flint v. Boston, etc., R. Co. (N. H.), 59 Ati. 938—501.
 Flint v. Norwich, etc., Transp. Co., 34 Conn. 554—621, 626, 641, 648.
 Flint, etc., R. Co. v. Stark, 38 Mich. 714 —670, 675.
 Flint, etc., R. Co. v. Weir, 37 Mich. 111 —569, 712.
 Flood v. Chesapeake, etc., R. Co., 25 Ky. L. Rep. 2135—732.
 Florida R., etc., Co. v. Webster, 25 Fla. 394—597, 673.
 Florida Southern R. Co. v. Hirst, 30 Fla. 1—552, 580, 589, 592, 652, 855, 816.
 Flourno v. Shreveport Belt Ry. Co., 56 La. Ann. 491—698.
 Floutroup v. Boston & M. R. Co., 163 Mass. 152—819.
 Flower v. Pennsylvania R. Co., 69 Pa. St. 210—576.
 Floyd v. Bovard, 6 W. & S. (Pa.) 75—156.
 Fluker v. Georgia R. & Bkg. Co., 81 Ga. 461—162, 614, 623, 740.
 Flynn v. Central Park, etc., R. Co., 49 N. Y. Super. Ct. 81—630, 632.
 Flynn v. St. Louis, etc., R. Co., 43 Mo. App. 424—491.
 Foard v. Atlantic, etc., R. Co., 8 Jones L. (N. C.) 235—70, 259, 382, 426.
 Foggan v. Lake Shore, etc., R. Co., 16 N. Y. Supp. 25—155, 166.
 Fonseca v. Cunard Steamship Co., 153 Mass. 553—309, 811, 721, 758.
 Forbes v. Atlantic, etc., R. Co., 76 N. C. 454—601.
 Forbes v. Boston, etc., R. Co., 133 Mass. 154—147, 161, 165, 168, 179, 180, 204, 211, 406.
 Ford v. Kansas City, 181 Mo. 137—374.
 Ford v. London, etc., R. Co., 2 F. & F. 736—604.
 Ford v. Mitchell, 21 Ind. 54—138.
 Ford v. Parker, 4 Ohio St. 576—71.
 Fordyce v. Beecher, 2 Tex. Civ. App. 29 —637.
 Fordyce v. Chancey, 2 Tex. Civ. App. 24 —805.
 Fordyce v. Dillingham (Tex. Civ. App.), 23 S. W. 650—688.
 Fordyce v. Jackson, 56 Ark. 594—580, 600, 699, 778.
 Fordyce v. Johnson, 56 Ark. 430—206, 438, 439.
 Fordyce v. McCants, 51 Ark. 509—807.
 Fordyce v. McFlynn, 56 Ark. 424—494, 536, 527.
 Fordyce v. Withers, 1 Tex. Civ. App. 540 779, 805.
 Forepaugh v. Delaware, etc., R. Co., 128 Pa. St. 217—310.
 Forrester v. Georgia R., etc., Co., 92 Ga. 699—491.
 Forsee v. Alabama G. S. R. Co., 63 Miss. 66—811.
 Forsyth v. Boston, etc., R. Co., 103 Mass. 510—873.
 Forsythe v. Walker, 9 Pa. St. 148—33, 382.
 Fortier v. Pennsylvania R. Co., 18 Ill. App. 260—475, 483.
 Fort v. Simpson, 13 Q. B. 680—441.
 Fort v. Southern Ry. Co. (S. C.), 42 S. E. 196—898.
 Fort Wayne Tract. Co. v. Hardendorf (Ind.), 72 N. E. 593—872.
 Fort Wayne Tract. Co. v. Morvillus (Ind.), 68 N. E. 304—852.
 Fort Worth, etc., R. Co. v. Alexander (Tex. Civ. App.), 81 S. W. 1015—519.
 Fort Worth, etc., R. Co. v. Byers (Tex. Civ. App.), 35 S. W. 1082—455.
 Fort Worth, etc., R. Co. v. Daggett, 87 Tex. 322—505, 506.
 Fort Worth, etc., R. Co. v. Greathouse, 82 Tex. 104—338, 350, 402, 405, 406, 424, 526, 534, 759, 761.
 Fort Worth, etc., R. Co. v. I. B. Rosenthal Milling Co. (Tex. Civ. App.), 29 S. W. 196—709.
 Fort Worth, etc., R. Co. v. Johnson, 5 Tex. Civ. App. 24—493.
 Fort Worth, etc., R. Co. v. Lillard (Tex. App.), 16 S. W. 654—206.

TABLE OF CASES.

li

(The references are to the pages.)

- Fort Worth, etc., R. Co. v. Martin** (*Tex. Civ. App.*), 35 S. W. 21—138.
Ft. Worth, etc., R. Co. v. Masterson (*Tex.*), 66 S. W. 833—536.
Fort Worth, etc., R. Co. v. McAnulty, 7 Tex. Civ. App. 321—476.
Fort Worth, etc., R. Co. v. Riley (*Tex. App.*), 1 S. W. 446—133, 137, 501, 516.
Fort Worth, etc., R. Co. v. Rogers, 21 Tex. Civ. App. 605—761.
Fort Worth, etc., R. Co. v. Thompson, 2 Tex. Civ. App. 170—804.
Ft. Worth, etc., R. Co. v. Whitehead, 6 Tex. Civ. App. 595—910.
Fort Worth St. R. Co. v. Witten, 74 Tex. 202—596.
Fort Worth, etc., R. Co. v. Waggoner Nat. Bank (*Tex. Civ. App.*), 81 S. W. 1050—512.
Fort Worth, etc., R. Co. v. Williams, 77 Tex. 121—468, 475, 482, 494.
Fort Worth, etc., R. Co. v. Wood (*Tex. Civ. App.*), 32 S. W. 14—536.
Ft. Worth, etc., R. Co. v. Wright (*Tex. Civ. App.*), 58 S. W. 846—482.
Forward v. Pittard, 1 T. R. 27—25, 226, 257.
Forward v. Toronto, 22 Ont. Rep. 351—785.
Foss v. Boston & M. R. Co., 66 N. H. 256—672, 683, 684, 688, 826.
Foster v. Atlanta Rap. Trans. Co., 119 Ga. 675—813.
Foster v. Cleveland, etc., R. Co., 56 Fed. 434—421, 921, 928.
Foster v. Colby, 3 H. & N. 705—442.
Foster v. Essex Bank, 17 Mass. 501—14.
Foster v. Frampton, 6 B. & C. 107—188.
Foster v. Metts, 55 Miss. 77—71.
Foster v. Seattle Electric Co., 35 Wash. 177—562, 655, 675, 836.
Foulkes v. Metropolitan Dist. R. Co., 28 W. R. 526—468.
Four Thousand, etc., Bags of Linseed, 1 Black (U. S.), 108—441.
Fowler v. Davenport, 21 Tex. 635, 626—399 404.
Fowler v. Liverpool, etc., Steam Co., 87 N. Y. 190—244, 286, 321.
Fowle v. Pitt Scott, 183 Mass. 351—478.
Fowler v. Western Union Tel. Co., 80 Me. 381—73.
Fowles v. Great Western, etc., R. Co., 22 L. J. Exch. 76—147, 149, 483.
Fox v. Boston, etc., R. Co., 148 Mass. 220—223, 240, 411, 455, 461.
Fox v. Holt, 36 Conn. 558—442.
Fox v. Mayor, etc., of N. Y., 5 App. Div. (N. Y.) 349—672.
Fox v. McGregor, 11 Barb. (N. Y.) 41—445.
Foy v. London, etc., R. Co., 18 C. B. N. S. 228—672, 673.
Foy v. Troy, etc., R. Co., 24 Barb. (N. Y.) 382—458, 477.
Francis v. Cockrell, S. R. 5 Q. B. 184—609.
Francis v. Dubuque, etc., R. Co., 25 Iowa. 60—193, 262.
Francis v. New York Steam Co., 114 N. Y. 385—870.
Francis v. St. Louis Trans. Co., 5 Mo. App. 7—881, 884, 885, 886.
Frank v. Central R. Co., 9 Pa. Super. Ct. 129—34, 230.
Frank v. Memphis, etc., R. Co., 52 Miss. 570—457, 469, 473.
Frank v. Metropolitan St. Co., 91 App. Div. (N. Y.) 483—629.
- - -
- Frank v. Grand Tower**, etc., R. Co., 57 Mo. App. 181—268, 275.
Frankford, etc., Turnpike Co. v. Philadelphia, etc., R. Co., 54 Pa. St. 379—604.
Franklin v. Low & Swartwout, 1 Johns. (N. Y.) 396—71.
Franklin v. So. California, etc., Co., 85 Cal. 63—552, 687, 875.
Franklin v. Third Ave. R. Co., 52 App. Div. (N. Y.) 512—632.
Franklin v. Twogood, 25 Iowa, 520—267.
Frazier v. Telegraph Co. (Ala.), 4 So. 831—697.
Frazier v. Atchison, etc., R. Co. (Mo. App.), 78 S. W. 679—218.
Frazier v. Kansas City, etc., R. Co., 48 Iowa, 571—133, 137, 515.
Frazier v. Smith, 60 Ill. 145—427.
Frederick v. Louisville, etc., R. Co., 133 Ala. 486—390.
Frederick v. Northern Cent. R. Co., 157 Pa. St. 103—654, 770, 788.
Freeburg Coal Co. v. Union R., etc., Co., 10 Mo. App. 596—459.
Freedon v. New York Cent., etc., R. Co., 24 App. Div. (N. Y.) 306—621, 737.
Freck v. Philadelphia, etc., R. Co., 39 Md. 576—798, 800.
Freeman v. Detroit, etc., R. Co., 56 Mich. 577—667.
Freeman v. Louisville, etc., R. Co., 32 Fla. 420—455.
Freeman v. Metropolitan St. R. Co., 95 Mo. App. 314—635, 657.
Freeman v. Newton, 3 E. D. Sm. (N. Y.) 246—290.
Freeman v. Pere Marquette R. Co., 9 Det. L. N. 436—854.
Freemantle v. London, etc., R. Co., 10 C. B. N. S. 95—604.
Frelsen v. Southern Pac. Co., 42 La. Ann. 673—607.
Fremont, etc., R. Co. v. French, 48 Neb. 638—541.
Fremont v. Metropolitan St. R. Co., 53 App. Div. (N. Y.) 414—835.
Fremont, etc., R. Co. v. New York, etc., R. Co. (Neb.), 92 N. W. 131—364, 481.
Fremont, etc., R. Co. v. Waters (Neb.), 70 N. W. 225—459, 493.
French v. Buffalo, etc., R. Co., 4 Keyes (N. Y.) 108—321, 392, 762, 763.
French v. Star Union Co., 134 Mass. 288—229.
Frick v. St. Louis, etc., R. Co., 23 Wis. 186—822.
Friedlander v. Texas, etc., R. Co., 130 U. S. 424—165, 174.
Friedman v. Metropolitan S. S. Co., 45 Misc. Rep. (N. Y.) 383—195.
Friend v. Woods, 6 Gratt. (Va.) 189—25.
Frink v. Coe, 4 Green (Iowa), 555—540, 898, 899.
Frink v. Potter, 17 Ill. 406—820.
Frink v. Schroyer, 18 Ill. 416—893.
Frizzell v. Omaha St. Ry. Co., 124 Fed. 176—592.
Frothingham v. Jenkins, 1 Cal. 42—436, 441, 445.
Fry v. Louisville, etc., R. Co., 103 Ind. 265—494.
Fry v. State, 63 Ind. 562—906.
Fulks v. St. Louis, etc., R. Co., 111 Mo. 335—816, 836, 837, 798.
Fuller v. Bradley, 25 Pa. St. 120—14, 16, 19, 48, 442.

TABLE OF CASES.

(The references are to the pages.)

- Fuller v. Dennison, etc., Ry. Co. (Tex.), 74 S. W. 940-676, 853.
 Fuller v. Jamestown St. R. Co., 75 Hun (N. Y.), 273-309.
 Fuller v. Naugatuck R. Co., 21 Conn. 570, 557-59, 652, 674, 805.
 Fulton v. Grand Trunk R. Co., 17 U. C. Q. B. 428-560, 735.
 Fulton v. Lydecker, 17 N. Y. Supp. 451-207.
 Furgason v. Citizens' St. R. Co. (Ind. App.), 44 N. E. 936-643, 650.
 Furman v. Chicago, etc., R. Co., 57 Iowa, 42, 81 Iowa, 540-154, 230, 231.
 Furman v. Chicago, etc., R. Co., 68 Iowa, 219-275.
 Furman v. Union Pac. R. Co., 106 N. Y. 579-153, 166, 168, 169, 170, 178.
 Furnish v. Missouri Pac. R. Co., 102 Mo. 438-605, 606, 654, 779.

G.

- Gabriel v. Long Island R. Co., 54 App. Div. (N. Y.) 41-804.
 Gabrielson v. Waydell, 67 Fed. 342-618.
 Gadsden, etc., R. Co. v. Causler, 97 Ala. 235-618, 666, 815, 846.
 Gaffney v. Brooklyn City R. Co., 6 Misc. Rep. (N. Y.) 1-601.
 Gaffney v. St. Paul City R. Co., 81 Minn. 459-547.
 Gage v. Illinois Cent. R. Co., 75 Miss. 17-690.
 Gage v. Tirrell, 9 Allen, 91 Mass. 299-65, 226, 243.
 Gaines v. Union Transp., etc., Co., 28 Ohio St. 418-288, 292, 298, 394, 396.
 Gale v. Delaware, etc., R. Co., 7 Hun (N. Y.), 670-558, 564, 565.
 Gale v. Hailman, 11 Pa. St. 515-21.
 Galena, etc., R. Co. v. Fay, 16 Ill. 558-796, 812.
 Galena v. Hot Springs R. Co., 4 McCrary (U. S.), 371-897.
 Galena, etc., R. Co. v. Rae, 18 Ill. 488-92, 93, 102, 106, 108, 138, 240, 416, 417, 419, 428.
 Galena, etc., R. Co. v. Yarwood, 17 Ill. 509-619, 780, 787.
 Galesburg, etc., R. Co. v. West, 108 Ill. App. 504-128, 189.
 Gallagher v. Bowie, 66 Tex. 265-617.
 Gallagher v. Great Western R. Co., 8 I.R. C. L. 326-324.
 Gallaway v. Chicago, etc., R. Co., 87 Iowa, 458-851.
 Gallegly v. Kansas City, etc., R. Co. (Miss.), 35 So. 420-739.
 Gallena v. Hot Springs R. Co., 13 Fed. 116-616, 626, 635, 638, 748, 749.
 Gallena, etc., R. Co. v. Yarwood, 15 Ill. 468-820.
 Galliers v. Chicago, etc., R. Co., 116 Iowa, 319-403.
 Galligan v. Old Colony St. R. Co., 182 Mass. 211-655.
 Gallin v. London, etc., R. Co., L. R. 10 Q. B. 212-754, 758, 768.
 Galloway v. Hughes, 1 Bailey (S. C.), 553, 1 Conk. Adm. 96-149, 166, 195.
 Galt v. Adams Express Co., McArthur & M. (D. C.) 124-356, 358, 360, 753, 760.
 Galt v. Archer, 7 Gratt. (Va.) 307-446, 447.
 Galveston, etc., R. Co. v. Allison, 59 Tex. 193-288, 460, 484.
 Galveston, etc., R. Co. v. Ball, 50 Tex. 602-318, 337, 350, 406.
 Galveston, etc., R. Co. v. Barnett (Tex. Civ. App.), 26 S. W. 782-239.
 Galveston, etc., R. Co. v. Boothe, 3 Tex. Civ. App. Cas. sec. 363-339.
 Galveston, etc., R. Co. v. Botts (Tex. Civ. App.), 70 S. W. 113-520, 535.
 Galveston, etc., R. Co. v. Cooper, 2 Tex. Civ. App. 42-832, 903.
 Galveston, etc., R. Co. v. Crispi, 73 Tex. 236-672, 688.
 Galveston, etc., R. Co. v. Donohoe, 56 Tex. 162-628, 639, 899, 900.
 Galveston, etc., R. Co. v. Efron (Tex. Civ. App.), 38 S. W. 639-396, 400.
 Galveston, etc., R. Co. v. Fales (Tex. Civ. App.), 77 S. W. 234-703, 718.
 Galveston, etc., R. Co. v. Gildea, 2 Tex. App. Civ. Cas. sec. 271-387.
 Galveston, etc., R. Co. v. Harman, 2 Tex. App. Civ. Cas. sec. 135-525.
 Galveston, etc., R. Co. v. Herring (Tex. Civ. App.), 24 S. W. 939, 28 S. W. 825, 36 S. W. 129-409, 461, 514.
 Galveston, etc., R. Co. v. Hubbard (Tex. Civ. App.), 76 S. W. 764-675.
 Galveston, etc., R. Co. v. Hewitt, 67 Tex. 473-655.
 Galveston, etc., R. Co. v. Ivey (Tex. Civ. App.), 23 S. W. 321-506.
 Galveston, etc., R. Co. v. Kelly (Tex. Civ. App.), 26 S. W. 470-333, 406.
 Galveston, etc., R. Co. v. Johnson (Tex.), 19 S. W. 867-406, 409, 642.
 Galveston, etc., R. Co. v. Johnson (Tex. Civ. App.), 37 S. W. 243-493.
 Galveston, etc., R. Co. v. Jackson (Tex. Civ. App.), 37 S. W. 255-501, 512, 515.
 Galveston, etc., R. Co. v. Kinnebrew, 7 Tex. Civ. App. 549-754.
 Galveston, etc., R. Co. v. La Prelle (Tex. Civ. App.), 65 S. W. 488-633, 636.
 Galveston, etc., R. Co. v. Le Gierse, 51 Tex. 189-837.
 Galveston, etc., R. Co. v. Long (Tex. Civ. App.), 36 S. W. 485-648.
 Galveston, etc., R. Co. v. Morris (Tex.), 61 S. W. 709-869.
 Galveston, etc., R. Co. v. Parsley, 6 Tex. Civ. App. 130-242.
 Galveston, etc., R. Co. v. Rutledge (Tex. Civ. App.), 37 S. W. 176-515.
 Galveston, etc., R. Co. v. Schmidt (Tex. Civ. App.), 25 S. W. 452-111.
 Galveston, etc., R. Co. v. Scott (Tex. Civ. App.), 79 S. W. 642-732.
 Galveston, etc., R. Co. v. Short (Tex. Civ. App.), 25 S. W. 142-339, 460, 482.
 Galveston, etc., R. Co. v. Silegman (Tex. Civ. App.), 23 S. W. 298-115, 333, 409.
 Galveston, etc., R. Co. v. Smith (Tex. Civ. App.), 24 S. W. 668-724, 725.
 Galveston, etc., R. Co. v. Smith, 59 Tex. 406, 81 Tex. 479-726, 849.
 Galveston, etc., R. Co. v. Stovall, 3 Tex. App. Civ. Cas. sec. 250-532.
 Galveston, etc., R. Co. v. Thompson (Tex. Civ. App.), 23 S. W. 930-339, 505.
 Galveston, etc., R. Co. v. Thornsberry (Tex.), 17 S. W. 521-674, 892.
 Galveston, etc., R. Co. v. Tuckett (Tex. Civ. App.), 25 S. W. 150-241, 410.
 Galveston, etc., R. Co. v. Van Winkle, 3 Tex. Civ. App. Cas. secs. 442, 443-195, 460, 467.
 Galveston, etc., R. Co. v. Warnken (Tex. Civ. App.), 35 S. W. 72-508.

TABLE OF CASES.

lili

(The references are to the pages.)

- Galveston, etc., R. Co. v. Watson, 1 Tex. Civ. App. Cas. sec. 813—197.
 Galveston, etc., R. Co. v. Williams (Tex. Civ. App.), 25 S. W. 1019—339.
 Galvin v. Kansas City, etc., R. Co., 21 Mo. App. 273—412.
 Gamble v. Western R. Co., 24 U. C. Q. B. 407—714.
 Ganiard v. Rochester City, etc., R. Co., 50 Hun (N. Y.), 22—547, 652, 676, 802.
 Gankler v. Detroit, etc., R. Co., 9 Detroit L. N. 215 (Mich.) 90—749.
 Gann v. Chicago, etc., R. Co., 72 Mo. App. 34—109, 244, 368.
 Gannell v. Ford, 5 L. T. N. S. 604—523.
 Gannon v. New York, etc., R. Co., 173 Mass. 50—819.
 Gardner v. St. Paul, etc., R. Co., 30 Minn. 217—550.
 Gardner v. Southern R. Co., 127 N. C. 293—292, 303, 317, 329.
 Gardner v. Detroit St. R. Co., 99 Mich. 182—678, 811.
 Gardner v. New Haven, etc., R. Co., 51 Conn. 143—541, 546, 573, 584.
 Gardner v. Waycross Air Line R. Co., 97 Ga. 482—769, 776.
 Garland v. Southern R. Co., 111 Ga. 852—661.
 Garlington v. Fort Worth, etc., R. Co. (Tex. Civ. App.), 78 S. W. 368—414.
 Garneau v. Illinois Cent. R. Co., 109 Ill. App. 169—671.
 Garner v. Green, 8 Ala. 96—53.
 Garnett v. Willan, 5 B. & Ald. 53—323.
 Garoni v. Campagne National De Navigation, 131 N. Y. 614—604, 824.
 Garrison v. Babbage Transp. Co., 94 Mo. 130—176.
 Garrison v. Memphis Ins. Co., 19 How. (N. Y.) 312—65.
 Garrison v. United Rys., etc., Co. (Md.), 55 Atl. 371—733, 748.
 Garside v. Trent Nav. Co., 4 T. R. 581—148, 265, 269, 483, 488.
 Garton v. Bristol, etc., R. Co., 1 B. & S. 112—19, 92, 94, 99, 121.
 Gashweiler v. Wabash, etc., R. Co., 83 Mo. 112—195, 262, 278.
 Gass v. New York, etc., R. Co., 99 Mass. 220—135, 466, 476, 489, 492, 493.
 Gasway v. Atlanta, etc., R. Co., 58 Ga. 216—617.
 Gatens v. Metropolitan St. R. Co., 89 App. Div. (N. Y.) 311—661, 862.
 Gates v. Chicago, etc., R. Co., 42 Neb. 379—94, 153, 162, 167, 238.
 Gates v. Ryan, 37 Fed. 154—192, 358.
 Gavett v. Manchester, etc., R. Co., 16 Gray (Mass.), 501—848.
 Gaynor v. Old Colony, etc., R. Co., 100 Mass. 208—556, 679, 830, 876.
 Gay's Gold, 13 Wall. (U. S.) 358—118.
 Geary v. Stephenson, 169 Mass. 31—810.
 Gee v. Lancashire, etc., R. Co., 6 H. & N. 211—425.
 Gee v. Metropolitan R. Co., L. R. 8 Q. B. 161—822, 866.
 Geiler v. Manhattan R. Co., 11 Misc. Rep. (N. Y.) 413—808.
 Geipel v. Steinway R. Co., 14 App. Div. (N. Y.) 551—595.
 Geismer v. Lake Shore, etc., R. Co., 102 N. Y. 563—383, 107, 191, 228, 237, 238, 239, 250, 254, 255, 256.
 Geitz v. Milwaukee City R. Co., 72 Wis. 307—857, 859, 862.
 Gelley v. New Orleans City & L. R. Co., 49 La. Ann. 588—860.
 Gelpcke v. City of Dubuque, 1 Wall. (U. S.) 175—266.
 Gelvin v. Kansas City, etc., R. Co., 21 Mo. App. 273—140, 369, 424.
 Geneva, etc., R. Co. v. Sage, 35 Hun (N. Y.) 95—441.
 Geogagn v. New York, etc., R. Co., 10 App. Div. (N. Y.) 454—847.
 George v. Chicago, etc., R. Co., 57 Mo. App. 358—388.
 George F. Ditman Boot, etc., Co. v. Keokuk, etc., R. Co., 91 Iowa, 416—724, 726.
 George v. Los Angeles R. Co., 126 Cal. 357—547.
 Geo. V. Vagley Elevator Co. v. American Express Co., 63 Minn. 142—376.
 Georgia v. St. Louis, etc., R. Co., 34 Ark. 613—595, 597, 652, 780.
 Georgia Pac. R. Co. v. Gaines, 88 Ala. 377—493.
 Georgia Pac. R. Co. v. Hughart, 90 Ala. 36—342, 491.
 Georgia Pac. R. Co. v. Love, 91 Ala. 432—776, 777.
 Georgia Pac. R. Co. v. Robinson, 68 Miss. 643—561.
 Georgia Pac. R. Co. v. Underwood, 90 Ala. 49—870.
 Georgia Pac. R. Co. v. West, 66 Miss. 310—678, 849, 850.
 Georgia R. Co. v. Beatie, 66 Ga. 438—315.
 Georgia R., etc., Co. v. Baker, 120 Ga. 991—889.
 Georgia R. Co. v. Murden, 86 Ga. 434—591.
 Georgia R. Co. v. Cole, 68 Ga. 623—213, 470.
 Georgia R. Co. v. Dougherty, 86 Ga. 744—744.
 Georgia R. Co. v. Dorsey, 116 Ga. 719—387.
 Georgia R. etc., Co. v. Eskew, 86 Ga. 641—596.
 Georgia R. Co. v. Gann, 68 Ga. 350—292, 468, 491, 760.
 Georgia R. Co. v. Hayden, 71 Ga. 518—691, 879, 881.
 Georgia R. Co. v. Homer, 73 Ga. 251—652, 898.
 Georgia R., etc., Co. v. Hopkins, 108 Ga. 324—635.
 Georgia R., etc., Co. v. Johnson, 113 Ga. 589—702.
 Georgia R., etc., Co. v. Keener, 93 Ga. 808—343.
 Georgia R., etc., Co. v. McCurdy, 45 Ga. 288—667, 668, 681, 687, 851.
 Georgia R., etc., Co. v. Murrah, 85 Ga. 343—437.
 Georgia R., etc., Co. v. Murray, 113 Ga. 1021—846.
 Georgia R. Co. v. Olds, 77 Ga. 673—744, 888, 889, 899.
 Georgia Ry. Co. v. Pound, 11 Ga. 6—147, 261, 263.
 Georgia R., etc., Co. v. Phillips, 93 Ga. 801—725.
 Georgia R., etc., Co. v. Reener, 93 Ga. 868—888.
 Georgia R., etc., Co. v. Reid, 91 Ga. 377—328, 350, 505, 523.
 Georgia, etc., R. Co. v. Smith, 83 Ga. 626—494.
 Georgia R. Co. v. Spears, 66 Ga. 485—298, 515, 510.
 Georgia R., etc., Co. v. Thompson, 86 Ga. 327—261, 726.

TABLE OF CASES.

(The references are to the pages.)

- Georgia, etc., R. Co. v. Usry, 82 Ga. 54—846.
 Georgia Southern R. Co. v. Bigelow, 63 Ga. 219—567.
 Gerber v. Wabash R. Co., 63 Mo. App. 145—195.
 Gerhard v. Neese, 36 Tex. 365—250.
 Gerke Brewing Co. v. Louisville, etc., R. Co., 4 Int. Com. Rep. 267—932.
 Germain v. Montreal, etc., R. Co., 6 L. C. Rep. 172—781.
 German v. Chicago, etc., R. Co., 38 Iowa, 127—510.
 German Exchange Bank v. Comr's, 6 Abb. N. C. (N. Y.) 394—363.
 German State Bank v. Minneapolis, etc., R. Co., 113 Fed. 414—72.
 Germania Fire Ins. Co. v. Memphis, etc., R. Co., 72 N. Y. 90—296, 305, 313, 395.
 Germantown Pass. R. Co. v. Walling, 97 Pa. St. 55—859, 862.
 Getman v. Delaware, etc., R. Co., 162 N. Y. 21—822.
 Ghormley v. Dinsmore, 51 N. Y. Super. Ct. 196—320, 336.
 Gibbons v. Farwell, 63 Mich. 344—179, 211, 231, 234.
 Gibbons v. Ogden, 9 Wheat (U. S.), 194—905.
 Gibbons v. Paynton, 4 Burr. 2298—256, 223.
 Gibbons v. Wade, 8 N. J. L. 255—292, 317.
 Giblin v. McMullen, L. R. 2 P. C. 317—6, 232.
 Giblin v. National Steamship Co., 8 Misc. Rep. (N. Y.) 22—511, 533.
 Gibson v. American, etc., Express Co., 1 Hun (N. Y.), 387—201, 276, 479.
 Gibson v. Culver, 17 Wend. (N. Y.) 305—193, 274.
 Gibson v. International Trust Co., 186 Mass. 454—84.
 Gilbert v. New York Cent., etc., R. Co., 4 Hun (N. Y.), 378—144.
 Gilbert v. Third Ave. R. Co., 54 N. Y. Super. Ct. 470—804.
 Gilbert v. West End St. R. Co., 160 Mass. 403—678.
 Giles v. Diamond State Iron Co., 8 Atl. Rep. (Del.) 368—794.
 Giles v. Fargo, 60 N. Y. Super. Ct. 117—320.
 Giles v. Taff Vale R. Co., 2 El. & Bl. 823—139, 371.
 Gilhooley v. New York, etc., Steam Nav. Co., 1 Daly (N. Y.), 197—554, 725.
 Glikerson v. Pacific R. Co., 39 Mo. 354—257.
 Gill v. Manchester, etc., R. Co., L. R. 8 Q. B. 186—149, 151, 463, 464, 511, 517.
 Gill v. Rochester, etc., R. Co., 37 Hun (N. Y.), 107—689, 737.
 Gillenwater v. Madison, etc., R. Co., 5 Ind. 342, 339—540, 544, 569, 587, 617, 653.
 Gillespie v. Brooklyn Heights R. Co., 178 N. Y. 347—626, 628, 631, 636, 895.
 Gillespie v. St. Louis, etc., R. Co., 6 Mo. App. 554—611, 660, 772, 788.
 Gillespie v. Yonkers R. Co., 87 App. Div. (N. Y.) 38—853.
 Gillet v. Roberts, 57 N. Y. 28—216.
 Gilliland v. Illinois Cent. R. Co. (Miss.), 32 So. 916—122.
 Gillingham v. Dempsey, 12 S. & R. (Pa.) 183—399.
 Gillingham v. Ohio River R. Co., 35 W. Va. 588—22, 539, 542, 545, 617, 626, 629, 640, 641, 655.
 Gillis v. Western Union Tel. Co., 61 Vt. 461—77.
- Gillis v. Pennsylvania R. Co., 59 Pa. St. 129—562.
 Gillshannon v. Stony Brook R. Corp., 10 Cush. (Mass.) 228—586.
 Gilmore v. Brooklyn Heights R. Co., 6 App. Div. (N. Y.) 117—769, 775.
 Gilmore v. Carman, 1 Smed. & M. (Miss.) 279—24, 65.
 Gilmore v. City of Utica, 121 N. Y. 561—598.
 Gilson v. Gwin, 107 Mass. 126—434.
 Gilson v. Jackson County H. R. Co., 76 Mo. 282—595, 654, 692.
 Giraldo v. Coney Island, etc., R. Co., 16 N. Y. Supp. 774—822.
 Girard College Pass. Ry. Co. v. Middleton, 3 W. N. C. (Pa.) 486—783.
 Gisbourn v. Hurst, 1 Salk. 249—18, 429.
 Gladson v. State (Minn.), 17 Sup. Ct. Rep. 627—668.
 Glasco v. New York Cent. R. Co., 36 Barb. (N. Y.) 557—710, 715, 718.
 Glascock v. Chicago, etc., R. Co., 69 Mo. 589—413.
 Glasscock v. Chicago, etc., R. Co., 86 Mo. App. 114—512, 521.
 Glendale v. Thomson, 56 N. Y. 194—125, 447.
 Gleason v. Goodrich Transp. Co., 32 Wis. 85, 97—138, 139, 701, 706, 715, 718.
 Gleason v. Metropolitan St. Ry. Co., 99 App. Div. (N. Y.) 209—842.
 Gleeson v. Virginia Midland R. Co., 140 U. S. 435—221, 578, 597, 695, 769, 773, 780.
 Glenn v. Charlotte, etc., R. Co., 63 N. C. 510—282.
 Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196—905, 906.
 Giovinsky v. Cunard Steamship Co., 4 Misc. Rep. (N. Y.) 266—705, 717, 718.
 Giovinsky v. Cunard Steamship Co., 6 Misc. Rep. (N. Y.) 388—701.
 Glyn v. East, etc., India Dock Co., L. R. 7 App. 591—176.
 Glyn v. New York, etc., R. Co., 85 Hun (N. Y.), 408—650.
 Godbout v. St. Paul Union Depot Co., 79 Minn. 188—615.
 Goddard v. Grand Trunk R. Co., 57 Me. 202—617, 626, 636, 901.
 Godfrey v. Ohio, etc., R. Co., 116 Ind. 30—555.
 Goetter v. Pickett, 61 Ala. 387—307.
 Goff v. Great Northern R. Co., 3 El. & Bl. 672—639.
 Goggin v. Kansas Pac. R. Co., 12 Kan. 416—334, 335, 525.
 Goins v. Western R. Co., 68 Ga. 190—880.
 Goldberg v. New York Cent., etc., R. Co., 133 N. Y. 561—844.
 Goldbowitz v. Metropolitan Express Co., 91 N. Y. Supp. 318—213.
 Golden v. Manning, 2 W. Bl. 916—194.
 Goldey v. Pennsylvania R. Co., 30 Pa. St. 242—317.
 Goldrick v. Union R. Co., 20 R. I. 128—596.
 Goldsmith v. Chicago, etc., R. Co., 12 Mo. App. 479—476.
 Goldsmith v. Great Eastern R. Co., 44 L. T. N. S. 181—319.
 Goldsmith v. Holland Bldg. Co., 182 Mo. 597—85.
 Goldsmith v. Tower Hill Steamship Co., 37 Fed. 806—515.
 Goldstein v. Sherman, etc., R. Co. (Tex. Clv. App.), 61 S. W. 336—461.
 Gonthier v. New Orleans, etc., R. Co., 28 La. Ann. 67—725.

TABLE OF CASES.

lv

(The references are to the pages.)

- Gonzales v. New York, etc., R. Co.**, 39 How. Pr. (N. Y.) 407—679, 693, 769, 847.
Gonzales v. New York, etc., R. Co., 38 N. Y. 440—694, 876.
Gould v. Galveston, etc., R. Co. (Tex.), 11 S. W. 854—339, 505, 532.
Goodbar v. Wabash R. Co., 53 Mo. App. 434—70, 259, 723.
Goodl v. Chapin, 20 N. Y. 259—260, 277, 489.
Goodloe v. Memphis & C. R. Co., 170 Ala. 233—634.
Goodman v. Oregon, R., etc., Co., 22 Or. 14—380, 391.
Goodrich v. Pennsylvania, etc., Camal Co., 29 Hun (N. Y.) 50—781.
Goodsell v. Taylor, 41 Minn. 207—85.
Goodwin v. Baltimore, etc., R. Co., 50 N. Y. 154—196, 209, 270.
Goodwin v. Boston, etc., R. Co., 84 Me. 203—856, 857.
Gordon v. Buchanan, 5 Yerg. (Tenn.) 71—63.
Gordon v. Grand St., etc., R. Co., 40 Barb. (N. Y.) 546—546, 547, 551, 552.
Gordon v. Great Western R. Co., 8 Q. B. Div. 44—518.
Gordon v. Great Western R. Co., 25 U. C. C. P. 488, 34 U. C. Q. B. 224—464, 487.
Gordon v. Hutchinson, 1 W. & S. (Pa.) 285—18, 20, 22, 61, 62, 63, 95.
Gordon v. Little, 8 S. & R. (Pa.) 533—66.
Gordon v. Manchester, etc., R. Co., 52 N. H. 596—691, 806.
Gordon v. West E. St. Ry. Co., 175 Mass. 181—547.
Gore v. Norwich, etc., Transp. Co., 2 Daly (N. Y.), 254—715.
Gorham Mfg. Co. v. Fargo, 45 How. Pr. (N. Y.) 90—359, 360.
Gorman v. Southern Pac. R. Co., 97 Cal. 1—888, 896.
Gorman's Admir. v. Louisville, etc., R. Co., 24 Ky. L. Rep. 1938—596.
Gorton v. Railroad Co., 54 Wis. 234—743.
Gosa v. Southern Ry., 67 S. C. 347, 45 S. E. 810—375.
Gott v. Dinsmore, 111 Mass. 45—290, 298, 307, 755.
Gottlieb v. New York, etc., R. Co., 100 N. Y. 462—602.
Gottwald v. St. Louis Transit Co. (Mo.), 77 S. W. 125—733.
Gould v. Hill, 2 Hill (N. Y.) 625—294, 319, 752, 754.
Government St. R. Co. v. Hanlon, 53 Ala. 70—823, 825.
Gowdy v. Lyon, 9 B. Mon (Ky.) 112—31.
Gowling v. American Express Co., 102 Mo. App. 366—330.
Grace v. Adams, 100 Mass. 505—294, 295, 306, 753.
Grace v. St. Louis R. Co., 156 Mo. 295—655, 677.
Gracie v. Palmer, 8 Wheat (U. S.), 635, 605—428, 441, 446.
Gradin v. St. Paul, etc., R. Co., 30 Minn. 217—544, 582.
Graff v. Bloomer, 9 Pa. St. 114—179, 193.
Graeff v. Phila. & R. Co., 161 Pa. St. 230—643.
Graffam v. Boston, etc., R. Co., 67 Me. 234—710.
Graham v. Burlington, etc., R. Co., 39 Minn. 81—770, 778.
Graham v. Davis, 4 Ohio St. 362—27, 317, 394, 396, 755, 756.
Graham v. Delaware, etc., Canal Co., 46 Hun (N. Y.), 386—600.
Graham v. Great Western R. Co., 41 U. C. Q. B. 324—698.
Graham v. Manhattan Ry. Co., 166 N. Y. 336—649.
Graham v. McNeill, 20 Wash. 466—696.
Graham v. Pacific R. Co., 66 Mo. 536—572.
Graham v. Pennsylvania R. Co., 39 Fed. 596—843.
Graham v. Toronto, etc., R. Co., 23 U. C. C. P. 54—544.
Graham & Ward v. Macon, etc., R. Co., 120 Ga. 575—449.
Gram v. Northern, etc., R. Co., 1 N. Dak. 260—798.
Grand v. Livingston, 4 App. Div. (N. Y.) 589—309.
Grand Rapids, etc., R. Co. v. Boyd, 65 Ind. 526—617, 653.
Grand Rapids, etc., R. Co. v. Ellison, 117 Ind. 234—653, 820.
Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 537—84, 542, 609, 683, 803.
Grand Tower Mfg., etc., R. Co. v. Ullman, 89 Ill. 244—131, 136.
Grand Trunk R. Co. v. Ives, 144 U. S. 408—790.
Grand Trunk R. Co. v. McMillan, 16 Can. Sup. Ct. 543—335, 464, 483, 484.
Grand Trunk R. Co. v. Stevens, 95 U. S. 655—287, 553, 569, 752, 759.
Grand Trunk R. Co. v. Vogel, 11 Can. Sup. Ct. 612—293, 325, 524.
Granier v. Louisiana Western R. Co., 42 La. Ann. 880—567.
Grant v. Baker, 12 Or. 329—798.
Grant v. Newton, 1 E. D. Sm. (N. Y.) 95—704, 708.
Grant v. Northern Pac. R. Co., 22 Ont. Rep. 645—467, 468.
Grant v. Norway, 10 C. B. 665—143, 144, 175.
Grant v. Raleigh, etc., R. Co., 108 N. C. 462—578.
Granville v. Western Union Tel. Co., 37 Iowa, 214—77.
Graven v. MacLeod, 92 Fed. 864—875.
Graves v. Hartford, etc., Steamboat Co., 38 Conn. 143—264.
Graves v. Lake Shore, etc., R. Co., 137 Mass. 33—344, 355, 360, 760.
Graves v. Miami S. S. Co., 29 Misc. Rep. (N. Y.) 645—366.
Graville v. Manhattan R. Co., 105 N. Y. 525—856, 861.
Gravey v. Rhode Island Co., 26 R. I. 90—877.
Gray v. Cincinnati Southern R. Co., 11 Fed. 683—589, 623.
Gray v. Jackson, 51 N. H. 9—236, 312, 463, 472.
Gray v. Metropolitan St. Ry. Co., 39 App. Div. (N. Y.) 536—824.
Gray v. Missouri Riv. Packet Co., 64 Mo. 47—9, 405, 406.
Gray v. Mobile Trade Co., 55 Ala. 387—287, 393, 616.
Gray v. Rochester City, etc., R. Co., 61 Hun (N. Y.), 212—599.
Gray v. St. Louis, etc., R. Co., 54 Mo. App. 666—422.
Grayson County Nat. Bank v. Nashville, etc., R. Co. (Tex. Civ. App.), 79 S. W. 1094—212.
Great Western R. Co. v. Bunch, L. R. 13 App. 31—713.
Great Western R. Co. v. Burns, 60 Ill. 284—93, 107, 108, 247, 253.
Great Northern R. Co. v. Bruyere, 114 Fed. 540—748.

TABLE OF CASES.

(The references are to the pages.)

- Great Northern R. Co. v. Harrison, 10 Exch. 376—561.
 Great Northern R. Co. v. Shepherd, 8 Exch. 30—101, 709.
 Great Northern R. Co. v. Swaffield, L. R. 9 Exch. 132—196.
 Great Western R. Co. v. Braid, 1 Moore, P. C. N. S. 101—611.
 Great Western R. Co. v. Crouch, 3 H. & N. 183—196, 202, 447.
 Great Western R. Co. v. Fawcett, 1 Moo. P. C. N. S. 101—596.
 Great Western R. Co. v. Fawcett, 8 L. T. N. S. 31, 9 Jur. N. S. 339—780.
 Great Western R. Co. v. Glenister, 22 W. R. 72—324, 762, 765.
 Great Western R. Co. v. Hawkins, 18 Mich. 427—316, 497, 499, 503.
 Great Western Despatch, etc., Line v. Glenny, 41 Ohio St. 166—135.
 Great Western R. Co. v. McComas, 33 Ill. 185—231, 363.
 Great Western R. Co. v. Miller, 19 Mich. 305—732, 748, 749.
 Great Western R. Co. v. Redmayne, L. R. 1 C. P. 329—242, 421.
 Great Western R. Co. v. Willis, 18 C. B. N. S. 748—370.
 Great Western R. Co. v. Sutton, L. R. 44 L. 226—915.
 Green Bay First Nat. Bank v. Dearborn, 115 Mass. 219—177, 178.
 Green v. Boston, etc., R. Co., 128 Mass. 221—421.
 Green v. Clark, 12 N. Y. 343—188.
 Green v. Indianapolis, etc., R. Co., 56 Mo. 556—388.
 Green v. Milwaukee, etc., R. Co., 38 Iowa, 100—138, 722, 723.
 Green, etc., Nav. Co. v. Marshall, 48 Ind. 596—277.
 Green v. New York Cent. R. Co., 4 Daly (N. Y.), 553—458, 727.
 Green v. Pennsylvania R. Co., 36 Fed. 66—674.
 Green v. St. John & M. R. Co., 22 N. B. 252—92, 95.
 Greenfield v. Detroit, etc., R. Co., 10 Detroit Leg. N. 256—581, 591, 624, 625.
 Greenfield First Nat. Bank v. Marietta, etc., R. Co., 20 Ohio St. 259—705, 706, 714.
 Greenleaf v. Illinois, etc., R. Co., 29 Iowa, 14—796.
 Greenwich Ins. Co. v. Memphis, etc., Packet Co., 1 Ohio N. P. 126—708.
 Greenwood v. Cooper, 10 La. Ann. 796—131, 144.
 Gregg v. Illinois Cent. R. Co., 147 Ill. 550—207, 262, 266, 270, 281, 443.
 Gregory v. Chicago, etc., R. Co., 100 Iowa, 345—82.
 Gregory v. Stryker, 2 Denio (N. Y.), 628—15.
 Gregory v. Wabash R. Co., 46 Mo. App. 574—240, 260.
 Gregory v. West Midland R. Co., 33 L. J. Exch. 155—325, 503.
 Grestle v. Union Pac. R. Co., 23 Mo. App. 361—857.
 Grey v. Mobile, etc., Trade Co., 55 Ala. 387—618.
 Grey v. New York, etc., R. Co., 30 Hun (N. Y.), 399—736.
 Grieve v. Illinois C. R. Co., 104 Iowa, 659—390.
 Grieve v. New York Cent. R. Co., 25 App. Div. (N. Y.) 518—281.
 Grieve v. North Jersey St. Ry. Co., 64 N. J. L. 409, 47 Atl. 427—854, 855.
 Griffee v. Burlington, etc., R. Co., 2 Int. Com. Rep. 194—920.
 Griffin v. Colver, 16 N. Y. 489—411.
 Griffin v. Great Western R. Co., 15 U. C. Q. B. 507—537.
 Griffin v. Manice, 166 N. Y. 188, 36 Misc. Rep. (N. Y.) 364, 74 App. Div. (N. Y.) 371—83, 84, 656.
 Griffin v. Southern Ry. Co., 65 S. C. 122—895.
 Griffith v. Cave, 22 Cal. 535—53, 789.
 Griffith v. Missouri Pac. R. Co., 98 Mo. 168—572.
 Griffith v. Utica, etc., R. Co., 63 Hun (N. Y.), 626—808.
 Grifhahn v. Kreizer, 62 App. Div. (N. Y.) 414—83.
 Grigsby v. Chappell, 5 Rich. (S. C.) 443—67.
 Grill v. General Iron Screw Collier Co., L. R. 1 C. P. 612—6.
 Grimes v. Pennsylvania Co., 36 Fed. 72—546, 674.
 Grindle v. Eastern Express Co., 67 Me. 317—410, 425.
 Grinnell v. Western Union Tel. Co., 113 Mass. 299—73, 75, 78.
 Grinnell v. Wisconsin Cent. R. Co., 47 Minn. 569—351.
 Griswold v. Chicago, etc., R. Co., 64 Wis. 652—584.
 Griswold v. Haven, 25 N. Y. 595—173.
 Griswold v. Illinois Cent. R. Co., 90 Iowa, 285—315.
 Griswold v. New York, etc., R. Co., 53 Conn. 371—570, 719, 753, 760, 762, 764, 766.
 Griswold v. Webb, 16 R. I. 649—614.
 Groff v. Bloomer, 9 Pa. St. 114—147.
 Grogan v. Adams Express Co., 114 Pa. St. 523—317, 345, 388, 761.
 Grogan v. Brooklyn H. R. Co., 97 App. Div. (N. Y.) 413—643.
 Grossman v. Dodd, 137 N. Y. 599—291, 720.
 Grossman v. Fargo, 6 Hun (N. Y.), 310—276, 281.
 Grosvenor v. New York Cent. R. Co., 39 N. Y. 34—132, 133, 138, 139, 141.
 Grote v. Chester, etc., R. Co., 2 Exch. 251—597, 609.
 Grotsch v. Steinway R. Co., 19 App. Div. (N. Y.) 130—774.
 Grover & B. Sewing Mach. Co. v. Missouri Pac. R. Co., 70 Mo. 672—364, 367, 459.
 Grows v. Maine Cent. R. Co., 67 Me. 100—700.
 Grund v. Pendergast, 58 Barb. (N. Y.) 216—418.
 Guesnard v. Louisville, etc., R. Co., 76 Ala. 453—371, 429, 438.
 Guillaume v. General Transp. Co., 100 N. Y. 491—282, 313.
 Guillaume v. Hamburg & Am. Packet Co., 42 N. Y. 212—179, 320.
 Guina v. Second Ave. R. Co., 67 N. Y. 596, 8 Hun (N. Y.), 494—860, 861.
 Guinn v. Wabash, etc., R. Co., 20 Mo. App. 453—107, 118, 239, 251, 498, 515.
 Gulf City, etc., R. Co. v. Hodge (Tex. Civ. App.), 30 S. W. 829—106.
 Gulf, etc., R. Co. v. A. B. Frank Co. (Tex.), 48 S. W. 210—185.
 Gulf, etc., R. Co. v. Adair (Tex. App.), 14 S. W. 1076—206.

TABLE OF CASES.

(The references are to the pages.)

- Gulf, etc., R. Co. v. Adam, 3 Tex. Civ. App. Cas. sec. 422—737.
 Gulf, etc., R. Co. v. Asmore, 88 Ga. 529—731.
 Gulf, etc., R. Co. v. Baird, 74 Tex. 256—460, 494.
 Gulf, etc., R. Co. v. Batte (Tex. Civ. App.), 81 S. W. 813—405.
 Gulf, etc., R. Co. v. Baugh (Tex. Civ. App.), 42 S. W. 245—191.
 Gulf, etc., R. Co. v. Bell (Tex. Civ. App.), 58 S. W. 614—611.
 Gulf, etc., R. Co. v. Boston, 4 Tex. Civ. App. Cas. sec. 66—198, 350.
 Gulf, etc., R. Co. v. Butler (Tex. Civ. App.), 73 S. W. 84—520, 521.
 Gulf, etc., R. Co. v. Campbell, 76 Tex. 174—551, 584.
 Gulf, etc., R. Co. v. Clark, 2 Tex. App. Civ. Cas. secs. 511, 512—183, 359, 360, 398, 401, 420.
 Gulf, etc., R. Co. v. Clarke, 5 Tex. Civ. App. 547—208, 332.
 Gulf, etc., R. Co. v. Cole, 8 Tex. Civ. App. 636—368, 572.
 Gulf, etc., R. Co. v. Compton (Tex. Civ. App.), 38 S. W. 220—141.
 Gulf, etc., R. Co. v. Copeland, 17 Tex. Civ. App. 55—74.
 Gulf, etc., R. Co. v. Crossman, 11 Tex. Civ. App. 622—482.
 Gulf, etc., R. Co. v. Daniels (Tex. Civ. App.), 29 S. W. 426—888.
 Gulf, etc., R. Co. v. Darby (Tex. Civ. App.), 67 S. W. 129—251.
 Gulf, etc., R. Co. v. Dawkins, 77 Tex. 228—577.
 Gulf, etc., R. Co. v. Dinwiddie, 21 Tex. Civ. App. 339—368.
 Gulf, etc., R. Co. v. Dunman (Tex. Civ. App.), 81 S. W. 789—401, 530.
 Gulf, etc., R. Co. v. Dwyer, 75 Tex. 572, 84 Tex. 194—205, 206, 453, 494.
 Gulf, etc., R. Co. v. Eddins, 7 Tex. Civ. App. 116—318, 489, 576.
 Gulf, etc., R. Co. v. Edloff, 89 Tex. 154—469, 482, 492.
 Gulf, etc., R. Co. v. Elliott (Tex. Civ. App.), 26 S. W. 636—333.
 Gulf, etc., R. Co. v. Ellison, 70 Tex. 491—30, 32, 497, 515.
 Gulf, etc., R. Co. v. Forst (Tex. Civ. App.), 34 S. W. 167—409.
 Gulf, etc., R. Co. v. Fort Grain Co. (Tex. Civ. App.), 73 S. W. 845—987.
 Gulf, etc., R. Co. v. Fowler, 12 Tex. Civ. App. 683—217.
 Gulf, etc., R. Co. v. Fox (Tex.), 6 S. W. 569—678.
 Gulf, etc., R. Co. v. Freeman, 4 Tex. Civ. App. Cas. sec. 245—181.
 Gulf, etc., R. Co. v. Gatewood, 79 Tex. 89—255, 328, 332, 336, 482.
 Gulf, etc., R. Co. v. Gilbert, 4 Tex. Civ. App. 366—422, 426.
 Gulf, etc., R. Co. v. Godair, 3 Tex. Civ. App. 514—407, 453, 466.
 Gulf, etc., R. Co. v. Golding, 3 Tex. App. Civ. Cas. sec. 33—460, 482.
 Gulf, etc., R. Co. v. Gray, 87 Tex. 312—505.
 Gulf, etc., R. Co. v. Griffith (Tex. Civ. App.), 24 S. W. 362—460, 476.
 Gulf, etc., R. Co. v. Harris (Tex. Civ. App.), 72 S. W. 71—482, 536.
 Gulf, etc., R. Co. v. Head (Tex. App.), 15 S. W. 504—673, 689, 887, 902.
 Gulf, etc., R. Co. v. Henry, 84 Tex. 678—559, 565.
 Gulf, etc., R. Co. v. Hodge, 10 Tex. Civ. App. 543—243, 369, 418, 873.
 Gulf, etc., R. Co. v. Holbrook (Tex. Civ. App.), 33 S. W. 1028—744.
 Gulf, etc., R. Co. v. Holden, 10 Tex. Civ. App. 223—387.
 Gulf, etc., R. Co. v. Holt (Tex. Civ. App.), 70 S. W. 519—697.
 Gulf, etc., R. Co. v. Houghton (Tex. Civ. App.), 63 S. W. 718—520.
 Gulf, etc., R. Co. v. Hume, 87 Tex. 211, 6 Tex. Civ. App. 653—106, 109, 246, 333, 416, 417, 499.
 Gulf, etc., R. Co. v. Insurance Co. of N. A. (Tex. Civ. App.), 28 S. W. 237—460, 472, 488.
 Gulf, etc., R. Co. v. Ions, 3 Tex. Civ. App. 619—710.
 Gulf, etc., R. Co. v. Irvine & Woods (Tex. Civ. App.), 73 S. W. 540—368, 499.
 Gulf, etc., R. Co. v. Jackson (Tex. App.), 15 S. W. 128—724, 729.
 Gulf, etc., R. Co. v. Jacobs, 3 Tex. Civ. App. Cas. 485—372.
 Gulf, etc., R. Co. v. Jones, 1 Ind. Ter. 354—461, 468.
 Gulf, etc., R. Co. v. Kemp (Tex. Civ. App.), 30 S. W. 714—407, 508.
 Gulf, etc., R. Co. v. Key, 4 Tex. App. Civ. Cas. sec. 257—350.
 Gulf, etc., R. Co. v. Killebrew (Tex.), 20 S. W. 182—596, 874.
 Gulf, etc., R. Co. v. Leatherwood (Tex. Civ. App.), 69 S. W. 118—484, 519.
 Gulf, etc., Ry. Co. v. Lee (Tex. Civ. App.), 65 S. W. 54—522.
 Gulf, etc., R. Co. v. Levi, 76 Tex. 337—33, 227, 255.
 Gulf, etc., R. Co. v. Lewine (Tex. Civ. App.), 29 S. W. 835—469.
 Gulf, etc., R. Co. v. Looney, 85 Tex. 158—565, 587.
 Gulf, etc., R. Co. v. Loonie, 84 Tex. 289—207, 416, 425.
 Gulf, etc., R. Co. v. Maetze, 2 Tex. Civ. App. Cas. sec. 630—198, 318, 382, 426.
 Gulf, etc., R. Co. v. Malone (Tex. Civ. App.), 25 S. W. 1077—482.
 Gulf, etc., R. Co. v. Martin (Tex. Civ. App.), 28 S. W. 576—369, 418, 424.
 Gulf, etc., R. Co. v. McAuley (Tex. Civ. App.), 26 S. W. 475—106, 412.
 Gulf, etc., R. Co. v. McCarty, 82 Tex. 608—304, 332, 405.
 Gulf, etc., R. Co. v. McCorquodale, 71 Tex. 41—109, 243, 251, 513.
 Gulf, etc., R. Co. v. McGown, 65 Tex. 640—569, 754, 761, 764, 766.
 Gulf, etc., R. Co. v. McCown (Tex. Civ. App.), 25 S. W. 435—166, 206.
 Gulf, etc., R. Co. v. Miami Steamship Co., 86 Fed. 407—909, 917, 930, 931.
 Gulf, etc., R. Co. v. Moody (Tex. Civ. App.), 30 S. W. 574—589, 591, 725.
 Gulf, etc., R. Co. v. Moore (Tex. Civ. App.), 83 S. W. 362—880.
 Gulf, etc., R. Co. v. North Texas Grain Co. (Tex. Civ. App.), 74 S. W. 567—446.
 Gulf, etc., R. Co. v. Pettit, 3 Tex. Civ. App. 588—424, 425.
 Gulf, etc., R. Co. v. Pickens (Tex. Civ. App.), 58 S. W. 156—183.
 Gulf, etc., R. Co. v. Pierce, 7 Tex. Civ. App. 597—810.

TABLE OF CASES.

(The references are to the pages.)

- Gulf, etc., R. Co. v. Pomeroy, 67 Tex. 498—611.
 Gulf, etc., R. Co. v. Porter (Tex. Civ. App.), 61 S. W. 343—512, 513.
 Gulf, etc., R. Co. v. Rather, 3 Tex. Civ. App. 72—744.
 Gulf, etc., R. Co. v. Roberts (Tex. Civ. App.), 88 S. W. 479—399.
 Gulf, etc., R. Co. v. Rowland, 82 Tex. 166—802, 804.
 Gulf, etc., R. Co. v. Ryan, 4 Tex. App. Civ. Cas. sec. 305—667.
 Gulf, etc., R. Co. v. Shelton (Tex. Civ. App.), 69 S. W. 653, 70 S. W. 359—630, 818.
 Gulf, etc., R. Co. v. Sparger (Tex. Civ. App.), 39 S. W. 1051—734.
 Gulf, etc., R. Co. v. Stanley (Tex. Civ. App.), 29 S. W. 806—407.
 Gulf, etc., R. Co. v. Stanley (Tex.), 33 S. W. 110—333, 526.
 Gulf, etc., R. Co. v. Simmons (Tex. Civ. App.), 28 S. W. 825—409.
 Gulf, etc., R. Co. v. Tennant (Tex. Civ. App.), 22 S. W. 761—482.
 Gulf, etc., R. Co. v. Thompson (Tex. Civ. App.), 21 S. W. 186—482.
 Gulf, etc., R. Co. v. Trawick, 68 Tex. 314—318, 331, 333, 334, 337.
 Gulf, etc., R. Co. v. Trawick, 80 Tex. 270—131, 142, 260, 501, 516.
 Gulf, etc., R. Co. v. Ware & Walker (Tex. Civ. App.), 78 S. W. 961—520.
 Gulf, etc., R. Co. v. White (Tex. Civ. App.), 32 S. W. 323—332.
 Gulf, etc., R. Co. v. Wilbanks, 7 Tex. Civ. App. 489—482.
 Gulf, etc., R. Co. v. Wilhelm, 3 Tex. App. Civ. Cas., sec. 458—318, 503, 504.
 Gulf, etc., R. Co. v. Williams 70 Tex. 159—670.
 Gulf, etc., R. Co. v. Wilson, 79 Tex. 371—540, 552, 570, 578, 892.
 Gulf, etc., R. Co. v. Wilson, 7 Tex. Civ. App. 128—482, 492.
 Gulf, etc., R. Co. v. Wood (Tex. Civ. App.), 30 S. W. 715—307, 501.
 Gulf, etc., R. Co. v. Wood (Tex. Civ. App.), 63 S. W. 164—610.
 Gulf, etc., R. Co. v. Wright, 1 Tex. Civ. App. 402—304, 335, 369, 402.
 Gulf, etc., R. Co. v. Wright, 2 Tex. Civ. App. 463—567.
 Gulf, etc., R. Co. v. Yates (Tex. Civ. App.), 32 S. W. 335—525.
 Gulf, etc., R. Co. v. York, 2 Tex. App. Civ. Cas., sec. 812—502, 526.
 Gulf, etc., R. Co. v. Zimmerman, 81 Tex. 605—396.
 Gulliver v. Adams Express Co., 38 Ill. 503—35, 149, 196.
 Guizlioni v. Tyler, 64 Cal. 334—810.
 Gumb v. Twenty-Third St. Ry. Co., 58 N. Y. Super. Ct. 1—783.
 Gumby v. Metropolitan St. Ry. Co., 171 N. Y. 635—823.
 Gurley v. Armstead, 148 Mass. 267—216.
 Gurney v. Behrend, 3 El. & Bl. 622—165, 170.
 Gurney v. Grand Trunk R. Co., 14 N. Y. Supp. 321—706.
 G. S. Roth Clothing Co. v. Maine S. S. Co., 44 Misc. Rep. (N. Y.) 237—411.
 Guthrie v. Louisville, etc., R. Co., 11 Lea (Tenn.), 372—609.
 Guy v. New York, etc., R. Co., 30 Hun (N. Y.), 399—737, 739.
 Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co., 128 N. C. 280—334.
- H.
- Haas v. Kansas City, etc., R. Co., 228, 955.
 Haase v. Oregon R., etc., Co., 19 Or. 354—561, 564, 583, 843.
 Hackett v. Boston, etc., R. Co., 35 N. H. 390—399, 408, 410.
 Hadd v. United States, etc., Express Co., 56 Vt. 335—460, 472.
 Hadley v. Baxendale, 9 Exch. 341—422, 425.
 Hadley v. Clark, 8 T. R. 259—13, 243, 250.
 Hadley v. Cross, 34 Vt. 586—607.
 Hagan v. Providence, etc., R. Co., 3 R. I. 88—899, 900.
 Hagenlocher v. Coney Island, etc., R. Co., 99 N. Y. 136—808.
 Haines v. Chicago, etc., R. Co., 29 Minn. 160—708, 709.
 Halden v. Great Western R. Co., 30 U. C. C. P. 89—837.
 Hale v. Barrett, 26 Ill. 195—442, 443.
 Hale v. Bonner, 82 Tex. 33—421.
 Hale v. Grand Trunk R. Co., 60 Vt. 605—578.
 Hale v. Missouri Pac. R. Co., 35 Neb. 266—509.
 Hale v. New Jersey Steam Nav. Co., 15 Conn. 539—65, 66, 220, 287, 309, 310, 754, 925.
 Hales v. London, etc., R. Co., 4 B. & S. 66—104, 240, 241, 242, 416.
 Haley v. Chicago, etc., R. Co., 21 Iowa, 15—732.
 Hallahan v. New York, etc., R. Co., 102 N. Y. 194—812, 871.
 Halliday v. St. Louis, etc., R. Co., 74 Mo. 159—169, 338, 465, 484.
 Hallihan v. Hannibal, etc., R. Co., 71 Mo. 113—611.
 Hall v. Boston, etc., R. Co., 14 Allen (Mass.), 439—147, 179, 180.
 Hall v. Cedar Rapids, etc., R. Co., 115 Iowa, 8—807.
 Hall v. Cheney, 36 N. H. 26—102, 288, 388.
 Hall v. Connecticut River Steamboat Co., 13 Conn. 324, 319—65, 616, 652.
 Hall v. Dimond, 63 N. H. 565—428, 443.
 Hall v. Grand Trunk R. Co., 34 U. C. Q. B. 517—265.
 Hall v. McFadden, 19 New Bruns. 340—669, 675.
 Hall v. Murdock, 119 Mich. 392, 114 Mich. 233—84, 810.
 Hall v. Northeastern R. Co., L. R. 10 Q. B. 437, 443—485, 754, 758.
 Hall v. Ogden City St. R. Co., 13 Utah 243—596.
 Hall v. Pennsylvania R. Co., 1 Fed. 226, 13 Wall. (U. S.) 367—21, 228, 254.
 Hall v. Renford, 3 Metc. (Ky.) 51—24.
 Hall v. Smith, 2 Bing. C. P. 156—72.
 Hall v. South Carolina R. Co., 28 S. C. 261—689, 898.
 Hall v. Wabash R. Co., 80 Mo. App. 463—457.
 Ham v. Delaware, etc., Canal Co., 155 Pa. 548, 142 Pa. St. 617—689, 736.
 Haman v. Omaha Ry. Co., 35 Neb. 74—635.
 Hamburg American Packet Co. v. Gattman, 127 Ill. 598—705, 707, 708.
 Hamel v. Brooklyn, etc., Ferry Co., 53 Hun (N. Y.), 634—639.
 Hamil v. New York, etc., Exp. Co., 177 Mass. 474—372.

TABLE OF CASES.

lix

(The references are to the pages.)

- Hamilton v. Chicago, etc., R. Co.**, 103 Iowa, 325—315.
Hamilton v. Grand Trunk R. Co., 23 U. C. Q. B. 600—325.
Hamilton v. Great Falls St. R. Co., 17 Mont. 334—657, 770, 778.
Hamilton v. McPherson, 28 N. Y. 72—410, 422.
Hamilton v. New York Cent. R. Co., 51 N. Y. 100—558, 741.
Hamilton v. Texas, etc., R. Co., 64 Tex. 251—584, 585.
Hamilton v. Third Ave. R. Co., 53 N. Y. 25—543, 631, 748, 831, 896, 898.
Hamilton v. Western North Carolina R. Co., 96 N. C. 398—109, 111, 255, 301, 422, 516.
Hamilton v. West End St. R. Co., 163 Mass. 199—612.
Hamlin v. Great Northern R. Co., 1 H. & N. 408—691, 881, 884.
Hammond v. North Eastern R. Co., 6 S. C. 130—578, 580.
Hampton v. Pullman Palace Car Co., 42 Mo. App. 134—56, 57.
Hance v. Pacific Express Co., 48 Mo. App. 179—388, 393, 510.
Hance v. Wabash Western R. Co., 56 Mo. App. 476—302, 303, 305, 475, 483.
Hancock v. Leggett, 115 Ind. 544—808.
Hand v. Baynes, 4 Whart. (Pa.) 204, 214—13, 104, 243, 299, 412.
Hanley v. Kansas City S. Ry. Co., 187 U. S. 617—908.
Hanley v. North Jersey St. R. Co. (N. J. Sup.), 47 Atl. 445—904.
Hanlon v. Illinois Cent. R. Co., 109 Iowa, 136—565.
Hanlon v. Milwaukee, etc., R. Co. (Wis.), 95 N. W. 100—374.
Hanlon v. South Boston, etc., R. Co., 129 Mass. 31—736.
Hanley v. Harlem R. Co., 1 Edm. Sel. Cas. (N. Y.) 395, 225—597, 601, 606.
Hanley v. Houston, etc., R. Co., 2 Tex. Unrep. Cas. 282—571.
Hanna v. Nassau El. R. Co., 18 App. Div. (N. Y.) 137—547.
Hannibal, etc., R. Co. v. Husen, 95 U. S. 469—905.
Hannibal, etc., R. Co. v. Martin, 111 Ill. 219—545, 549, 692, 817, 869, 882, 892.
Hannibal, etc., R. Co. v. Swift, 12 Wall. (U. S.) 262—45, 101, 619, 624, 701, 706, 708, 709, 711, 712.
Hannon v. St. Louis Transit Co. (Mo.), 77 S. W. 158—852.
Hanrahan v. Manhattan R. Co., 53 Hun (N. Y.), 420—613, 804.
Hansberger v. Sedalia El., etc., Co., 82 Mo. App. 566—657, 838.
Mansen v. Flint, etc., R. Co., 73 Wis. 346—367, 451, 477.
Hansley v. Jamesville, etc., R. Co., 115 N. C. 602—546, 554.
Hansen v. North Jersey St. Ry. Co., 64 N. J. L. 636—655, 657.
Hanson v. European, etc., R. Co., 62 Me. 84—626, 636, 901.
Hanson v. Urbana, etc., R. Co., 75 Ill. App. 474—628.
Hanson v. Lancashire, etc., R. Co., 20 W. R. 297—773.
Hanson v. Mansfield R., etc., Co., 38 La. Ann. 111—814, 854, 855.
Hanson v. Mayfield R., etc., Co., 38 La. Ann. 111—816, 817.
Hanson v. Third Ave. R. Co., 27 Misc. Rep. (N. Y.) 524—840.
Hapgood Plow Co. v. Wabash R. Co., 61 Mo. App. 372—284.
Harbison v. Metropolitan R. Co., 24 Wash. L. Rep. 438—589, 857.
Hardenbergh v. St. Paul, etc., R. Co., 39 Minn. 3—553, 695, 751.
Harding v. International Nav. Co., 12 Fed. 168—458.
Harding v. New York Cent., etc., R. Co., 36 Hun (N. Y.), 72—892, 895.
Harding v. Townshend, 43 Vt. 536—904.
Hardin v. Fort Worth, etc., R. Co. (Tex. Civ. App.), 77 S. W. 431—554, 654.
Hardy v. American Express Co., 182 Mass. 328—203.
Hardy v. Minneapolis, etc., R. Co., 56 Fed. 657—903.
Hardy v. North Carolina Cent. R. Co., 74 N. C. 734—806.
Harrell v. Owens, 1 Dev. & B. (N. C.) 273—24, 92, 240.
Harrell v. Wilmington, etc., R. Co., 106 N. C. 258—139, 140, 369.
Hardman v. Brett, 37 Fed. 803—416.
Hardman v. Montana U. R. Co., 48 U. S. App. 570—263, 265.
Hardman v. Willcock, 9 Bing. 382—156.
Harker v. Dement, 9 GIII (Md.), 13—87, 156, 234.
Harkness v. Western Union Tel. Co., 73 Iowa, 190—76.
Harmony v. Bingham, 12 N. Y. 99—127, 243, 244.
Harmon v. New York, etc., R. Co., 23 Barb. (N. Y.) 323—358.
Harned v. Missouri Pac. R. Co., 51 Mo. App. 482—335, 337, 339.
Harp v. Choctaw, etc., Ry. Co. (U. S. C. Ark.), 118 Fed. 169—23.
Harp v. Southern Ry. Co., 119 Ga. 927—555, 731.
Harp v. The Grand Era, 1 Woods (U. S.), 186, 184—458, 728.
Harper v. Railroad Co., 37 Conn. 272—393.
Harris v. Cheshire R. Co. (R. I.), 16 Atl. 512—476, 492.
Harris v. Delaware, etc., R. Co., 61 N. Y. 656—398.
Harris v. Detroit City R. Co., 76 Mich. 227—808.
Harris v. Grand Trunk R. Co., 15 R. I. 371—460.
Harris v. Great Western R. Co., 1 Q. B. Div. 515—278, 296.
Harris v. Hannibal, etc., R. Co., 89 Mo. 233—866.
Harris v. Howe, 74 Tex. 534—754.
Harris v. Jex, 55 N. Y. 421—267.
Harris v. Louisville, etc., R. Co., 35 Fed. 116—640.
Harris v. Midland R. Co., 25 W. R. 63—325.
Harris v. Minneapolis, etc., R. Co., 36 Misc. Rep. (N. Y.) 181—457.
Harris v. Northern Indiana R. Co., 20 N. Y. 232—502, 504.
Harris v. Pratt, 17 N. Y. 249—149.
Harris v. Packard, 3 Taunt. 264—127, 341, 393, 396, 397.
Harris v. Panama R. Co., 5 Bosw. (N. Y.) 312—398.
Harris v. Pittsburg, etc., R. Co., 32 Ind. App. 600—670.
Harris v. Rand, 4 N. H. 259—126, 222.
Harris v. Stevens, 31 Vt. 79—562.
Harrison v. Fink, 42 Fed. 787—553, 557, 635, 890.
Harrison v. London, etc., R. Co., 110 E. C. L. 122—82, 325, 523, 781.
Harrison v. Midland R. Co., 62 L. J. Q. B. 225—96, 433, 534.
Harrison v. Missouri Pac. R. Co., 74 Mo. 364—243, 250, 301, 369, 371, 499, 507.
Harrison v. Roy, 39 Miss. 396—62, 64.

TABLE OF CASES.

(The references are to the pages.)

- Harrison v. Stewart, Taney's Dec. (U. S.) 485—427.
 Harrison v. Weir, 71 App. Div. (N. Y.) 248—81.
 Harrington v. McShane, 2 Watts (Pa.) 443—7, 66, 202.
 Hart v. Allen, 2 Watts (Pa.) 114—66.
 Hart v. Baxendale, 16 L. T. N. S. 390, 6 Exch., 769—100, 139.
 Hart v. Chicago, etc., R. Co., 69 Iowa, 485, 58 Iowa, 166—21, 315, 380, 511, 518, 753.
 Hart v. Hudson R. Bridge Co., 80 N. Y. 622—738.
 Hart v. Hudson River R. Co., 84 N. Y. 56—796.
 Hart v. Hyde, 5 Vt. 328—364.
 Hart v. Metropolitan St. R. Co., 34 Misc. Rep. (N. Y.) 531—592, 631, 748.
 Hart v. Metropolitan St. Ry. Co., 65 App. Div. (N. Y.) 493—633.
 Hart v. Pennsylvania R. Co., 112 U. S. 331, 18 Am. & Eng. R. Cas. 604—341, 356, 359, 528, 758, 769.
 Hart v. Rensselaer, etc., R. Co., 8 N. Y. 37—471, 727.
 Hart v. Spalding, 1 Cal. 213—411.
 Hart v. St. Louis, etc., R. Co., 94 Mo. 255—678.
 Hart v. Western Union Tel. Co., 66 Cal. 579—73, 78.
 Hart v. Western, etc., R. Co., 13 Metc. (Mass.) 99—21, 273.
 Hartan v. Eastern R. Co., 114 Mass. 44—728.
 Hartley v. St. Louis, etc., R. Co. (Iowa), 89 N. W. 88—481, 535.
 Hartman v. Louisville, etc., R. Co., 39 Mo. App. 88—187, 262, 269, 309.
 Hartshorn v. Johnson, 7 N. J. L. 108—431.
 Hartwell v. Northern Pac. Express Co., 5 Dak. 463—299, 314, 333, 337, 754, 757.
 Hartwig v. Chicago, etc., R. Co., 49 Wis. 358—672, 873.
 Hartv v. New York, etc., R. Co., 95 App. Div. (N. Y.) 119—663.
 Hartzig v. Lehigh Valley R. Co., 155 Pa. St. 364—817, 844.
 Harvard Co. v. Pennsylvania Co., 3 Int. Com. Rep. 257—912.
 Harvey v. Connecticut, etc., River R. Co., 124 Mass. 421—417, 424.
 Harvey v. Dunlop, Hill & D. Supp. (N. Y.) 193—610.
 Harvey v. Eastern R. Co., 116 Mass. 269—836.
 Harvey v. Louisville, etc., R. Co., 3 Int. Com. Rep. 793—920.
 Harvey v. Rose, 26 Ark. 3—52, 53.
 Harvey v. Terre Haute, etc., R. Co., 74 Mo. 541, 538—317, 344, 356, 393, 408.
 Haselton v. Portsmouth, etc., St. Ry., 71 N. H. 589—545, 595.
 Hasson v. Nassau Elec. Ry. Co., 34 App. Div. (N. Y.) 71—858.
 Haslam v. Adams Express Co., 6 Bosw. (N. Y.) 235—35, 193, 209.
 Hasse v. American Express Co., 94 Mich. 133—201, 264.
 Hastings v. Boland (Mich.), 98 N. W. 1017—853.
 Hastings v. Central Crosstown R. Co., 7 App. Div. (N. Y.) 812—774, 858.
 Hastings v. New York, etc., R. Co., 53 Hun (N. Y.), 638—353, 515.
 Hastings v. Northern Pac. R. Co., 53 Fed. 224—819, 830.
 Hastings v. Pepper, 11 Pick. (Mass.) 41—32, 65, 66, 376.
 Hatch v. Pullman Sleeping Car Co. (Tex. Civ. App.), 84 S. W. 246—57.
- Hattan v. Railroad Co., 39 Ohio St. 375—558.
 Hathaway v. Hayes, 124 Mass. 311—172.
 Hathorn v. Ely, 28 N. Y. 78—269.
 Haug v. Great Northern R. Co., 8 N. Dak. 23—684, 689.
 Havemeyer v. Iowa County, 3 Wall. (U. S.) 294—267.
 Haver v. Central R. Co., 62 N. J. L. 236—543, 637.
 Haverly v. State Line, etc., R. Co., 125 Pa. St. 50—257.
 Hawcroft v. Great Northern R. Co., 8 Eng. L. Eq. 362—666.
 Hawcroft v. Great Northern R. Co., 16 Jur. 196—243.
 Hawes v. Burlington, etc., Ry. Co., 64 Iowa, 315—798.
 Hawes v. Southeastern R. Co., 54 L. J. Q. B. Div. 174—241.
 Hawkins v. Front St. Cable R. Co., 3 Wash. 592—771, 865.
 Hawkins v. Great Western R. Co., 17 Mich. 57—316, 351, 352, 760.
 Hawkins v. Hoffman, 6 Hill (N. Y.), 586, 588—54, 179, 216, 358, 701, 706, 708, 712.
 Hawley v. Screvens, 62 Ga. 347—468, 728.
 Haycroft v. Lake Shore, etc., R. Co., 2 Hun (N. Y.), 491—822.
 Hayden v. Davis, 9 Cal. 573—229.
 Haygood v. 1,310 Tons of Coal, 21 Fed. 681—429.
 Hayman v. Canadian Pac. R. Co., 43 Misc. Rep. (N. Y.) 74—209.
 Hayman v. Pennsylvania R. Co., 118 Pa. St. 508—772.
 Hayman v. Philadelphia, etc., R. Co., 8 St. Rep. (N. Y.) 86—534.
 Hayes v. Great Western R. Co., 41 L. T. N. S. 436—325.
 Hayes v. Wabash R. Co., 54 Mo. App. 582—500, 503.
 Haynie v. Baylor, 18 Tex. 498—22, 62.
 Haywood v. Daves, 81 N. C. 8—267.
 Hayward v. Grand Trunk R. Co., 32 U. C. Q. B. 392—437, 443.
 Hayes v. Campbell, 63 Cal. 143—313, 434.
 Hayes v. Forty-second St., etc., R. Co., 97 N. Y. 259—663, 777, 782, 794, 865.
 Hayes v. Gainesville St. R. Co., 70 Tex. 602—617.
 Hayes v. Kennedy, 2 Pittsb. (Pa.) 262—353.
 Hayes v. New York Cent., etc., R. Co., 34 Hun (N. Y.), 627—733.
 Hayes v. Paul, 51 Pa. St. 134—51.
 Hayes v. Railroad Co., 111 U. S. 228—600.
 Hayes v. St. Louis R. Co., 15 Mo. App. 583—802.
 Hayes v. Wells, Fargo & Co., 23 Cal. 185—33, 356, 358, 360.
 Hayes v. Houston, etc., R. Co., 46 Tex. 272—899, 900.
 Hays v. Michigan Cent. R. Co., 111 U. S. 228—786, 794.
 Hays v. Miller, 77 Pa. St. 238—51.
 Hays v. Monille, 14 Pa. St. 48—440.
 Hays v. Pennsylvania Co., 12 Fed. 309—123, 918.
 Hays v. Riddle, 1 Sandf. (N. Y.) 248—443.
 Hays v. Wabash R. Co., 51 Mo. App. 438—672.
 Hazard v. Chicago, etc., R. Co., 1 Biss. (U. S.) 503—682, 626, 652.
 Hazel v. Chicago, etc., R. Co., 82 Iowa, 477—299, 309, 314.
 Hazelton v. Portsmouth, etc., R. Co., 71 N. H. 589—545.
 Hazman v. Hoboken Land, etc., Co., 2 Daly (N. Y.), 130—670, 854.
 H. C. Judd & Root v. New York, etc., S. Co., 130 Fed. 991—283.

TABLE OF CASES.

(The references are to the pages.)

- Head v. Georgia, etc., R. Co., 79 Ga. 673—744.
 Heazle v. Indianapolis, etc., R. Co., 76 Ill. 501—780, 787.
 Heath v. Glens Falls, etc., St. Ry. Co., 90 Hun (N. Y.), 560—518.
 Heaton v. Morgan's La., etc., S. Co., 1 Tex. App. Civ. Cas. sec. 774—318.
 Heath v. South Bound R. Co., 46 S. C. 104—267.
 Heckle v. Southern Pac. Co., 123 Cal. 441—809.
 Heck v. Missouri Pac. R. Co., 51 Mo. App. 532—388.
 Heck v. East Tennessee, etc., R. Co., 1 Int. Com. Rep. 775—915.
 Heddles v. Railroad Co., 77 Wis. 228—893.
 Hedges v. Hudson River R. Co., 49 N. Y. 223—264, 268, 270.
 Hedges v. Wilmington, etc., R. Co., 73 N. C. 558—803.
 Hedding v. Gallagher, 72 N. H. 377—615.
 Heenrich v. Pullman Palace Car Co., 20 Fed. 100—627.
 Heffron v. Detroit City R. Co., 92 Mich. 406—565.
 Hegeman v. Boyd, 65 Ind. 526—601.
 Hegeman v. Western R. Corp., 13 N. Y. 22, 9, 16 Barb. (N. Y.) 552—542, 595, 598, 603, 607, 608, 609, 616, 769, 781, 893.
 Heil v. St. Louis, etc., R. Co., 16 Mo. App. 363—393, 408.
 Heineman v. Grand Trunk R. Co., 31 How. Pr. (N. Y.) 430—24, 320, 505, 529.
 Heinlien v. Boston, etc., R. Co., 147 Mass. 136—562.
 Heirn v. McCaughan, 32 Miss. 17—691, 881, 885, 897.
 Heller v. Chicago, etc., R. Co. (Mich.), 66 N. W. 667—507, 510.
 Hellwell v. Grand Trunk R. Co., 10 Biss. (U. S.) 170—106, 107.
 Hellman v. Holladay, 1 Wollw. (U. S.) 365—708.
 Helm v. Missouri Pac. R. Co. (Mo. App.), 72 S. W. 148—520.
 Hemingway v. Chicago, etc., R. Co., 72 Wis. 668—671, 672, 812, 822, 848, 849.
 Hemphill v. Chenie, 6. W. & S. (Pa.) 62—149, 193, 195.
 Hemstead v. New York Cent. R. Co., 28 Barb. (N. Y.) 485—465, 488.
 Hendrick v. Boston, etc., R. Co., 170 Mass. 44—409.
 Hendricks v. Sixth Ave. R. Co., 44 N. Y. Super. Ct. 8—644, 811, 898.
 Hendrix v. Kansas City, etc., R. Co., 45 Kan. 377—560, 583.
 Hendrix v. Wabash R. Co. (Mo. App.), 80 S. W. 970—304, 522.
 Henderson v. Louisville, etc., R. Co., 20 Fed. 430—713.
 Henderson v. Maid of Orleans, 12 La. Ann. 352—408.
 Henderson v. Nassau Electric R. Co., 46 App. Div. (N. Y.) 280—368.
 Henderson v. New York, 92 U. S. 259—905.
 Henderson v. Three Hundred Tons of Iron Ore, 38 Fed. 36—218.
 Henderson v. Walker, 55 Ga. 481—40.
 Hennessy v. St. Louis, etc., R. Co., 173 Mo. 86—697.
 Hennewell v. Taber, 2 Sprague (U. S.), 1—31.
 Henning v. Louisville Ry. Co., 24 Ky. L. Rep. 2419—853.
 Henry v. Canadian Pac. R. Co., 1 Manitoba, 210—325, 389.
 Henry v. Central R., etc., Co., 89 Ga. 815—410, 416.
 Henry v. Cleveland, etc., R. Co., 67 Fed. 426—379.
 Henry v. St. Louis, etc., R. Co., 76 Mo. 288—887.
 Henry Sonneborn & Co. v. Southern Ry. Co., 65 S. C. 500—611.
 Hepworth v. Union Ferry Co., 62 Hun (N. Y.), 257—631.
 Heribich v. North Jersey St. Ry. Co., 67 N. J. L. 574—663.
 Herbrick v. Carr, 29 Fed. 298—556.
 Herdt v. Rochester City, etc., R. Co., 65 Hun (N. Y.), 625—599.
 Herf Frerichs Chemical Co. v. Lackawana Line (Mo. App.), 73 S. W. 346—150.
 Herring v. Chesapeake, etc., R. Co. (Va.), 45 S. E. 322—222, 472.
 Hermann v. Goodrich, 21 Wis. 536—154, 275, 277, 488, 489.
 Herne v. Garton, 12 El. & El. 66—383.
 Hernsheim v. New Port News, etc., R. Co. (Ky.), 35 S. W. 1115—94, 248.
 Herrick v. Gallagher, 60 Barb. (N. Y.) 566—203.
 Herscherberger v. Lynch, 11 Atl. Rep. (Pa.) 642—793.
 Hersfield v. Adams, 19 Barb. (N. Y.) 577—35, 36.
 Hestine v. Lehigh Valley R. Co., 151 Pa. St. 241, 244—771, 776, 793.
 Hess v. Missouri Pac. R. Co., 40 Mo. App. 202—335, 403.
 Hestonville, etc., R. Co. v. Kelly, 102 Pa. St. 115—611.
 Hestonville Pass. Ry. Co. v. Connell, 88 Pa. St. 520—825.
 Hett v. Boston, etc., R. Co. (N. H.), 44 Atl. 910—214.
 Heugh v. London, etc., R. Co., L. R. 5 Exch. 51—148, 158.
 Hewett v. Chicago, etc., R. Co., 63 Iowa, 611—186, 223, 247, 257, 459, 463, 487.
 Hewes v. Philadelphia, etc., R. Co., 76 Md. 154—793.
 Hewson v. Interurban St. Ry. Co., 95 App. Div. (N. Y.) 112—631.
 Heyde v. St. Louis Transit Co., 102 Mo. App. 537—654, 779.
 Heyl v. Inman Steamship Co., 14 Hun (N. Y.), 564—256.
 Heyman v. Philadelphia, etc., R. Co., 54 N. Y. Super. Ct. 158—509, 534.
 Hezel Milling Co. v. St. Louis, etc., R. Co., 3 Int. Com. Rep. 701—920.
 Hibbard v. New York, etc., R. Co., 15 N. Y. 455—555, 589, 630, 700, 731, 735.
 Hibbard v. Western Union Tel. Co., 33 Wis. 565—74.
 Hibernal Ins. Co. v. St. Louis Transp. Co., 120 U. S. 166—353.
 Hick v. Missouri Pac. R. Co., 51 Mo. App. 532—316.
 Hickox v. Naugatuck R. Co., 31 Conn. 281—704, 721, 722.
 Hickenbottom v. Delaware, etc., R. Co., 122 N. Y. 91—883, 892.
 Hickey v. Boston, etc., R. Co., 14 Allen (Mass.), 429—846, 854, 856, 860.
 Hicks v. Dorn, 42 N. Y. 47—72.
 Hicks v. Georgia, etc., R. Co., 108 Ga. 304—856.
 Hicks v. New York, etc., R. Co., 164 Mass. 424—773.
 Highby v. Gilmore, 3 Mont. 97—798.
 Highland Ave. R. Co. v. Burt, 92 Ala. 291—678.
 Highland Ave., etc., R. Co. v. Winn, 93 Ala. 309—817, 820, 851.
 Higginbotham v. Great Northern R. Co., 10 W. R. 358—381.

TABLE OF CASES.

(The references are to the pages.)

- Higginson v. Weld, 14 Gray (Mass.), 165—243.
 Higgins v. Bretherton, 5 C. & P. 2—429.
 Higgins v. Cherokee R. Co., 73 Ga. 149—660, 854.
 Higgins v. Hannibal, etc., R. Co., 36 Mo. 418—586.
 Higgins v. Louisville, etc., R. Co., 64 Miss. 80—897.
 Higgins v. New Orleans, etc., R. Co., 28 La. Ann. 133—753, 760, 764, 766.
 Higgins v. New York, etc., R. Co., 2 Bosw. (N. Y.) 139—856.
 Higgins v. Watervliet Turnpike, etc., Co., 46 N. Y. 23—630, 632, 638, 731, 747.
 Higley v. Gilmer, 3 Mont. 90—541, 543, 546, 549, 553, 560, 776.
 Hill v. Boston, etc., R. Co., 144 Mass. 284—296, 312, 344.
 Hill v. Burlington, etc., R. Co., 60 Iowa, 196—467.
 Hill v. Georgia, etc., R. Co., 43 S. C. 461—482.
 Hill v. Humphreys, 5 W. & S. (Pa.) 123—192, 198, 209, 240.
 Hill v. Leadbetter, 42 Me. 572—126, 447.
 Hill v. Missouri Pac. R. Co., 46 Mo. App. 517—481.
 Hill v. New Orleans, etc., R. Co. 11 La. Ann. 292—880, 891, 902.
 Hill v. Ninth Ave. R. Co., 109 N. Y. 239—776, 778.
 Hill v. Northern Pac. R. Co., 33 Wash. 697—329.
 Hill v. New Haven, 37 Vt. 501—799.
 Hill v. St. Louis, etc., R. Co., 67 Ark. 402—184.
 Hill v. Syracuse, etc., R. Co., 73 N. Y. 351, 63 N. Y. 101—296, 305, 564, 566, 736.
 Hill v. Union Ry. Co., 25 R. I. 565—902.
 Hill v. Western Union Tel. Co., 85 Ga. 425—332.
 Hill v. Windsor, 118 Mass. 251—814.
 Hilliard v. Gold, 34 N. H. 230—734.
 Hilliard v. Wilmington, etc., R. Co., 6 Jones L. (N. C.) 343—262, 263.
 Hillis v. Chicago, etc., R. Co., 72 Iowa, 228—58, 60.
 Hill Mfg. Co. v. Boston, etc., R. Corp., 104 Mass. 122—275, 459, 472.
 Hinckley v. Cape Cod, etc., R. Co., 120 Mass. 257—796.
 Hinckley v. New York Cent. R. Co., 56 N. Y. 429, 3 T. & C. 281—104, 471, 479, 486.
 Hinsdell v. Weed, 5 Denio (N. Y.) 172—126.
 Hinshaw v. Raleigh, etc., R. Co., 118 N. C. 1047—680.
 Hinton v. Eastern R. Co. (Minn.), 75 N. W.) 373—390, 396.
 Hinter v. Steamer Napoleon, 3 Wall. (U. S.) 5—50.
 Hinton v. Dibbin, 42 E. C. L. 487—6, 375.
 Hinton v. Eastern R. Co., 72 Minn. 339—224.
 Hiort v. London, etc., R. Co., 4 Exch. Div. 188—214.
 Hipsley v. Kansas City, etc., R. Co., 88 Mo. 348—779, 804, 805.
 Hipp v. Southern R. Co., 50 S. C. 129—265.
 Hirsch v. New York Dispatch & Delivery Co., 85 N. Y. Supp. 198—348.
 Hirsch v. Platt, 89 N. Y. Supp. 362—197.
 Hirsch v. Steamboat Quaker City, 2 Disney (Ohio), 144—148, 265.
 Hirschberg v. Dinsmore, 12 Daly (N. Y.), 429—382.
 Hirschsohn v. Hamburg American Packet Co., 2 J. & Sp. (N. Y.) 521—705.
 Hirshfield v. Central Pac. R. Co., 56 Cal. 484—264, 278.
 Hitchcock v. Brooklyn City R. Co., 44 Hun (N. Y.), 627—780.
 Hoadley v. International Paper Co., 72 Vt. 79—832.
 Hoadley v. Northern Transp. Co., 115 Mass. 304—240, 259, 306, 311.
 Hoar v. Maine Cent. R. Co., 70 Me. 65—541, 546, 577.
 Hoare v. Great Western R. Co., 25 W. R. 63—179, 324.
 Hobbs v. Texas, etc., R. Co., 49 Ark. 357—560, 747, 751.
 Hobbs v. London, etc., R. Co., L. R. 10 Q. B. 111—688, 886.
 Hobson v. New Mexico & A. R. Co., 11 Pac. (Arl.) 545—798, 799, 802.
 Hocum v. Wetherick, 22 Minn. 152—798.
 Hodgdon v. New York, etc., R. Co., 46 Conn. 277—243.
 Hodges v. New Hanover Transit Co., 107 N. C. 576—834.
 Hodges v. Percival, 132 Ill. 53—85.
 Hodgman v. West Maryland R. Co., 5 B. & S. 173—497.
 Hoeger v. Chicago, etc., R. Co., 63 Wis. 100—707, 709, 725, 726.
 Hoelljes v. Interurban St. Ry. Co., 43 Misc. Rep. (N. Y.) 350—555, 731.
 Hoffbauer v. Delhi, etc., R. Co., 52 Iowa, 342—732, 735.
 Hoffberg v. Bumford, 88 N. Y. Supp. 940—386.
 Hoffman v. Cumberland Valley R. Co., 85 Md. 391—367.
 Hoffman v. Lake Shore, etc., Ry. Co. (Mich.), 7 Det. Leg. N. 503—434.
 Hoffman v. New York Cent., etc., R. Co., 87 N. Y. 25—638, 776, 801.
 Hoffman v. Northern Pac. R. Co., 45 Minn. 53—567, 881, 888, 896.
 Hoffman v. Third Ave. R. Co., 45 App. Div. (N. Y.) 586—662.
 Hofnagle v. New York Cent. R. Co., 55 N. Y. 608—378, 814.
 Hogan v. Central Park, etc., R. Co., 124 N. Y. 647—823.
 Hogan v. Manhattan R. Co., 149 N. Y. 23—784.
 Holbrook v. Utica, etc., R. Co., 12 N. Y. 236—770, 772, 774, 780, 782, 787, 793, 870.
 Holcomb v. Town of Danby, 51 Vt. 428—523.
 Holden v. New York Cent. R. Co., 54 N. Y. 662—411.
 Holderness v. Collinson, 1 M. & R. 55, 7 B. & C. 212—15, 431.
 Holdridge v. Utica, etc., R. Co., 56 Barb. (N. Y.) 191—724, 725.
 Holland v. St. Louis, etc., R. Co., 103 Mo. App. 117—602, 666.
 Holland v. West End St. R. Co., 155 Mass. 387—663, 777, 829.
 Holladay v. Kennard, 12 Wall. (U. S.) 254—6, 23, 236, 618.
 Hollahan v. Metropolitan St. Ry. Co., 73 App. Div. (N. Y.) 164—795.
 Holling v. Fowler, L. R. 7 H. L. 757—214.
 Holliday v. St. Louis, etc., R. Co., 74 Mo. 159—485, 486.
 Holliday v. St. Leonards, 103 E. C. L. 192—71.
 Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 239—22, 27, 33, 39, 54, 55, 66, 290, 291, 294, 323, 341, 360, 542, 712, 717, 754.
 Holloway v. Pasadena, etc., R. Co., 130 Cal. 177—595.
 Holmes v. Ashtabula R. T. Co., 10 O. C. D. 638—655.
 Holmes v. Alleghany Tract. Co., 153 Pa. 152—840.

TABLE OF CASES.

lxiii

(The references are to the pages.)

- Holmes v. Carolina Cent. R. Co.**, 94 N. C. 318—890, 896.
Holmes v. German Security Bank, 87 Pa. St. 525—178.
Holmes v. North German Lloyd S. S. Co., 100 App. Div. (N. Y.) 36—720.
Holmes v. Oregon, etc., R. Co., 6 Sawy. (U. S.) 262—829.
Holsapple v. Rome, etc., R. Co., 86 N. Y. 275—320, 352, 508, 529, 765.
Holtzelaw v. Duff, 27 Mo. 395—262.
Holt v. Hannibal, etc., R. Co., 174 Mo. 524, 87 Mo. App. 203—543, 570, 748.
Holt v. Southwestern Mo. Elec. R. Co., 84 Mo. App. 443—612.
Holly v. Atlanta St. R. Co., 61 Ga. 215—44, 539, 540, 642, 656.
Holly v. Southern Ry. Co., 119 Ga. 767—719.
Holzab v. New Orleans, etc., R. Co., 58 La. Ann. 185—819.
Home Ins. Co. v. Western Transp. Co., 51 N. Y. 93—209.
Homesley v. Elias, 66 N. C. 330—184.
Honegberger v. Second Ave. R. Co., 2 Abb. Ct. App. 378—823.
Honeyman v. Oregon, etc., R. Co., 13 Or. 352—80, 605.
Hood v. Grand Trunk R. Co., 20 U. C. C. P. 361—325, 529.
Hood v. New York, etc., R. Co., 22 Conn. 502—472.
Hood v. North Eastern R. Co., 19 W. R. 523—667.
Hood v. New York, etc., R. Co., 22 Conn. 1—458.
Hooper v. California, 155 U. S. 648—905.
Hooper v. Chicago, etc., R. Co., 27 Wis. 81—64, 277, 449, 451, 489.
Hooper v. London, etc., R. Co., 29 W. R. 241—730.
Hooper v. Rathbone, Taney's Dec. (U. S.) 519—394.
Hooper v. Wells, 27 Cal. 11, 161—23, 69, 314, 351.
Hoosier Stone Co. v. Louisville, etc., R. Co., 131 Ind. 575—114.
Hopkins v. Atlantic, etc., R. Co., 36 N. H. 9—892, 898, 902.
Hopkins v. United States, 171 U. S. 578—936.
Hopkins v. Utah N. Ry. Co., 2 Idaho, 280—798.
Hopkins v. Westcott, 6 Blatchf. (U. S.) 64—290, 342, 701, 720, 754, 756.
Hope v. Delaware, etc., Canal Co. (Mich.), 69 N. W. 487—459, 481.
Hope v. Chicago, etc., R. Co., 61 Wis. 357—786.
Horn v. Kermit, 4 E. D. Sm. (N. Y.) 433—715.
Horne v. Midland R. Co., L. R. 8 C. P. 131—370, 424.
Hornesby v. Georgia R., etc., Co., 120 Ga. 913—731.
Hornthall v. Roanoke, etc., Steamboat Co., 107 N. C. 76—254.
Horowitz v. Hamburg American Packet Co., 18 Misc. Rep. (N. Y.) 24—769, 776.
Horseman v. Grand Trunk R. Co., 31 U. C. Q. B. 535—145.
Hoskins v. Missouri Pac. R. Co., 19 Mo. App. 315—301.
Hosmer v. Old Colony R. Co., 156 Mass. 506—753, 766.
Hostettler v. Baltimore, etc., R. Co. (Pa.), 32 Am. & Eng. R. Cas. 549—300, 460, 469.
Hotchkiss v. Artisans' Bank, 2 Abb. App. Dec. (N. Y.) 403—154, 209.
Hotel Co. v. Camp, 97 Ky. 424—85.
Hot Springs R. Co. v. Deloney, 65 Ark. 177—743.
Hot Springs R. Co. v. Hudgins, 42 Ark. 485—387.
Hot Springs R. Co. v. Trippe, 42 Ark. 465—492, 493.
Houck v. Southern Pac. R. Co., 38 Fed. 226—590, 623.
Hough v. Railway Co., 100 U. S. 226—797.
Houghton v. Louisville Ry. Co., 26 Ky. L. Rep. 393—853.
Houseman v. Merchants Despatch Transp. Co., 104 Mich. 300—411.
Houston Electric R. Co. v. Nelson (Tex. Civ. App.), 77 S. W. 978—654.
Houston v. Peters, 1 Metc. (Ky.) 558—195.
Houston v. Vicksburg, etc., R. Co., 39 La. Ann. 796—700.
Houston, etc., R. Co. v. Adams, 49 Tex. 748—167, 172, 179, 180, 181, 182, 265, 273.
Houston, etc., R. Co. v. Batchler (Tex. Civ. App.), 73 S. W. 981—554, 890.
Houston, etc., R. Co. v. Bath, 17 Tex. Civ. App. 697—396.
Houston, etc., R. Co. v. Boehm, 57 Tex. 152—893, 903.
Houston, etc., R. Co. v. Bolling, 59 Ark. 395—577.
Houston, etc., R. Co. v. Buchanan (Tex. Civ. App.), 84 S. W. 1037—536.
Houston, etc., R. Co. v. Burke, 55 Tex. 323—21, 318, 359, 421.
Houston, etc., R. Co. v. Bryant (Tex. Civ. App.), 72 S. W. 885—592, 817.
Houston, etc., R. Co. v. Clemmons, 55 Pa. St. 88—816, 855.
Houston, etc., R. Co. v. Davis, 11 Tex. Civ. App. 24, 31 S. W. 308—318, 338, 350.
Houston, etc., Nav. Co. v. Dwyer, 29 Tex. 376—27.
Houston, etc., R. Co. v. Ford, 53 Tex. 364—555.
Houston, etc., R. Co. v. Goodyear (Tex. Civ. App.), 66 S. W. 862—665.
Houston, etc., R. Co. v. Gorbett, 49 Tex. 573—675.
Houston, etc., R. Co. v. Hampton, 64 Tex. 427—578.
Houston, etc., R. Co. v. Harry, 63 Tex. 256—205.
Houston, etc., R. Co. v. Harn, 44 Tex. 628—224.
Houston, etc., R. Co. v. Hester (Tex.), 7 S. W. 776—537.
Houston, etc., R. Co. v. Hodde, 42 Tex. 467—135, 136, 137.
Houston, etc., R. Co. v. Hogg, 2 Tex. Unrep. Cas. 544—159.
Houston, etc., R. Co. v. Iseo (Tex. Civ. App.), 60 S. W. 313—655.
Houston, etc., R. Co. v. Jackson, 62 Tex. 209—405.
Houston, etc., R. Co. v. Kohm, 22 Tex. Civ. App. 11—684.
Houston, etc., R. Co. v. Leslie, 57 Tex. 83—850, 894.
Houston, etc., R. Co. v. Loefier (Tex.), 51 S. W. 536—808.
Houston, etc., R. Co. v. McCullough, 22 Tex. Civ. App. 208—578.
Houston, etc., R. Co. v. McGlosson, 1 Tex. App. Civ. Cas. sec. 224—392.
Houston, etc., R. Co. v. McNeel (Tex. Civ. App.), 76 S. W. 206—889.
Houston, etc., R. Co. v. Moore, 49 Tex. 31—551, 584, 589, 624, 816.
Houston, etc., R. Co. v. Ney (Tex. Civ. App.), 58 S. W. 43—420, 461.
Houston, etc., R. Co. v. Norris (Tex. Civ. App.), 41 S. W. 708—582.
Houston, etc., R. Co. v. Park, 1 Tex. App. Civ. Cas. sec. 333—400, 472.

TABLE OF CASES.

(The references are to the pages.)

- Houston, etc., R. Co. v. Perkins, 21 Tex. Civ. App. 508—61, 645.
 Houston, etc., R. Co. v. Phillo (Tex.), 69 S. W. 994—649.
 Houston, etc., R. Co. v. Schmidt, 61 Tex. 282—833.
 Houston, etc., R. Co. v. Stewart, 14 Tex. Civ. App. 703—836, 837.
 Houston, etc., R. Co. v. Smith, 63 Tex. 322—106, 111, 120, 125, 245, 418, 688.
 Houston, etc., Ry. Co. v. Trammell (Tex. Civ. App.), 68 S. W. 716—517.
 Houston, etc., R. Co. v. Washington (Tex. Civ. App.), 30 S. W. 719—548, 629.
 Houston, etc., R. Co. v. Williams (Tex. Civ. App.), 31 S. W. 559, 556—318, 350, 401, 408, 410.
 Hoover v. Barkhoof, 44 N. Y. 113—72.
 Howard v. Chicago, etc., R. Co., 61 Miss. 194—565, 758.
 Howard v. Macondray, 7 Gray (Mass.), 516—441, 445.
 Howard v. Shepard, 9 M. Gr. & S. 296—169.
 Howe v. Oswego, etc., R. Co., 56 Barb. (N. Y.) 121—24, 198.
 Howell v. Grand Trunk R. Co., 36 N. Y. Supp. 544—716.
 Howell v. Lansing City Elec. R. Co., 11 Det. Leg. N. (Mich.) 82—600.
 Howell v. New York, etc., R. Co., 2 Int. Com. Rep. 162—912, 919.
 Howland v. Milwaukee R. Co., 54 Wis. 226—586.
 Howland v. Oakland Consol. St. R. Co., 110 Cal. 513—893.
 Howser v. Cumberland, etc., R. Co., 80 Md. 146—773.
 Hoyt v. Chicago, etc., R. Co., 93 Ill. 601—190.
 Hoyt v. Cleveland, etc., R. Co., 112 Mich. 638—667.
 Hoyt v. Hudson, 41 Wis. 105—799.
 Hrebrlik v. Carr, 29 Fed. 298—556.
 Huba v. Schenectady Ry. Co., 85 App. Div. (N. Y.) 199—733.
 Hubbard v. Harnden Express Co., 10 R. I. 244—226, 318.
 Hubbard v. Town of Mason City, 60 Iowa, 400—738.
 Hubbell v. Yonkers, 104 N. Y. 434—374.
 Hubbersty v. Ward, 8 Exch. 330—143, 160, 175.
 Hubener v. Heide, 62 App. Div. (N. Y.) 368—83.
 Huber v. Cedar Rapids, etc., R. Co., 124 Iowa, 556—872.
 Hudson v. Baxendale, 2 H. & N. 575—276, 283.
 Hudson v. Kansas Pac. R. Co., 3 McCrary (U. S.), 249—567.
 Hudson v. Lynn & Boston R. Co., 185 Mass. 510—553, 737, 750.
 Hudson v. Northern Pac. R. Co., 92 Iowa, 231—335, 411.
 Huston v. Midland, etc., R. Co., 10 B. & S. 504—702.
 Hudson v. Richmond, etc., R. Co., 2 App. Cas. (D. C.) 98—544.
 Hudson River Lighterage Co. v. Wheeler Condenser & E. Co., 93 Fed. 374—390.
 Huelenkamp v. Ciflizens' R. Co., 34 Mo. 45, 37 Mo. 537—654, 859.
 Huff v. Austin, 46 Ohio St. 386, 21 N. E. 864—783.
 Huffard v. Grand Rapids, etc., R. Co., 64 Mich. 631—591, 744.
 Hufford v. Railway Co., 53 Mich. 118—748.
 Hughes v. Great Western R. Co., 14 C. B. 637—240, 323.
 Hughes v. New York, etc., R. Co., 36 N. Y. Super. Ct. 222—638, 748, 801.
 Hughes v. Pennsylvania Co., 202 Pa. 222—536.
 Hughes v. Pullman Palace Car Co., 74 Fed. 499—57.
 Hughes v. Western R. Co., 61 Ga. 131—880.
 Hughson v. Richmond, etc., R. Co., 2 App. Cas. (D. C.) 98—563.
 Hull v. Chicago, etc., R. Co., 41 Minn. 510—388, 390, 394, 396.
 Hull v. East Line, etc., R. Co., 66 Tex. 619—668.
 Hull v. Missouri Pac. R. Co., 60 Mo. App. 593—276.
 Hulehan v. Green Bay, etc., R. Co., 68 Wis. 527—798.
 Hubert v. New York Cent. R. Co., 49 N. Y. 145—670, 846.
 Humphries v. Illinois Cent. R. Co., 70 Miss. 453—668, 686.
 Humphreys v. Perry, 148 U. S. 627—39, 703, 707, 709, 717, 718.
 Humphreys v. Read, 6 Whart. (Pa.) 435—126, 447.
 Hungerford v. Winnebago Tug Boat, etc., Co., 33 Wis. 303—196.
 Hunt v. Haskell, 24 Me. 339—446.
 Hunt v. New York, etc., R. Co., 1 Hillt. (N. Y.) 228—458, 467.
 Hunt v. Nutt (Tex. Civ. App.), 27 S. W. 1031—114, 461.
 Hunt Bros. v. Missouri, etc., R. Co. (Tex. Civ. App.), 74 S. W. 69—225.
 Hunt v. Mississippi Cent. R. Co., 29 La. Ann. 446—175.
 Hunt v. Morris, 12 N. J. L. 175—388.
 Hunter v. Borst, 13 U. C. Q. B. 141—241.
 Hunter v. Cooperstown, etc., R. Co., 112 N. Y. 371—681, 818.
 Hunter v. Cooperstown, etc., R. Co., 128 N. Y. 23—836.
 Hunter v. Kansas City, etc., R. Co., 85 Fed. 379—344.
 Hunter v. Potts, 4 Campb. 203—30.
 Hunter v. Southern Pac. R. Co., 76 Tex. 195—460, 475, 482.
 Huntington v. Dinsmore, 4 Hun (N. Y.), 66—294.
 Hunterson v. Union Tract. Co., 205 Pa. 568—835, 838, 843.
 Huntley v. Dows, 55 Barb. (N. Y.) 310—429.
 Hurd v. Hartford, etc., R. Co., 49 Conn. 49—148, 284.
 Hurlburt v. Lake Shore, etc., R. Co., 2 Int. Com. Rep. 81—911.
 Hurst v. Great Western R. Co., 19 C. B. N. S. 310—690.
 Hurt v. Southern R. Co., 40 Miss. 391—550, 552, 555.
 Hurt v. St. Louis, etc., R. Co., 94 Mo. 255—683.
 Hurwitz v. Hamburg American Packet Co., 27 Misc. Rep. (N. Y.) 814—701.
 Hussey v. Saragossa, 3 Wood (U. S.), 380—534.
 Huston v. Peters, 1 Metc. (Ky.) 558—340, 402.
 Hutcheson v. Louisville, etc., R. Co. (Ky.), 57 S. W. 251—122.
 Hutchings v. Ladd, 16 Mich. 493—199.
 Hutchings v. Western R. Co., 25 Ga. 61—701, 704.
 Hutchins v. Brackett, 22 N. H. 252—71.
 Hutchinson v. Chicago, etc., R. Co., 37 Minn. 524—33, 316, 382, 518, 538.
 Hutchison v. New York, etc., R. Co., 6 Eng. Ry. & C. Cas. 580—580.

TABLE OF CASES.

lxv

(The references are to the pages.)

- Hutkoff v. Pennsylvania R. Co.**, 29 Misc. Rep. (N. Y.) 770—821, 389.
Hutton v. Osborne, 1 Sel. N. P. 420—4, 5.
Hyde v. New York, etc., Steamship Co., 17 La. Ann. 29—356.
Hyde v. Trent Nav. Co., 5 T. R. 389—192, 193, 195.
Hyman v. Central Vermont R. Co., 66 Hun (N. Y.), 202—721, 730.
Hyman v. Nye, 6 Q. B. Div. 685—615.

I.

- Idaho Gold Reduction Co. v. Croghan** (*Id.*), 56 Pac. 164—72.
Ihl v. Forty-Second St., etc., R. Co., 47 N. Y. 317—822.
Ilges v. St. Louis Transit Co., 102 Mo. App. 529—660.
Illinois Cent. R. Co. v. Able, 59 Ill. 181—848.
Illinois Cent. R. Co. v. Adams, 42 Ill. 474—504, 507, 511, 762.
Illinois Cent. R. Co. v. Alexander, 20 Ill. 23—262, 284.
Illinois Cent. R. Co. v. Allen (Ky.), 89 S. W. 150—621.
Illinois Cent. R. Co. v. Anderson, 148 Ill. 294—761, 768.
Illinois Cent. R. Co. v. Ashmead, 58 Ill. 487—71, 227, 259.
Illinois Cent. R. Co. v. Axley, 47 Ill. App. 307—694.
Illinois Cent. R. Co. v. Beebe, 174 Ill. 13, 69 Ill. App. 363—572, 770.
Illinois Cent. R. Co. v. Bogard (Miss.), 27 So. 879—316.
Illinois Cent. R. Co. v. Breisford, 12 Ill. App. 54—510.
Illinois Cent. R. Co. v. Brookhaven Mach. Co., 71 Miss. 663—419.
Illinois Cent. R. Co. v. Brown, 77 Miss. 338—855.
Illinois Cent. R. Co. v. Bundy, 97 Ill. App. 202—499.
Illinois Cent. R. Co. v. Carter, 165 Ill. 570—274, 462, 483.
Illinois Cent. R. Co. v. Cobb, 64 Ill. 128, 72 Ill. 148—101, 104, 107, 196, 242, 406, 411, 423, 427.
Illinois Cent. R. Co. v. Cobb, 48 Ill. 402—231, 232, 233.
Illinois Cent. R. Co. v. Cheek, 152 Ind. 375, 663—680, 833.
Illinois Cent. R. Co. v. Copeland, 24 Ill. 332, 362—468, 704, 705, 728.
Illinois Cent. R. Co. v. Cunningham, 102 Ill. App. 206, 67 Ill. 316—734, 848, 899.
Illinois Cent. R. Co. v. Cowles, 32 Ill. 117—462.
Illinois Cent. R. Co. v. Davenport, 177 Ill. 110—582, 748.
Illinois Cent. R. Co. v. Davidson, 76 Fed. 617—656.
Illinois Cent. R. Co. v. Dick, 91 Ky. 434—555.
Illinois Cent. R. Co. v. Eblen, 24 Ky. L. Rep. 1609—506.
Illinois Cent. R. Co. v. Foley, 53 Fed. 459—572.
Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88—290, 292, 297, 462, 475, 481.
Illinois Cent. R. Co. v. Friend, 64 Ill. 303—148, 262.
Illinois Cent. R. Co. v. Green, 81 Ill. 19—846.
Illinois Cent. R. Co. v. Hall, 58 Ill. 409—401.
Illinois Cent. R. Co. v. Hobbs, 58 Ill. App. 130—770, 771.
Illinois Cent. R. Co. v. Homberger, 77 Ill. 457—71, 101, 259.
Illinois Cent. R. Co. v. Handy, 63 Miss. 609, 615—56, 58, 705, 714.
Illinois Cent. R. Co. v. Harris (Miss.), 32 So. 309—566.
Illinois Cent. R. Co. v. Harper (Miss.), 35 So. 764—744.
Illinois Cent. R. Co. v. Haynes, 64 Miss. 604, 63 Miss. 485—240, 241, 406, 427, 499, 515.
Illinois Cent. R. Co. v. Illinois, 163 U. S. 142—669.
Illinois Cent. R. Co. v. Jackson, 25 Ky. L. Rep. 2087—744.
Illinois Cent. R. Co. v. Jennings (Ill.), 75 N. E. 457—576.
Illinois Cent. R. Co. v. Johnson, 67 Ill. 312—625, 734, 747.
Illinois Cent. R. Co. v. Johnson, 34 Ill. 389—462, 475, 899.
Illinois Cent. R. Co. v. Jolly, 25 Ky. L. Rep. 1735—867.
Illinois Cent. R. Co. v. Jonte, 13 Brad. (Ill. App.) 424—295, 322, 463, 762.
Illinois Cent. R. Co. v. Keegan, 210 Ill. 150—670.
Illinois Cent. R. Co. v. Kerr, 68 Miss. 14—459, 476.
Illinois Cent. R. Co. v. Kuhn, 107 Tenn. 106—595, 596.
Illinois Cent. R. Co. v. Lancashire Ins. Co. (Miss.), 30 So. 43—304.
Illinois Cent. R. Co. v. Langdon, 71 Miss. 146—401.
Illinois Cent. R. Co. v. Latimer, 128 Ill. 163, 28 Ill. App. 552—750, 895.
Illinois Cent. R. Co. v. Lutz, 84 Ill. 598—848.
Illinois Cent. R. Co. v. McClellan, 54 Ill. 58—24, 30, 71, 107, 242, 259, 354, 376, 380, 411, 423.
Illinois Cent. R. Co. v. Meacham, 91 Tenn. 428—775.
Illinois Cent. R. Co. v. Miller, 32 Ill. App. 259—162, 475, 481.
Illinois Cent. R. Co. v. Minor, 69 Miss. 710, 18 L. R. A. 627—632, 642.
Illinois Cent. R. Co. v. Mitchell, 68 Ill. 471—260, 489.
Illinois Cent. R. Co. v. Morrison, 19 Ill. 316—312, 313, 510, 516, 524, 757, 758, 762.
Illinois Cent. R. Co. v. Nelson, 59 Ill. 112, 110—624, 694, 747, 880.
Illinois Cent. R. Co. v. Nowicki, 148 Ill. 29—791.
Illinois Cent. R. Co. v. O'Keefe, 168 Ill. 115—541.
Illinois Cent. R. Co. v. Pearson (Miss.), 21 So. 435—897.
Illinois, etc., R. Co. v. People, 19 Ill. App. 141—112.
Illinois Cent. R. Co. v. People, 143 Ill. 434, 19 Ill. App. 141—112, 668.
Illinois Cent. R. Co. v. Peterson, 68 Mass. 454—508, 509, 524.
Illinois Cent. R. Co. v. Phelps, 4 Ill. App. 238—101, 107.
Illinois Cent. R. Co. v. Phillips, 49 Ill. 234—607.
Illinois Cent. R. Co. v. Radford, 23 Ky. Law Rep. 836—527, 528.
Illinois Cent. R. Co. v. Read, 37 Ill. 484—753, 764, 766.
Illinois Cent. R. Co. v. Robinson, 58 Ill. App. 181—892, 893.
Illinois Cent. R. Co. v. Sauper, 38 Ill. 354—315.
Illinois Central R. Co. v. Scruggs, 69 Miss. 418—316, 328, 510.

TABLE OF CASES.

(The references are to the pages.)

- Illinois Cent. R. Co. v. Schwartz, 13 Ill. App. 490-101, 294, 363.
 Illinois C. R. Co. v. Sheehan, 29 Ill. App. 90-636, 738.
 Illinois Cent. R. Co. v. Simmons, 49 Ill. App. 443-243, 417.
 Illinois Cent. R. Co. v. Simpson, 17 Ill. App. 325-153.
 Illinois Cent. R. Co. v. Slatton, 54 Ill. 135-848.
 Illinois Cent. R. Co. v. Smiesni, 104 Ill. App. 194-611.
 Illinois Cent. R. Co. v. Smyser, 38 Ill. 354-133, 136, 138, 141, 322.
 Illinois Cent. R. Co. v. Southern Bank, 41 Ill. App. 287-163, 172.
 Illinois Cent. R. Co. v. Southern Seating, etc., Co., 104 Tenn. 568-412, 413.
 Illinois Cent. R. Co. v. Stewart, 23 Ky. L. Rep. 637-375, 762.
 Illinois Cent. R. Co. v. Strauss, 75 Miss. 367-874.
 Illinois Cent. R. Co. v. Sutton, 42 Ill. 438-750, 807.
 Illinois Cent. R. Co. v. Taylor, 46 Ill. App. 441-674.
 Illinois Cent. R. Co. v. Team (Miss.), 20 So. 706-534.
 Illinois Cent. R. Co. v. Treat, 179 Ill. 576-548.
 Illinois Cent. R. Co. v. Troustine, 64 Miss. 834-70, 259, 423, 712.
 Illinois Cent. R. Co. v. Vinson, 25 Ky. L. Rep. 38-660.
 Illinois Cent. R. Co. v. Waters, 41 Ill. 73-239, 402, 417, 515.
 Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420-589, 731, 751.
 Illinois Southern R. Co. v. Hubbarb, 106 Ill. App. 462-653.
 Ilwaco R. etc., Co. v. Oregon Short Line, etc., R. Co. 57 Fed. 673-927.
 Imhoff v. Chicago, etc., R. Co., 20 Wis. 344, 22 Wis. 681-534, 664, 675.
 Imperial Coal Co. v. Pittsburgh, etc., R. Co., 2 Int. Com. Rep. 436-669, 919, 925.
 Independence Mills Co. v. Burlington, etc., R. Co., 72 Iowa, 535-262.
 Indianapolis & G. R. T. Co. v. Derry, 3 St. Ry. Rep. 231-685.
 Indianapolis, etc., R. Co. v. Adams, 36 Ill. App. 629-530.
 Indianapolis, etc., R. Co. v. Allen, 31 Ind. 394-315, 529, 538.
 Indianapolis, etc., R. Co. v. Anthony, 43 Ind. 183-627.
 Indianapolis, etc., R. Co. v. Beaver, 41 Ind. 493, 497-572, 573, 625.
 Indianapolis, etc., R. Co. v. Birney, 71 Ill. 391-666, 881, 882, 884.
 Indianapolis St. Ry. Co. v. Brown, 32 Ind. App. 130-653.
 Indianapolis Union R. Co. v. Cooper, 6 Ind. App. 202-628.
 Indianapolis, etc., R. Co. v. Cox, 29 Ind. 360-292, 717, 718.
 Indianapolis St. Ry. Co. v. Darnell, 2 St. Ry. Rep. 237 (Ind. App.), 68 N. E. 609-375.
 Indianapolis St. Ry. Co. v. Dawson, 31 Ind. App. 605-645.
 Indianapolis, etc., R. Co. v. Forsythe, 4 Ind. App. 326-315, 398.
 Indianapolis, etc., R. Co. v. Hall, 106 Ill. 371-700.
 Indianapolis, etc., R. Co. v. Herndon, 81 Ill. 143-213, 445.
 Indianapolis St. Ry. Co. v. Hockett (Ind.), 67 N. E. 106-562, 733, 748.
 Indianapolis, etc., R. Co. v. Horst, 93 U. S. 291-44, 572, 652, 694, 797.
 Indianapolis, etc., R. Co. v. Jungen, 10 Ill. App. 295-228, 233, 255.
 Indianapolis, etc., R. Co. v. Jurey, 8 Ill. App. 160-30, 297.
 Indianapolis, etc., R. Co. v. Kennedy, 77 Ind. 507-746.
 Indianapolis, etc., R. Co. v. Murray, 72 Ill. 128-470.
 Indianapolis, etc., R. Co. v. Pitzer, 109 Ind. 179-684, 689, 826.
 Indianapolis, etc., R. Co. v. Remmy, 13 Ind. 518-762.
 Indianapolis, etc., R. Co. v. Rinard, 46 Ind. 293-619, 732, 734.
 Indianapolis, etc., Ry. Co. v. Robinson, 157 Ind. 414-595, 799.
 Indianapolis, etc., R. Co. v. Rutherford, 29 Ind. 82-601, 782, 860, 870.
 Indianapolis St. Ry. Co. v. Schmidt (Ind.), 71 N. E. 201-589, 770.
 Indianapolis, etc., R. Co. v. Strain, 81 Ill. 504-401, 499, 535.
 Indianapolis St. Ry. Co. v. Taylor (Ind.), 72 N. E. 1045-812.
 Indianapolis St. Ry. Co. v. Tenner, 1 St. Ry. Rep. 178-554, 877.
 Indianapolis, etc., R. Co. v. Vanduzen, 81 Ill. 143-179.
 Indianapolis St. Ry. Co. v. Wilson (Ind.), 66 N. E. 950-744.
 Indiana, etc., R. Co. v. Ditto, 158 Ind. 699-748.
 Indiana, etc., R. Co. v. Doremeyer, 20 Ind. App. 605-229.
 Indiana, etc., R. Co. v. Green, 106 Ind. 279-797.
 Indiana Cent. R. Co. v. Hudleson, 13 Ind. 325-552, 561.
 Indiana, etc., R. Co. v. James, 18 Ill. App. 655-532.
 Indiana Ry. Co. v. Maurer (Ind.), 66 N. E. 156-820.
 Indiana Cent. R. Co. v. Mundy, 21 Ind. 48-753, 762.
 Independence Mills Co. v. Burlington, etc., R. Co., 72 Iowa, 535-270, 271, 492.
 Independent Refiners' Assoc. v. Western New York, etc., R. Co., 4 Int. Com. Rep. 162-916, 919, 937.
 Ingalls v. Bills, 9 Metc. (Mass.) 1-595, 607, 615, 655, 820.
 Ingalls v. Brooks, 1 Edm. Sel. Cas. (N. Y.) 104-438.
 Ingate v. Christie, 3 C. & K. 61-21, 63.
 Ingleedew v. Northern R. Co., 7 Gray (Mass.), 86-387, 411, 416.
 Ingersoll v. Van Bokkelin, 7 Cow. (N. Y.) 670-364.
 Inland & S. Coasting Co. v. Tolson, 139 (U. S.) 551-695.
 Inman v. Buffalo, etc., R. Co., 7 U. C. C. P. 325-265.
 Inman v. South Carolina R. Co., 129 U. S. 128-311, 314, 373.
 Inman v. St. Louis, S. W. R. Co. (Tex. Civ. App.), 37 S. W. 37-455.
 In re Charge to Grand Jury, 66 Fed. 146-921.
 In re Missouri Steamship Co., L. R. 42 Ch. Div. 321-220, 311.
 In re Pooling Freights, 115 Fed. 588-937.
 Ins. Co. of North America v. Delaware Mut. Safety Ins. Co., 91 Tenn. 537-118.
 Insurance Co. of N. A. v. Easton, 73 Tex. 167-378.
 Insurance Co. of N. A. v. Lake Erie, etc. R. Co., 152 Ind. 333-237, 395.
 Insurance Co. of N. A. v. St. Louis, etc. R. Co., 11 Fed. 380-377.

TABLE OF CASES.

lxvii

(The references are to the pages.)

- Investment Co. v. Ohio, etc., R. Co., 41 Fed. 378-492.
 Ionnone v. New York, etc., R. Co. (R. I.), 44 Atl. 592-586.
 Irish v. Milwaukee, etc., R. Co., 19 Minn. 376-451, 459, 488, 489.
 Irish v. Northern Pac. R. Co., 4 Wash. 48-833.
 Iron R. Co. v. Mowery, 36 Ohio St. 418-541, 778, 820.
 Irvine v. Nashville, etc., R. Co., 92 Ill. 103-493, 494.
 Irvine v. Midland Great Western R. Co., L. R. 6 Ir. 55-418, 422.
 Irvine v. New York Cent. R. Co., 59 N. Y. 653-458, 493.
 Isaac v. Third Ave. R. Co., 47 N. Y. 122-630.
 Isaacson v. New York Cent., etc., R. Co., 94 N. Y. 278-308, 367, 710, 721, 722, 728, 729.
 Isbell v. New York, etc., R. Co., 27 Conn. 393-689.
 Isham v. Greenham, Handy (Ohio), 357-447.
 Isherwood v. Whitmore, 11 M. & W. 347-203.
 Israel v. Clark, 4 Esp. N. P. 259-781.
 International, etc., R. Co. v. Anchonda (Tex. Civ. App.), 68 S. W. 743-886.
 International, etc., R. Co. v. Anderson, 3 Tex. Civ. App. 8-106, 107, 350, 412, 461, 482, 483, 493.
 International, etc., R. Co. v. Anthony (Tex. Civ. App.), 57 S. W. 897-601.
 International, etc., R. Co. v. Aten (Tex. Civ. App.), 81 S. W. 346-461.
 International, etc., R. Co. v. Bergman (Tex. Civ. App.), 64 S. W. 399-222, 224.
 International, etc., R. Co. v. Brazzil, 78 Tex. 314-893, 900, 904.
 International, etc., R. Co. v. Campbell, 1 Tex. Civ. App. 509-482, 572, 754.
 International, etc., R. Co. v. Cock, 68 Tex. 713-577.
 International, etc., R. Co. v. Copeland, 60 Tex. 325-368.
 International, etc., R. Co. v. Dummit County Pasture Co., 5 Tex. Civ. App. 186-142.
 International, etc., R. Co. v. Earnest & Bost (Tex. Civ. App.), 77 S. W. 29-519, 535.
 International, etc., R. Co. v. Folliard, 66 Tex. 603-723, 846.
 International, etc., R. Co. v. Foltz, 3 Tex. Civ. App. 644-717, 727.
 International, etc., R. Co. v. Garrett, 5 Tex. Civ. App. 540-335.
 International, etc., R. Co. v. Giesen (Tex. Civ. App.), 69 S. W. 652-890.
 International, etc., R. Co. v. Gilbert, 64 Tex. 536-551, 689, 889.
 International, etc., R. Co. v. Goldstein, 2 Tex. App. Civ. Cas. sec. 274-589.
 International, etc., R. Co. v. Gray, 65 Tex. 32-553, 577, 597.
 International, etc., R. Co. v. Halloren, 53 Tex. 46-597, 604, 606, 611, 617, 654.
 International, etc., R. Co. v. Harden (Tex. Civ. App.), 81 S. W. 356-879.
 International, etc., R. Co. v. Hassell, 62 Tex. 256-741, 820.
 International, etc., R. Co. v. Hynes, 3 Tex. Civ. App. 20-107, 250, 515.
 International, etc., R. Co. v. Ing, (Tex. Civ. App.), 68 S. W. 722-567.
 International, etc., R. Co. v. Irvine, 64 Tex. 529-583, 891.
 International, etc., R. Co. v. Kentle (Tex.), 16 Am. & Eng. R. Cas. 337-629, 922.
 International, etc., R. Co. v. Lewis (Tex. Civ. App.), 23 S. W. 323-106, 516.
 International, etc., R. Co. v. Mahula, 1 Tex. Civ. App. 182-482, 485.
 International, etc., R. Co. v. McCoun, 2 Tex. App. Civ. Cas. sec. 712-704.
 International, etc., R. Co. v. McRae, 82 Tex. 614-501, 508.
 International, etc., R. Co. v. Miller, 9 Tex. Civ. App. 104-642, 644.
 International, etc., R. Co. v. Moody, 71 Tex. 614-309, 338.
 International, etc., R. Co. v. Nicholson, 61 Tex. 550-420.
 International, etc., R. Co. v. Philips, 63 Tex. 590-412, 716.
 International, etc., R. Co. v. Pool (Tex. Civ. App.), 59 S. W. 911-500.
 International, etc., R. Co. v. Prince, 77 Tex. 560-571.
 International, etc., R. Co. v. Ritchie (Tex. Civ. App.), 26 S. W. 840-94, 239, 241.
 International, etc., R. Co. v. Satterwhite, 15 Tex. Civ. App. 102-849.
 International, etc., R. Co. v. Schuford (Tex. Civ. App.), 81 S. W. 1189-854.
 International, etc., R. Co. v. Server, 3 Tex. Civ. App. Cas., sec. 440-241, 255, 328.
 International, etc., R. Co. v. Smith (Tex.), 14 S. W. 642-534, 681, 808.
 International, etc., R. Co. v. Startz (Tex.) 77 S. W. 1-535.
 International, etc., R. Co. v. Startz (Tex. Civ. App.), 33 S. W. 575-418, 424.
 International, etc., R. Co. v. Terry, 62 Tex. 380-688, 887.
 International, etc., R. Co. v. Thornton, 3 Tex. Civ. App. 197-482.
 International, etc., R. Co. v. Tisdale, 74 Tex. 8-228, 255, 465, 493.
 International, etc., R. Co. v. True (Tex. Civ. App.), 57 S. W. 977-369.
 International, etc., R. Co. v. Underwood, 62 Tex. 21-333, 335, 351.
 International, etc., R. Co. v. Watt, 2 Tex. App. Civ. Cas. sec. 781-296, 297.
 International, etc., R. Co. v. Welch, 86 Tex. 203-651.
 International, etc., R. Co. v. Wentworth, 87 Tex. 311-244, 475.
 International, etc., R. Co. v. Wilkes, 68 Tex. 617-733.
 International, etc., R. Co. v. Wolf, 3 Tex. Civ. App. 383-491.
 International, etc., R. Co. v. Young (Tex. Civ. App.), 28 S. W. 819-105.
 International, etc., R. Co. v. Young (Tex. Civ. App.), 72 S. W. 68-512, 520.
 Interstate Commerce Com. v. Alabama M. R. Co., 168 U. S. 144, 165-169, 913, 915, 917, 918, 920, 921, 924, 925, 928, 933, 934, 935.
 Interstate Commerce Com. v. Alabama M. R. Co., 69 Fed. 227-907, 912.
 Interstate Commerce Com. v. Alabama M. R. Co., 74 Fed. 175, 168 U. S. 170-911, 923.
 Interstate Commerce Com. v. Atchison, etc., R. Co., 50 Fed. 295-333.
 Interstate Commerce Com. v. Baltimore, etc., R. Co., 145 U. S. 281, 284-316, 919, 922, 924.
 Interstate Commerce Com. v. Baltimore, etc., R. Co., 43 Fed. 37-924, 935.

TABLE OF CASES.

(The references are to the pages.)

- Interstate Commerce Com. v. Baltimore, etc., R. Co., 145 U. S. 283, 263-906, 915, 921, 928, 933, 938.
 Interstate Commerce Com. v. Brimson, 154 U. S. 448, 457-906, 910, 911, 915, 922, 928, 932, 937.
 Interstate Commerce Com. v. Chesapeake & O. Ry. Co., 128 Fed. 59-916.
 Interstate Commerce Com. v. Chesapeake & C. Ry. Co., et alio, U. S. Sup. Ct. Oct. Term, 1905, decided Feb. 19, 1906.
 Interstate Commerce Com. v. Chicago, etc., R. Co., 94 Fed. 272-907.
 Interstate Commerce Com. v. Cincinnati, etc., R. Co., 124 Fed. 624-923.
 Interstate Commerce Com. v. Cincinnati, etc. R. Co., 167 U. S. 510-906, 911, 912, 933.
 Interstate Commerce Com. v. Cincinnati, etc., R. Co., 56 Fed. 925-908, 910, 927.
 Interstate Commerce Com. v. Cincinnati, etc., R. Co., 76 Fed. 183-907.
 Interstate Commerce Com. v. Clyde S. S. Co., 181 U. S. 29-934.
 Interstate Commerce Com. v. East Tennessee, etc., R. Co., 85 Fed. 107-907, 908, 914, 917, 927, 932.
 Interstate Commerce Com. v. Lehigh Valley R. Co., 74 Fed. 784-907, 913.
 Interstate Commerce Com. v. Louisville & N. R. Co., 118 Fed. 613-914, 940.
 Interstate Commerce Com. v. Louisville, etc., R. Co., 73 Fed. 409-907, 913, 914, 917, 924, 925, 939.
 Interstate Commerce Com. v. Louisville & M. R. Co., 190 U. S. 273-934.
 Interstate Commerce Com. v. Nashville, etc., R. Co., 120 Fed. 934-914, 934.
 Interstate Commerce Com. v. Northeastern R. Co., 83 Fed. 611-907.
 Interstate Commerce Com. v. Southern R. Co., 122 Fed. 800-934, 940.
 Interstate Commerce Com. v. Southern Pac. R. Co., 132 Fed. 829-936, 939.
 Interstate Commerce Com. v. Southern R. Co., 105 Fed. 703-913.
 Interstate Commerce Com. v. Texas, etc., R. Co., 52 Fed. 187, 189-945, 916, 917, 918, 919, 924.
 Interstate Commerce Com. v. Western, etc., R. Co., 88 Fed. 186-914, 915, 927, 933, 934.
 Interstate Commerce Com. v. Western, etc., R. Co., 93 Fed. 83-908, 913, 915, 927, 930.
 Ives v. Smith, 3 N. Y. Supp. 645, 8 N. Y. Supp. 46-937.

J.

- Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34-18, 22 27, 63, 64.
 Jackson v. Crilly, 16 Colo. 102-830, 854.
 Jackson v. Grand Ave. R. Co., 118 Mo. 199-827.
 Jackson v. Kansas City R. Co., 31 Kan. 761-770.
 Jackson v. Metropolitan R. Co., 26 W. R. 175-692.
 Jackson v. Nichol, 7 Scott, 577-441.
 Jackson v. Rogers, 2 Show. 327-92.
 Jackson v. Sacramento Valley R. Co., 23 Cal. 270-264, 286, 392.
 Jackson v. Second Ave. R. Co., 47 N. Y. 247-630, 748.
 Jackson v. Tollett, 2 Stark, 37-655.
 Jacksonville St. Ry. Co. v. Cappell, 21 Fla. 175-683, 828.
 Jacksonville, etc., R. Co. v. Southworth, 135 Ill. 250-803.
 Jacobs v. Central R. Co. of N. J., 208 Pa. 535-718, 719.
 Jacobs v. Hooker, 1 Edm. Sel. Cas. (N. Y.) 472-474.
 Jacobs v. Third Ave. R. Co., 71 App. Div. (N. Y.) 199-881.
 Jacobs v. Tutt, 23 Fed. 412-706, 707, 724.
 Jacobs v. West End St. Ry. Co. (Mass.), 69 N. E. 639-682.
 Jacobson v. Adams Express Co., 1 O. C. D. 212-220, 330.
 Jacobus v. St. Paul, etc., R. Co., 20 Minn. 125-287, 569, 570, 753, 761, 762, 766, 817.
 Jacques v. Sioux City Tract. Co., 124 Iowa, 257-842.
 Jagger v. Peoples Pass. Ry. Co., 180 Pa. St. 436-336.
 James, etc., Buggy Co. v. Cincinnati, etc., R. Co., 3 Int. Com. Rep. 682-933.
 James v. Canadian Pac. R. Co., 5 Int. Com. C. Rep. 612-923.
 James v. Metropolitan St. Ry. Co., 80 App. Div. (N. Y.) 364-635.
 James S. Davis Clothing Co. v. Merchants Despatch Transp. Co., 160 Mo. App. 487-487.
 Jaminet v. American Storage, etc., Co., 109 Mo. App. 257-65.
 Jamison v. San Jose, etc., R. Co., 55 Cal. 593-596, 652.
 Jamison v. Chesapeake, etc., R. Co., 92 Va. 327-689.
 Janny v. Great Northern R. Co., 63 Minn. 380-534.
 Jardine v. Cornell, 50 N. J. L. 485-637, 732, 889.
 Jarrett v. Atlanta, etc., R. Co., 83 Ga. 347-350.
 Jarrett v. Great Northern R. Co., 74 Minn. 477-207.
 Jeffersonville, etc., R. Co. v. Cleveland, 2 Bush. (N. Y.) 473-264, 267, 273.
 Jeffersonville, etc., R. Co. v. Cotton, 29 Ind. 498-272.
 Jeffersonville R. Co. v. Hendricks, 26 Ind. 228-653, 673, 675, 847.
 Jeffersonville, etc., R. Co. v. Irvin, 46 Ind. 180-122, 177.
 Jeffersonville, etc., R. Co. v. Parmalee, 51 Ind. 44-554, 675.
 Jeffersonville, etc., R. Co. v. Riley, 39 Ind. 568-557, 634.
 Jeffersonville R. Co. v. Rogers, 28 Ind. 1-749, 750.
 Jeffersonville R. Co. v. Swift, 26 Ind. 459-673, 818, 852.
 Jeffersonville R. Co. v. Rogers, 38 Ind. 116-627, 637, 734, 898, 900.
 Jeffersonville R. Co. v. White, 6 Bush (Ky.), 251-363.
 Jeffrey v. Bigelow, 13 Wend. (N. Y.) 518-384.
 Jeffris v. Fitchburg R. Co., 93 Wis. 250-442.
 Jellett v. St. Paul, etc., R. Co., 30 Minn. 265-179, 199, 211, 399.
 Jemison v. McDaniel, 25 Miss. 83-109, 243.
 Jemison v. Southwestern R. Co., 75 Ga. 444-705.
 Jencks v. Coleman, 2 Sumn. (U. S.) 221-65, 540, 590, 614, 620, 739.
 Jenkins v. Brooklyn, etc., R. Co., 51 N. Y. Supp. 216-743.
 Jenkins v. Chicago, etc., R. Co., 41 Wis. 112-584.
 Jenkins v. Motlow, 1 Snead. (Tenn.) 248, 253-5, 8.
 Jenkins v. Pickett, 9 Yerg. (Tenn.) 480-11, 62.

TABLE OF CASES.

lxix

(The references are to the pages.)

- Jennings v. Grand Trunk R. Co., 15 Ont. App. 477—580.
 Jennings v. Grand Trunk R. Co., 127 N. Y. 438—27, 305, 312, 330, 333, 335, 348, 455, 458, 471, 473, 476.
 Jennings v. Great Northern R. Co., 35 L. J. Q. B. 15—592.
 Jennings v. Smith, 99 Fed. 189—331.
 Jennings v. Smith, 106 Fed. 139—342, 527.
 Jessel v. Bath, L. R. 2 Exch. 267—175.
 Jessup v. Carnegie, 80 N. Y. 441—266.
 Jewell v. Chicago, etc., R. Co., 54 Wis. 610—816, 852.
 Jewell v. Grand Trunk R. Co., 55 N. H. 84—185, 209, 263, 279.
 Jewett v. Klein, 27 N. J. Eq. 550—875.
 Jewett v. Olsen, 18 Or. 419—229.
 J. J. Douglass Co. v. Minnesota Transfer R. Co., 62 Minn. 288—345, 355, 360.
 John v. Bacon, L. R. 5 C. P. 437—609.
 Johnson v. Agricultural Ins. Co., 25 Hun (N. Y.), 251—794.
 Johnson v. Alabama, etc., R. Co., 69 Miss. 191—316, 395, 507, 760.
 Johnson v. Alabama Great Southern R. Co. (Ala.), 37 So. 226—522.
 Johnson v. Boston, etc., R. Co., 125 Mass. 75—558.
 Johnson v. Chicago, etc., R. Co., 58 Iowa, 248—689.
 Johnson v. Concord R. Corp., 46 N. H. 213—558, 565, 566, 590, 591, 807.
 Johnson v. Detroit, etc., R. Co. (Mich.), 90 N. W. 274—633.
 Johnson v. Dominion Exp. Co., 28 Ont. Rep. 203—124.
 Johnson v. East Tennessee, etc., R. Co., 90 Ga. 810—27, 239, 250, 456, 464, 467.
 Johnson v. Fort Worth, etc., R. Co., 9 Tex. Civ. App. 619—207.
 Johnson v. Friar, 4 Yerg. (Tenn.) 48—63.
 Johnson v. Grand Trunk R. Co., 44 N. H. 626—232.
 Johnson v. Hudson River R. Co., 20 N. Y. 65—797, 799.
 Johnson v. Interurban St. R. Co., 88 N. Y. Supp. 866—772.
 Johnson v. Lightsey, 34 Ala. 169—249.
 Johnson v. Louisville, etc., R. Co., 104 Ala. 241—737.
 Johnson v. Manhattan R. Co., 52 Hun (N. Y.), 111—804.
 Johnson v. Midland R. Co., 4 Exch. 367—92, 98, 104, 242.
 Johnson v. New York Cent. R. Co., 33 N. Y. 610—376, 428, 470.
 Johnson v. New York Cent. R. Co., 39 How. Pr. (N. Y.) 127—471, 490.
 Johnson v. Northern Pac. R. Co., 47 Minn. 430—892.
 Johnson v. Pensacola, etc., R. Co., 16 Fla. 623—37, 124, 127.
 Johnson v. Philadelphia, etc., R. Co., 63 Md. 106—555, 558, 565, 757.
 Johnson v. Seattle Electric Co., 35 Wash. 382—655, 701.
 Johnson v. Stone, 11 Humph. (Tenn.) 419—705.
 Johnson v. Toledo, etc., R. Co. (Mich.), 95 N. W. 724—472.
 Johnson v. Town of Irasburg, 47 Vt. 28—832.
 Johnson v. Wells, 6 Nev. 224—880, 895.
 Johnson v. West Chester, etc., R. Co., 70 Pa. St. 257—836.
 Johnson v. Winona, etc., R. Co., 11 Minn. 296—844.
 Johnson v. Yonkers R. Co., 101 App. Div. (N. Y.) 65—853.
 Johnston v. Chicago, etc., R. Co. (Neb.), 97 N. W. 479—216, 514, 516.
 Johnston v. Davis, 60 Mich. 56—435.
 Johnstone v. Richmond, etc., R. Co., 39 S. C. 55—246, 296, 306, 318, 344, 388, 394, 527, 530, 761.
 Joint Water, etc., Lines, 2 Int. Com. Rep. 486—911.
 Joliet St. R. Co. v. Call, 42 Ill. App. 41—804.
 Joliet St. Ry. Co. v. Duggan, 45 Ill. App. 450—821.
 Jones v. Alabama Mineral R. Co., 107 Ala. 400—785.
 Jones v. Anderson, 82 Ala. 302—363.
 Jones v. Bond, 40 Fed. 281—705.
 Jones v. Boston, etc., R. Co., 63 Me. 188—439.
 Jones v. Boston, etc., R. Co., 163 Mass. 245—548, 562.
 Jones v. Brooklyn, etc., R. Co., 21 St. Rep. (N. Y.) 169—830.
 Jones v. Chicago, etc., R. Co., 20 Minn. 125—855.
 Jones v. Chicago, etc., R. Co., 42 Minn. 183, 279—681, 817, 852.
 Jones v. Cincinnati, etc., R. Co., 89 Ala. 376—480, 485.
 Jones v. Earl, 37 Cal. 630—160, 349.
 Jones v. Long Island R. Co., 47 N. Y. Supp. 149—774.
 Jones v. Minneapolis, etc., R. Co. (Minn.), 97 N. W. 893—220, 392.
 Jones v. New York, etc., R. Co., 29 Barb. (N. Y.) 633—94, 249.
 Jones v. New York Cent. R. Co., 46 App. Div. (N. Y.) 470—834.
 Jones v. Norwich, etc., Transp. Co., 59 Barb. (N. Y.) 193—148, 724, 726.
 Jones v. Pearl, 1 Stra. 556—446.
 Jones v. Pitcher, 3 Stew. & P. (Ala.) 136—23, 66.
 Jones v. Priester, 1 Tex. App. Civ. Cas. sec. 613—705, 706.
 Jones v. Seligman, 81 N. Y. 191—600.
 Jones v. St. Louis Southwestern R. Co., 125 Mo. 666—544, 563, 758.
 Jones v. St. Louis, etc., R. Co., 89 Mo. App. 653—484, 517.
 Jones v. Union Ry. Co., 18 App. Div. (N. Y.) 267—773, 784.
 Jones v. Voorhees, 10 Ohio, 145, 180—54, 293, 317, 703, 704, 752, 755, 756.
 Jones v. Wabash, etc., R. Co., 17 Mo. App. 158—581, 747.
 Jones v. Western Union Tel. Co., 18 Fed. Rep. 717—78.
 Jones v. Western Vermont R. Co., 27 Vt. 399—38.
 Jordan v. Fall River R. Co., 5 Cush. (Mass.) 69—92, 701, 704, 722, 723.
 Jordan v. New York, etc., R. Co., 166 Mass. 346—832.
 Jordan v. Pennsylvania Co., 18 Am. & Eng. R. Cas. 647—177.
 Jorden v. American Express Co., 86 Me. 225—389.
 Joseph v. Georgia R. etc., Co., 88 Ga. 426—466.
 Joslin v. Grand Rapids, etc., R. Co., 53 Mich. 322—810.
 Joslyn v. Grand Trunk R. Co., 51 Vt. 92—172.
 Joy v. Winnissimmet Co., 114 Mass. 63—52.
 J. Russell Mfg. Co. v. New Haven Steamship Co., 50 N. Y. 121—192.
 Judd v. New York, etc., S. Co., 117 Fed. 206—284.

TABLE OF CASES.

(The references are to the pages.)

- Judson v. Giant Powder Co., 107 Cal. 549
—773, 783.
- Judson v. Western R. Corp., 4 Allen
(Mass.), 486, 490, 520—132, 259, 290, 292,
488.
- Judson v. Western R. Corp., 6 Allen
(Mass.), 486—290, 344, 360, 755.
- Jullen v. Steamer Wade Hampton, 27 La.
Ann. 377—692, 788.
- Junction Railway Co. v. Bank of Ash-
land, 12 Wall. (U. S.) 226—310.
- June v. Boston, etc., R. Co., 153 Mass. 79
—562.
- Junod v. Chicago, etc., R. Co., 47 Fed.
290—933.
- K.**
- Kaiser v. Illinois Cent. R. Co., 18 Fed.
151—906.
- Kahn v. Atlantic, etc., R. Co., 115 N. C.
638—726.
- Kain v. Smith, 80 N. Y. 468—41.
- Kaiser v. Hoey, 1 N. Y. Supp. 429—332,
333.
- Kaiser v. Latimer, 40 App. Div. (N. Y.)
149—773.
- Kaiser v. St. Louis Transit Co., 108 Mo.
App. 708—842.
- Kalina & Cizek v. Union Pac. R. Co.
(Kan.), 76 Pac. 488—534.
- Kallman v. United States Express Co., 3
Kan. 205—290, 344, 393, 395.
- Kalmerten v. Cowen, 111 Fed. 297—793.
- Kane v. Cicero, etc., R. Co., 100 Ill. 181
—543, 655.
- Kansas City, etc., R. Co. v. Barnett, 69
Ark. 150—522.
- Kansas City, etc., R. Co. v. Dalton, 65
Kan. 661—897.
- Kansas City, etc., R. Co. v. Fites, 67 Miss.
373—898.
- Kansas City, etc., R. Co. v. Flynn, 78 Mo.
195—799.
- Kansas City, etc., R. Co. v. Higdon, 94
Ala. 286—81, 705.
- Kansas City, etc., R. Co. v. Holden, 66
Ark. 602—750.
- Kansas City, etc., R. Co. v. Holland, 68
Miss. 351—115, 351, 503.
- Kansas City, etc., R. Co. v. Kelly, 36
Kan. 655—638.
- Kansas City, etc., R. Co. v. Kirksey, 48
Ark. 366—562.
- Kansas City, etc., R. Co. v. Lilly (Miss.),
8 So. 644—99, 119, 137.
- Kansas City, etc., R. Co. v. Little, 66
Kan. 378—888, 895.
- Kansas City, etc., R. Co. v. Morrison, 34
Kan. 502—272, 706.
- Kansas City, etc., R. Co. v. Patten, 3
Kan. App. 338—264, 724.
- Kansas City, etc., R. Co. v. Phillibert, 25
Kan. 586—798.
- Kansas City, etc., R. Co. v. Reynolds, 8
Kan. 623—393.
- Kansas City, etc., R. Co. v. Riley, 68
Miss. 765—566, 744.
- Kansas City, etc., R. Co. v. Rodebaugh,
38 Kan. 45—717, 755, 756, 757.
- Kansas City, etc., R. Co. v. Sanders, 98
Ala. 293—616, 694, 901.
- Kansas City, etc., R. Co. v. Simpson, 30
Kan. 645—302, 344, 753.
- Kansas City, etc., R. Co. v. Stoner, 51
Fed. 649, 49 Fed. 209—698, 777.
- Kansas City, etc., R. Co. v. Washington
(Ark.), 85 S. W. 406—728.
- Kansas, etc., R. Co. v. Ayers (Ark.), 38
S. W. 516—525.
- Kansas, etc., R. Co. v. Bayles, 19 Colo.
348—123.
- Kansas, etc., R. Co. v. Dorough, 72 Tex.
108—818.
- Kansas City Transfer Co. v. Neiswanger,
18 Mo. App. 103—262, 432.
- Kansas Pac. R. Co. v. Kessler, 18 Kan.
523—625, 747, 898.
- Kansas Pac. R. Co. v. Ludin, 3 Colo. 94
—597.
- Kansas Pac. R. Co. v. Miller, 2 Colo.
442—596, 660, 780, 805.
- Kansas Pac. R. Co. v. Montelle, 10 Kan.
119—722.
- Kansas Pac. R. Co. v. Nichols, 9 Kan.
235—20, 99.
- Kansas Pac. R. Co. v. Peavey, 29 Kan.
169—315.
- Kansas Pac. R. Co. v. Reynolds, 8 Kan.
623—395, 411.
- Kansas Pac. R. Co. v. Reynolds, 17 Kan.
261—304, 307, 755, 758.
- Kansas Pac. R. Co. v. Salmon, 11 Kan. 83
—586.
- Kapland v. Midland R. Terminal Co., 33
N. Y. Supp. 945—509.
- Karle v. Kansas City, etc., R. Co., 55
Mo. 476—786.
- Kaskaskia Bridge Co. v. Shannon, 1 Gil-
man (Ill.), 15—126.
- Kates v. Alabama Baggage & Cab Co.,
107 Ga. 636—615.
- Katz v. Cleveland, etc., R. Co., 46 Misc.
Rep. (N. Y.) 259—730.
- Katzenstein v. Raleigh, etc., R. Co., 84
N. C. 688—246.
- Kauffman Milling Co. v. Missouri Pac. R.
Co., 3 Int. Com. Rep. 400—917.
- Kay v. Metropolitan St. R. Co., 29 App.
Div. (N. Y.) 466—778.
- Kean v. Baltimore, etc., R. Co., 61 Md.
154—829.
- Kearney v. London, etc., R. Co., L. R.
5 Q. B. 411—772, 773.
- Keating v. Michigan Cent. R. Co., 97
Mich. 154—564, 575.
- Keating v. New York Cent. R. Co., 3
Lans. (N. Y.) 469—669, 843.
- Keating v. New York Cent., etc., R. Co.,
49 N. Y. 673—674, 676, 678, 680.
- Keator v. Scranton Tract. Co., 191 Pa.
102—781.
- Keefe v. Boston, etc., R. Co., 142 Mass.
251—556.
- Keegan v. Third Ave. R. Co., 34 App.
Div. (N. Y.) 297—655, 658.
- Keegan v. Western R. Co., 8 N. Y. 115—
796.
- Keeler v. Goodwin, 111 Mass. 490—304.
- Keene v. Lizardi, 5 La. 431—637.
- Keeney v. Grand Trunk R. Co., 47 N. Y.
525—120, 322.
- Keeter v. Wilmington, etc., R. Co., 86 N.
C. 346—246.
- Kefauver v. Philadelphia, etc., R. Co., 122
Fed. 966—781.
- Keith v. Pinkham, 43 Me. 501—854.
- Kelham v. Steamship Kensington, 24 La.
Ann. 100—393.
- Keller v. Baltimore, etc., R. Co., 174 Pa.
St. 62—482.
- Keller v. Hestonville, etc., Pass. R. Co.,
149 Pa. St. 65—832.
- Keller v. New York Cent. R. Co., 2 Abb.
App. Dec. (N. Y.) 480—664, 680.
- Keller v. Sioux City, etc., R. Co., 27
Minn. 178—675, 677, 812.
- Kellerman v. Kansas City, etc., R. Co.
(Kan.), 34 S. W. 41—296.
- Kelley v. Hannibal, etc., R. Co., 70 Mo.
604—830, 850.

TABLE OF CASES.

lxxi

(The references are to the pages.)

- Kelley v. Manhattan R. Co., 112 N. Y. 443—595, 602, 613.
 Kelley v. Metropolitan St. Ry. Co., 89 App. Div. (N. Y.) 159—652.
 Kelley v. New York, etc., R. Co., 109 N. Y. 44—602, 776.
 Kelly v. Southern Minnesota R. Co., 28 Minn. 98—805.
 Kellogg v. Suffolk, etc., R. Co., 100 N. C. 158—99.
 Kellogg v. New York Cent., etc., R. Co., 75 N. Y. 72—903.
 Kellor v. Sioux City R. Co., 27 Minn. 178—810.
 Kellow v. Central Iowa R. Co., 68 Iowa, 470—653, 693, 698.
 Kelton v. Taylor, 11 Lea (Tenn.), 264—377.
 Kemp v. Coughtry, 11 Johns. (N. Y.) 107—7, 66, 202.
 Kemp v. Western Union Tel. Co., 28 Neb. 661—78.
 Kent v. Hudson River R. Co., 22 Barb. (N. Y.) 278—249, 411.
 Kent v. Midland R. Co., L. R. 10 Q. B. 1—468, 483.
 Kendall v. London, etc., R. Co., L. R. 7 Exch. 373—36, 510, 511.
 Kennard v. Burton, 25 Me. 39—796.
 Kennedy v. Birmingham Ry., etc., Co., (Ala.), 35 So. 108—734.
 Kennedy v. Mobile, etc., R. Co., 74 Ala. 430—148, 264.
 Kennedy v. North Jersey St. R. Co. (N. J. Sup.), 60 Atl. 40—547.
 Kennedy v. Rochester, etc., R. Co., 130 N. Y. 654—809.
 Kennon v. Railroad Co., 51 La. Ann. 1599—661.
 Kenney v. New York Cent. R. Co., 125 N. Y. 422—78, 321, 348, 352, 752, 757, 765, 767.
 Kentucky Bank v. Adams Express Co., 93 U. S. 174—529, 759.
 Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. 567—67, 86, 450, 907, 908, 911, 920, 929, 930, 937.
 Kentucky, etc., Bridge Co. v. Quinkert, 2 Ind. App. 224—660, 686, 856.
 Kentucky Cent. R. Co. v. Dills, 4 Bush. (Ky.) 593—815, 899.
 Kentucky Cent. R. Co. v. Thomas, 79 Ky. 160—604, 798, 854, 855.
 Kentucky Wagon Mfg. Co. v. Ohio & M. R. Co., 98 Ky. 152—429.
 Kentucky, etc., Ins. Co. v. Western, etc., R. Co., 8 Baxt. (Tenn.) 268—186, 488.
 Keokuk Northern Line Packet Co. v. True, 88 Ill. 608—557, 634.
 Keokuk Packet Co. v. Henry, 50 Ill. 264—545, 843.
 Kepner v. Harrisburg Tract. Co., 183 Pa. 24—784.
 Keppel v. Petersburg R. Co., 14 Rich. L. (S. C.) 181, Chase's Dec. (U. S.) 167—226.
 Kerr v. Chicago, etc., R. Co., 100 Ill. App. 148—854.
 Kerr v. Grand Trunk R. Co., 24 U. C. C. P. 209—723.
 Kerr v. Liverpool, etc., R. Co., 12 Wkly. Dig. (N. Y.) 265—308.
 Kerwhacker v. Cleveland, etc., R. Co., 3 Ohio St. 172—689.
 Kessler v. New York Cent., etc., R. Co., 61 N. Y. 538—728.
 Ketchum v. American Merchants Union Exp. Co., 52 Mo. 390—317, 390.
 Keyser v. Chicago, etc., R. Co., 66 Mich. 390—290, 811.
 Keyes Marshall Bros. Livery Co. v. St. Louis, etc., R. Co. (Mo. App.), 80 S. W. 53—532.
 Kliff v. Atchison, etc., R. Co., 32 Kan. 263—319, 485.
 Kliff v. Old Colony, etc., R. Co., 117 Mass. 591—34, 231, 234.
 Knight v. Metropolitan R. Co., 21 App. D. C. 494—650, 652.
 Kilpatrick v. Pennsylvania R. Co., 104 Pa. St. 502—852.
 Kilroy v. Delaware, etc., Canal Co., 121 N. Y. 22—194.
 Kimball v. Rutland, etc., R. Co., 26 Vt. 247—13, 30, 38, 46, 288, 293, 497, 510, 755, 758.
 Kimball v. Western R. Corp., 6 Gray (Mass.), 542—144, 151, 278.
 Kimble v. Boston, etc., R. Co., 141 Mass. 463—555.
 Kimes v. St. Louis, etc., R. Co., 85 Mo. 611—405.
 King v. Illinois Cent. R. Co., 69 Miss. 245—640.
 King v. Interstate Consol. St. R. Co. (R. I.), 51 Atl. 301—656.
 King v. Macon, etc., R. Co., 62 Barb. (N. Y.) 160, 161—458, 477.
 King v. New Brunswick, etc., Steamboat Co., 36 Misc. Rep. (N. Y.) 555—150, 263, 270.
 King v. New York, etc., R. Co., 3 Int. Com. Rep. 272—926.
 King v. Ohio, etc., R. Co., 22 Fed. 413—642.
 King v. Richards, 6 Whart. (Pa.) 418—156.
 King v. Shepherd, 3 Story (U. S.), 349—65, 224, 405.
 King v. Woodbridge, 34 Vt. 565—301, 412, 438.
 Kingsford v. Merry, 26 L. J. Exch. 83—157.
 Kinkade v. Atlantic Ave. R. Co., 9 Misc. Rep. (N. Y.) 273—659, 676.
 Kinnear v. Midland R. Co., 19 L. T. N. S. 387—433.
 Kinner v. Lake Shore, etc., R. Co., 69 Ohio St. 339—568.
 Kinney v. Central R. Co., 32 N. J. L. 407—719, 753, 764, 766.
 Kinney v. Central R. Co., 34 N. J. L. 513—570.
 Kinsley v. Lake Shore, etc., R. Co., 125 Mass. 54—60, 541, 696, 713, 714.
 Kinney v. London, etc., R. Co., L. R. 5 Q. B. 411—773.
 Kinney v. Louisville, etc., R. Co., 99 Ky. 59—632, 648.
 Kinnick v. Chicago, etc., R. Co., 69 Iowa, 665—31, 250, 507, 511, 515, 537.
 Kirby v. Adams Express Co., 2 Mo. App. 369—21, 36, 316.
 Kirby v. Delaware, etc., Canal Co., 20 App. Div. (N. Y.) 473—375.
 Kirby v. Western Union Tel. Co., 7 S. D. 623—61, 76.
 Kirk v. New Orleans & N. W. R. Co., 105 La. Ann. 226—657.
 Kirk v. Chicago, etc., R. Co., 59 Minn. 161—264.
 Kirk v. Folsom, 23 La. Ann. 584—393.
 Kirkland v. Dinsmore, 62 N. Y. 171—295, 296, 298, 306.
 Kirkland v. Leary, 2 Sw. (N. Y.) 677—249, 411.
 Kirtland v. Montgomery, 1 Swan (Tenn.), 452—5, 9, 13, 66.
 Kirkman v. Shawcross, 6 T. R. 14—431, 432.
 Kirst v. Milwaukee, etc., R. Co., 46 Wis. 489—3, 173, 389.
 Klaire v. Wilmington Steamboat Co. (Del. Super.), 54 Atl. 694—343.
 Klauber v. American Express Co., 21 Wis. 21—380.

TABLE OF CASES.

(The references are to the pages.)

- Klass Commission Co. v. Wabash R. Co., 80 Mo. App. 164—252.
 Kleiber v. Peoples R. Co., 107 Mo. 240—812, 822.
 Klein v. Dunlap, 16 Misc. Rep. (N. Y.) 34—458.
 Klein v. Hamburg American Packet Co., 3 Daly (N. Y.), 390—724, 725.
 Klein v. Jewett, 26 N. J. Eq. 474—41, 42, 654.
 Kline v. Central Pac. R. Co., 37 Cal. 400—689, 748, 820.
 Klingler v. United Tract. Co., 92 App. Div. (N. Y.) 100—652, 780.
 Klutta v. St. Louis, etc., R. Co., 75 Mo. 642—882, 891.
 Knapp v. Curtis, 9 Wend. (N. Y.) 60—69.
 Knapp, etc., Co. v. McCaffrey, 178 Ill. 107—16.
 Knapp v. Murray, 18 How. Pr. (N. Y.) 165—698.
 Knapp v. Sprague, 9 Mass. 262—363.
 Knauff v. San Antonio Tract. Co. (Tex. Civ. App.), 70 S. W. 1011—658.
 Knauss v. Lake Erie & W. R. Co. (Ind. App.), 64 N. E. 95—870.
 Knell v. United States, etc., S. Co., 1 J. & S. (N. Y.) 423—313, 320.
 Knieriem v. New York Cent., etc., R. Co., N. Y. Law Jan. 3—704.
 Knight v. Pontchartrain R. Co., 23 La. Ann. 462—836.
 Knight v. Portland, etc., R. Co., 56 Me. 234—559, 653, 728.
 Knight v. Providence, etc., R. Co., 13 R. I. 572—438, 460, 491.
 Knott v. Raleigh, etc., R. Co., 98 N. C. 73—459, 472.
 Knowles v. Atlantic, etc., R. Co., 38 Me. 65—10.
 Knowles v. Dabney, 105 Mass. 437—243.
 Knowles v. Norfolk Southern R. Co., 102 N. C. 59—896.
 Knowles v. Pittsburgh, etc., R. Co., 4 Biss. (U. S.) 466—464.
 Knowlton v. Erie R. Co., 19 Ohio St. 260—310, 312, 317, 753.
 Knowlton v. Milwaukee City Ry. Co., 59 Wis. 278—555, 819, 831.
 Knox v. Rives, 14 Ala. 249—8.
 Knoxville Iron Co. v. Dobson, 7 Lea (Tenn.), 367—609.
 Knoxville Tract. Co. v. Lane, 103 Tenn. 376—629, 637.
 Koch v. Brooklyn Heights R. Co., 75 App. Div. (N. Y.) 282—641.
 Koehne v. New York, etc., R. Co., 32 App. Div. (N. Y.) 419—605, 655.
 Koenig v. Union Depot R. Co., 173 Mo. 698—696.
 Koetter v. Manhattan R. Co., 59 Hun (N. Y.), 628—810, 892, 893.
 Kohm v. Interborough Rapid Trans. Co., 95 N. Y. Supp. 671—602.
 Kohn v. Packard, 3 La. 224—195, 274, 275.
 Kohn v. Richmond, etc., R. Co., 37 S. C. 1—153, 156, 232.
 Kohner v. Capital Traction Co., 22 App. D. C. 181—774.
 Koues v. Metropolitan St. Ry. Co., 86 App. Div. (N. Y.) 611—858.
 Koumn v. St. Louis, etc., R. Co. (Ark.), 76 S. W. 1075—866.
 Kowalski v. Newark Pass. Ry. Co., 15 N. J. L. 50—599.
 Kramer v. New Orleans City & S. R. Co., 51 La. Ann. 1639—829.
 Kreelman v. Jourdan (Mo. App.), 80 S. W. 323—835.
 Kremer v. Southern Express Co., 8 Coldw. (Tenn.) 356—269, 276.
 Kreuder v. Woolcott, 1 Hilt. (N. Y.) 223—69, 382.
 Kreusen v. Forty-second St., etc., R. Co., 13 N. Y. Supp. 588—644.
 Kreuziger v. Chicago, etc., R. Co., 73 Wis. 158—887, 895, 903.
 Krone v. Southwest Missouri Electric Ry. Co., 97 Mo. App. 609—650.
 Kroner v. St. Louis Transit Co., 107 Mo. App. 41—853.
 Krulder v. Ellison, 47 N. Y. 36—188, 209.
 Krulevitz v. Eastern R. Co., 140 Mass. 573, 143 Mass. 228—627, 640.
 Kuebler v. New York, etc., R. Co., 15 N. Y. Supp. 187—522.
 Kuhnen v. Union R. Co., 10 App. Div. (N. Y.) 195—795.
 Kumler v. Junction R. Co., 33 Ohio St. 150—536.
 Kuter v. Michigan Cent. R. Co., 1 Biss. (U. S.) 35—314, 357, 359.
 Kyle v. Buffalo, etc., R. Co., 16 U. C. C. P. 76—335.
 Kyle v. Laurens R. Co., 10 Rich. L. (S. C.) 382—399, 404, 460, 475.
- L.
- Laboyteaux v. Swigart, 103 Ind. 596—110.
 Lacas v. Detroit City R. Co., 92 Mich. 412—820.
 Lackawana, etc., R. Co. v. Chenewith, 52 Pa. St. 382—599, 815.
 Lackawana, etc., R. Co. v. Doak, 52 Pa. St. 379—604.
 Lackland v. Chicago, etc., Ry. Co. (Mo. App.), 74 S. W. 505—501, 512, 519.
 Lacky v. McDemott, 8 S. & R. (Pa.) 500—446.
 La Crosse Mfrs., etc., Union v. Chicago, etc., R. Co., 2 Int. Com. Rep. 9—908, 913.
 Ladd v. Foster, 31 Fed. 827—221, 652, 819.
 Ladd v. New Bedford R. Co., 119 Mass. 413—586, 607.
 Ladue v. Griffith, 25 N. Y. 364—69, 70, 487, 789.
 Lafayette, etc., R. Co. v. Sims, 27 Ind. 59—691.
 La Fitte v. New Orleans, etc., R. Co., 43 La. Ann. 34—626, 634, 636, 639.
 Lafflin v. Buffalo, etc., R. Co., 106 N. Y. 136—602, 613, 672, 682.
 Laffrey v. Grummond, 74 Mich. 186—715, 725.
 Laing v. Colder, 8 Pa. St. 479—293, 617, 654, 755, 770, 780, 788, 870, 891, 893, 903.
 Laird v. Pittsburg Traction Co., 166 Pa. 4—744.
 Lairmore v. Chicago, etc., R. Co., 65 Mo. App. 167—489.
 Lake v. Cincinnati Ins. P. R. Co., 13 Ohio C. C. 494—864.
 Lakeman v. Grinnell, 5 Bosw. (N. Y.) 625—401, 404, 411.
 Lakin v. Oregon Pac. R. Co., 15 Or. 220—618.
 Lake Erie, etc., R. Co. v. Acres, 108 Ind. 548—625.
 Lake Erie, etc., R. Co. v. Arnold (Ind. App.), 59 N. E. 394—646.
 Lake Erie, etc., R. Co. v. Christison, 64 Miss. 584—888, 896.
 Lake Erie, etc., R. Co. v. Condon, 10 Ind. App. 536—481.
 Lake Erie, etc., R. Co. v. Delong, 109 Ill. App. 241—788.
 Lake Erie, etc., R. Co. v. Fix, 88 Ind. 381—680, 745, 895.
 Lake Erie, etc., R. Co. v. Hatch, 52 Ohio St. 408—265, 271, 274.

TABLE OF CASES.

lxiii

(The references are to the pages.)

- Lake Erie, etc., R. Co. v. Holland (Ind.), 69 N. E. 138—287, 288, 303, 524, 525.
 Lake Erie, etc., R. Co. v. Mays, 4 Ind. App. 113, 413—548, 549, 553, 556, 734.
 Lake Erie, etc., R. Co. v. Oakes, 11 Ill. App. 489—491.
 Lake Erie, etc., R. Co. v. Rosenberg, 31 Ill. App. 47—369, 417, 518.
 Lake Shore, etc., R. Co. v. Bangs, 47 Mich. 470—850.
 Lake Shore, etc., R. Co. v. Bennett, 89 Ind. 457—227, 255, 315, 510, 524.
 Lake Shore, etc., R. Co. v. Bodemer, 139 Ill. 556—544.
 Lake Shore, etc., R. Co. v. Brown, 123 Ill. 162—572, 577, 583, 625, 679, 694, 855.
 Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co., 30 Ohio St. 604—697.
 Lake Shore, etc., R. Co. v. Ellesy, 86 Pa. St. 233—443.
 Lake Shore, etc., R. Co. v. Foster, 104 Ind. 293, 307—133, 549, 722, 723.
 Lake Shore, etc., R. Co. v. Greenwood, 79 Pa. St. 373—589.
 Lake Shore, etc., R. Co. v. Hodapp, 83 Pa. St. 22—381.
 Lake Shore, etc., R. Co. v. Hotchkiss, 24 Ohio Cir. Ct. Rep. 431—572, 835.
 Lake Shore, etc., R. Co. v. Lassen, 12 Ill. App. 659—722.
 Lake Shore, etc., R. Co. v. Luce, 11 Ohio Cir. Ct. Rep. 543—157.
 Lake Shore, etc., R. Co. v. National Livestock Bank, 178 Ill. 506, 59 Ill. App. 451—156, 162, 173.
 Lake Shore, etc., R. Co. v. Perkins, 25 Mich. 329—99, 497.
 Lake Shore, etc., R. Co. v. Pierce, 47 Mich. 277, 333—591, 666, 667, 680, 686, 732.
 Lake Shore, etc., R. Co. v. Prentice, 147 U. S. 101, 109—634, 641, 890, 899, 900, 901.
 Lake Shore, etc., R. Co. v. Rosenzweig, 113 Pa. St. 519—551, 591, 689, 750, 755.
 Lake Shore, etc., R. Co. v. Salzman, 52 Ohio St. 558—684, 826.
 Lake Shore, etc., R. Co. v. Smith, 173 U. S. 684, 697—909.
 Lake Shore, etc., R. Co. v. Warren, 3 Wyo. 134—712, 716.
 Lake Shore Nitro Glycerine Co. v. Illinois Cent. R. Co., 75 Ill. 394—392.
 Lake St. Elev. R. Co. v. Gormley, 108 Ill. App. 59—554.
 Lake St. El. R. Co. v. Long Island R. Co., 32 Misc. Rep. (N. Y.) 669—428.
 Lallande v. His Creditors, 42 La. Ann. 705—165.
 Lamar v. New York S. Nav. Co., 16 Ga. 558—93.
 Lamb v. Camden, etc., R. Co., 2 Daly (N. Y.), 454—104, 264, 268, 458, 479, 485.
 Lamb v. Camden, etc., R. Co., 4 Daly (N. Y.), 483—306.
 Lamb v. Camden, etc., R. Co., 46 N. Y. 271—328, 347, 392, 394, 395, 465, 476.
 Lamb v. Chicago, etc., R. Co., 101 Wis. 138—237.
 Lamb v. Parkman, 1 Sprague (U. S.), 343—379.
 Lamb v. Western R. Corp., 7 Allen (Mass.) 98—283, 396.
 Lambeth v. North Carolina R. Co., 66 N. C. 494—654, 672, 680, 686, 850.
 Lambert v. Robinson, 1 Esp. N. P. 119—441.
 Lamont v. Nashville, etc., R. Co., 9 Heisk. (Tenn.) 59—235, 250, 257.
 LaMotte v. Angel, 1 Hawaiian, 237—447.
 Lampkin v. Louisville, etc., R. Co., 106 Ala. 287—626.
 Lampkins v. Vicksburg, etc., R. Co., 42 La. Ann. 957—801.
 Lamphear v. Buckingham, 33 Conn. 237—42, 43.
 Lampley v. Scott, 24 Miss. 528—9, 10.
 Lancaster Mills v. Merchants' Cotton Press Co., 89 Tenn. 1—263, 353.
 Land v. Wilmington, etc., R. Co., 104 N. C. 48—99, 139.
 Land v. Holck, 129 Mo. 663—229, 232.
 Landa v. Missouri, etc., R. Co. (Mo.), 31 S. W. 900—282.
 Landers v. Garland Canal Co., 52 La. Ann. 1465—88.
 Landes v. Pacific R. Co., 50 Mo. 346—93.
 Landrigan v. Brooklyn Heights R. Co., 32 App. Div. (N. Y.) 43—378.
 Landrigan v. State, 31 Ark. 501—622, 740.
 Landsberg v. Dinsmore, 4 Daly (N. Y.), 490—276.
 Lane v. Atlantic Works, 111 Mass. 136—814.
 Lane v. Cotton, 1 Ld. Raym. 646, 1 Salk. 143—21, 72, 92, 99.
 Lane v. Boston, etc., R. Co., 112 Mass. 455—6, 261, 283.
 Lane v. Chadwick, 146 Mass. 68—199, 447.
 Lane v. East Tennessee, etc., R. Co., 5 Lea. (Tenn.) 124—734, 747.
 Lane v. Old Colony, etc., R. Co., 14 Gray (Mass.), 143—442.
 Lang v. Pennsylvania R. Co., 154 Pa. St. 342—220, 237.
 Lang v. Sanger, 76 Wis. 71—384.
 Langdon v. Howell, 4 Q. B. Div. 337—568.
 Langley v. Brown, 1 M. & P. 583—323.
 Langley v. Metropolitan St. Ry. Co., 74 N. Y. Supp. 857—776.
 Langworthy v. New York, etc., R. Co., 2 E. D. Smith (N. Y.), 195—39.
 Lanning v. Sussex R. Co., 1 N. J. L. J. 21—92, 94.
 Lapham v. Atlas Insurance Co., 24 Pick. (Mass.) 1—378.
 La Pointe v. Boston & M. R. Co., 182 Mass. 227—350.
 La Pointe v. Grand Trunk R. Co., 25 U. C. Q. B. 479—464, 483.
 Lapointe v. Middlesex R. Co., 144 Mass. 18—362.
 Laporte v. Wells, Fargo, etc., Express, 23 App. Div. (N. Y.) 267—282.
 Larkin v. Oregon Pac. R. Co., 22 Or. 430, 15 Or. 220—334.
 Larrison v. Chicago, etc., R. Co., 1 Int. Com. Rep. 369—917, 921, 935.
 Lasher v. Third Ave. R. Co., 27 Misc. Rep. (N. Y.) 824—731, 748.
 Lassiter v. Western Union Tel. Co., 89 N. C. 336—78.
 Latch v. Rummer R. Co., 27 L. J. Exch. 155—788.
 Laubheim v. De Koninglyke Nederlandsche Stoomboot Maabschappy, 107 N. Y. 228—618.
 Laughlin v. Chicago, etc., R. Co., 28 Wis. 204—491.
 Laughlin v. Grand Rapids St. R. Co., 80 Mich. 154, 62 Mich. 220—308, 308.
 Laurent v. Vaughn, 30 Vt. 90—400, 413.
 Lauterer v. Manhattan R. Co., 128 Fed. 540—670, 833.
 Laveroni v. Drury, 8 Exch. 166—65.
 Lavin v. Second Ave. R. Co., 12 App. Div. (N. Y.) 381—785.
 Lavis v. Wisconsin Cent. R. Co., 54 Ill. App. 636—775.
 Law v. Illinois, etc., R. Co., 32 Iowa, 534—746.

TABLE OF CASES.

(The references are to the pages.)

- Lawrenceburgh, etc., R. Co. v. Montgomery, 7 Ind. 474—575, 815.
 Lawrence v. Aberdeen, 5 B. & Ald. 107—30.
 Lawrence v. Green, 70 Cal. 417—776.
 Lawrence v. Milwaukee, etc., R. Co., 84 Wis. 427—489, 537.
 Lawrence v. Minturn, 17 How. (N. Y.) 100—166.
 Lawrence v. New York, etc., R. Co., 36 Conn. 63—290, 753, 760.
 Lawrence v. Pullman Palace Car Co., 144 Mass. 1—59.
 Lawrence v. Smith, 45 N. H. 533—231, 233.
 Lawrence v. Winona, etc., R. Co., 15 Minn. 390—131, 459, 489.
 Lawshe v. Tacoma R. Co. (Wash.), 70 Pac. 118—745.
 Lawson v. Chicago, etc., R. Co., 64 Wis. 455—322, 573, 757, 762.
 Lax v. Forty-second St., etc., R. Co., 46 N. Y. Super. Ct. 448—865.
 Leach v. New York, etc., R. Co., 89 Hun (N. Y.), 377—102.
 Leader v. Northern R. Co., 3 Ont. Rep. 92—204, 400.
 Leahey v. Cass Ave., etc., R. Co., 93 Mo. 165—807.
 Leavenworth Elec. R. Co. v. Cusick, 60 Kan. 590—677.
 Leavenworth, etc., R. Co. v. Maris, 16 Kan. 333—264, 268, 271.
 Le Barron v. East Boston Ferry Co., 11 Allen (Mass.), 312—53, 540, 604, 605.
 Lebeau v. General Steam Nav. Co., L. R. 8 C. P. 88—358.
 Le Blanche v. London, etc., R. Co., 1 C. P. Div. 286—690, 691, 882.
 Le Blanc v. Sweet, 107 La. 355—656.
 Lecky v. McDermott, 8 S. & R. (Pa.) 600—63.
 Lee v. Grand Trunk R. Co., 36 U. C. Q. B. 350—708.
 Lee v. Knapp, 115 Mo. 610—85.
 Lee v. Marsh, 43 Barb. (N. Y.) 102—516.
 Lee v. Raleigh, etc., R. Co., 72 N. C. 236—288, 510, 538.
 Lee v. Salter, Hill & D. Supp. (N. Y.) 163—447.
 Leech v. Baldwin, 5 Watts (Pa.), 446—31, 126, 447.
 Lees v. Lancashire, etc., R. Co., 18 Sol. Jour. 629—123.
 Lesson v. Holt, 1 Stark. 186—323.
 Leggett v. Western New York, etc., R. Co., 143 Pa. St. 51—39, 820, 849, 851.
 Lehigh Valley R. Co. v. Greiner, 113 Pa. St. 600—855.
 Lehigh Valley R. Co. v. Rainey, 112 Fed. 487—916.
 Lehman v. Louisville Western R. Co., 37 La. Ann. 705—653, 664, 670, 678.
 Lehmann v. Texas, etc., R. Co., 3 Int. Com. Rep. 706—932, 935.
 Lehner v. Metropolitan St. Ry. Co., 110 Mo. App. 215—842.
 Lehr v. Steinway, etc., R. Co., 118 N. Y. 556—650.
 Leigh v. Mobile, etc., R. Co., 58 Ala. 165—444.
 Leigh v. Smith, 1 C. & P. 640—136.
 Lehigh Valley Transp. Co. v. Pittsburgh, etc., Co., 92 Ill. App. 628—462.
 Leinkauf v. Lombard, A. & Co., 12 App. Div. (N. Y.) 302—364.
 Leland v. Chicago, etc., R. Co. (Iowa), 23 N. W. 390—282.
 Lembeck v. Jarvis Terminal, etc., Co. (N. J.), 69 Atl. 360—443.
 Lemke v. Chicago, etc., R. Co., 39 Wis. 449—265, 268, 269, 270.
 Lemon v. Chanslor, 68 Mo. 340—540, 568, 570, 654, 692, 781.
 Lemon v. Grand Rapids, etc., R. Co., 11 Det. L. N. 151—670.
 Lemon v. Pullman Palace Car Co., 52 Fed. 262—56, 59.
 Lemont v. New York, etc., R. Co., 28 Fed. 920—230.
 Lemont v. Washington, etc., R. Co., 1 Mackey (D. C.), 180—621, 648, 739.
 Lent v. New York Cent., etc., R. Co., 120 N. Y. 467—665, 669, 818, 868, 869.
 Lent v. New York Cent., etc., R. Co., 11 Det. L. N. 151—817.
 Leo v. St. Paul, etc., R. Co., 30 Minn. 438—491.
 Leonard v. Brooklyn Heights R. Co., 57 App. Div. (N. Y.) 125—603, 605, 657, 820.
 Leonard v. Chicago, etc., R. Co., 57 Mo. App. 366—240.
 Leonard v. Chicago, etc., R. Co., 54 Mo. App. 293—242, 256, 300, 303, 316, 337, 497.
 Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48—266.
 Leonard v. Fitchburg R. Co., 143 Mass. 307—116, 401, 500.
 Leonard v. Hendrickson, 18 Pa. St. 40—24, 51, 392.
 Leonard v. New York, etc., Tel. Co., 41 N. Y. 544—73, 75.
 Leonard v. Southern Pac. R. Co., 21 Or. 555—803.
 Leonard v. Tidd, 3 Metc. (Mass.) 6—216.
 Lepford v. Charlotte, etc., R. Co., 7 Rich. L. (S. C.) 409—224.
 Le Sage v. Great Western R. Co., 1 Daly (N. Y.), 306—458, 470.
 Lesan v. Maine Cent. R. Co., 77 Me. 85—796.
 Lesinsky v. Great Western Dispatch, 13 Mo. App. 575, 10 Mo. App. 134—196, 276, 412, 453.
 Leslie v. Wabash, etc., R. Co., 88 Mo. 50—654, 692, 850.
 Lester v. Delaware, etc., R. Co., 92 Hum (N. Y.), 342—179, 207, 209, 215.
 Lester v. Delaware, etc., R. Co., 73 Hun (N. Y.), 398—161.
 Leuckhart v. Cooper, 3 Bing. N. Cas. 99—441.
 Leu v. St. Louis Transit Co. (Mo. App.), 80 S. W. 273—834, 842.
 Levering v. Union Transp., etc., Co., 42 Mo. 88, 86 S. W. 137—282, 295, 317.
 Leveret v. Shreveport Belt Line Co. (La.), 1 St. Ry. Rep. 253—595, 606, 613, 843, 846, 877.
 Levi v. Lynn R. Co., 11 Allen (Mass.), 300—45.
 Levin v. Second Ave. Tract. Co., 201 Pa. 58—825.
 Levien v. Webb, 30 Misc. Rep. (N. Y.) 196—60.
 Levins v. New York, etc., R. Co., 183 Mass. 175—704.
 Levois v. Gale, 17 La. Ann. 302—360.
 Levy v. Campbell (Tex.), 19 S. W. 438—655, 657, 812.
 Levy v. Pontchartrain R. Co., 23 La. Ann. 477—328.
 Levy v. Southern Express Co., 4 S. C. 234—288, 293, 486.
 Levy v. Weir, 38 Misc. Rep. (N. Y.) 361—148, 218.
 Lewark v. Norfolk, etc., R. Co. (N. C.), 49 S. E. 832—425.
 Lewis v. Delaware, etc., Canal Co., 145 N. Y. 508—679.
 Lewis v. Flint, etc., R. Co., 54 Mich. 55—887.

TABLE OF CASES.

LXXV

(The references are to the pages.)

- Lewis v. Galena, etc., R. Co., 40 Ill. 281—160.
 Lewis v. Great Western R. Co., 5 H. & N. 867—219, 312, 325, 334, 765.
 Lewis v. Houston Elec. R. Co. (Tex.), 88 S. W. 489—546.
 Lewis v. London, etc., R. Co., 9 Q. B. 66—671, 673.
 Lewis v. Ludwick, 6 Coldw. (Tenn.) 368—25, 226.
 Lewis v. New York Sleeping Car Co., 143 Mass. 267—56, 58, 59, 714, 755.
 Lewis v. New York Cent. R. Co., 49 Barb. (N. Y.) 330—553.
 Lewis v. Pennsylvania R. Co., 70 N. J. L. 132—505, 514, 532.
 Lewis v. Richmond, etc., R. Co., 25 S. C. 249—495.
 Lewis v. Western R. Corp., 11 Metc. (Mass.) 509—152, 153, 188.
 Lewisohn v. National Steamship Co., 56 Fed. 602—311.
 Lewke v. Dry Dock, etc., R. Co., 46 Hun (N. Y.) 283—808.
 Lexington Ry. Co. v. Cozine, 23 Ky. L. Rep. 1137—897.
 Lexington, etc., R. Co. v. Lyons, 104 Ky. 28—744.
 Lezinsky v. Metropolitan St. R. Co., 88 Fed. 437—640.
 Libby v. Ingalls, 124 Mass. 503—171, 172.
 Libby v. Maine Cent. R. Co., 85 Me. 34—221, 578, 606, 611, 612, 642, 653.
 Lickbarrow v. Mason, 6 East. 21—170, 446.
 Liebert v. Galveston, etc., R. Co. (Tex. Civ. App.), 57 S. W. 899—211.
 Ligon v. Missouri Pac. R. Co., 3 Tex. App. Civ. Cas. sec. 1—425.
 Lillard v. Mitchell, 3 Tex. App. Civ. Cas. sec. 457—369.
 Lillis v. St. Louis, etc., R. Co., 64 Mo. 464—553, 565, 732, 751.
 Lillstrom v. Northern Pac. R. Co. (Minn.), 20 L. R. A. 587—790.
 Limburger v. Westcott, 49 Barb. (N. Y.) 283—720, 754, 756.
 Lin v. Terre Haute, etc., R. Co., 10 Mo. App. 125—224.
 Lindsey v. Chicago, etc., R. Co., 64 Iowa, 407, 477—801, 856.
 Lindsay v. Chicago, etc., R. Co., 36 Minn. 639—395, 510, 533, 534.
 Lindsey v. Pennsylvania R. Co., 34 Wash. L. Rep. (Feb., 1906), 65—579.
 Lindley v. Richmond, etc., R. Co., 88 N. C. 547—412, 424, 472, 491.
 Lincoln Board of Trade v. Burlington, etc., R. Co., 2 Int. Com. Rep. 95—912, 925.
 Lincoln Board of Trade v. Missouri Pac. R. Co., 2 Int. Com. Rep. 98—933.
 Lincoln St. R. Co. v. Cox, 48 Neb. 807—785.
 Lincoln Tract. Co. v. Heller (Neb.), 100 N. W. 197—770.
 Lincoln St. R. Co. v. McClellan, 54 Neb. 672—44, 655, 770.
 Lincoln v. New York, etc., S. S. Co., 30 Misc. Rep. (N. Y.) 753—715.
 Lincoln v. Walker, 18 Neb. 247—798, 799, 800.
 Lippman v. Illinois Cent. R. Co., 2 Int. Com. Rep. 414—920, 932.
 Liscomb v. New Jersey, etc., R. Co., 6 Lans. (N. Y.) 75—670.
 Lister v. Lancashire & Y. Ry., 72 L. J. K. B. 385—235.
 Litt v. Cowley, 7 Taunt. 169, 23 Eng. R. Cas. 411—349.
 Litt v. Wabash R. Co., 50 App. Div. (N. Y.) 550—409.
 Littman v. Dry Dock, etc., R. Co., 6 Misc. Rep. (N. Y.) 34—865.
 Little v. Boston, etc., R. Co., 66 Me. 239—293, 355, 360, 388, 399.
 Little v. Dusenberry, 46 N. J. L. 614—41.
 Little v. Fargo, 43 Hun (N. Y.), 233—228, 238, 239, 254, 484.
 Little v. Hackett, 116 U. S. 366—698.
 Little v. Riley, 43 N. H. 109—312.
 Littlejohn v. Jones, 2 McMUL. (S. C.) 365, 366—9, 10, 19, 53.
 Little Miami R. Co. v. Wetmore, 19 Ohio St. 110—629, 635.
 Little Miami, etc., R. Co. v. Washburn, 22 Ohio St. 324—470.
 Little Rock Tract. & E. Co. v. Nelson, 66 Ark. 494—684, 812, 824.
 Little Rock, etc., R. Co. v. Atkins, 46 Ark. 423—849.
 Little Rock, etc., R. Co. v. Bruce, 55 Ark. 65—205.
 Little Rock, etc., R. Co. v. Cavenesse, 48 Ark. 106—832, 874.
 Little Rock, etc., R. Co. v. Conatser, 61 Ark. 560—117, 427.
 Little Rock, etc., R. Co. v. Corcoran, 40 Ark. 355—393.
 Little Rock, etc., R. Co. v. Cravens, 57 Ark. 112—303, 327.
 Little Rock, etc., Tel. Co. v. Davis, 41 Ark. 79—73.
 Little Rock, etc., R. Co. v. Dean, 43 Ark. 529—559, 567.
 Little Rock, etc., R. Co. v. East Tennessee see, etc., R. Co., 3 I. C. C. 1—450, 927, 929, 930.
 Little Rock, etc., R. Co. v. Eubanks, 48 Ark. 460—303.
 Little Rock, etc., R. Co. v. Glidewell, 39 Ark. 487—38, 179.
 Little Rock, etc., R. Co. v. Hanniford, 49 Ark. 291—205, 206.
 Little Rock, etc., R. Co. v. Harper, 44 Ark. 208—393.
 Little Rock, etc., R. Co. v. Hunter, 42 Ark. 200—70, 131, 259, 714, 723, 725, 726.
 Little Rock, etc., R. Co. v. Lawton, 55 Ark. 423—585, 586.
 Little Rock, etc., R. Co. v. Miles, 40 Ark. 298—572, 652, 666, 779, 817, 854.
 Little Rock, etc., R. Co. v. Odom, 63 Ark. 326—214, 480, 494.
 Little Rock, etc., R. Co. v. Record (Ark.), 35 S. W. 421—718, 728.
 Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 59 Fed. 402—454, 924, 928, 929, 930.
 Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 41 Fed. 559—431, 450.
 Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 63 Fed. 775—450, 907, 924, 929, 930, 931.
 Little Rock, etc., R. Co. v. Talbot, 39 Ark. 523—287, 393, 395, 760.
 Little Rock, etc., R. Co. v. Walker, 64 Ark. 144—640.
 Livingston v. Miller, 48 Hun (N. Y.), 232—229.
 Livingston v. New York Cent., etc., R. Co., 76 N. Y. 631, 5 Hun (N. Y.), 562—246, 250, 411, 468, 488.
 Liverpool, etc., Steam Co. v. Ins. Co. of N. A., 129 U. S. 464—373.
 Liverpool, etc., Steam Co. v. Phoenix Ins. Co., 129 U. S. 397—65, 220, 308, 311, 314, 373, 486, 752, 754.
 Lloyd v. Hannibal, etc., R. Co., 53 Mo. 509—850, 857.
 Lobsenz v. Metropolitan St. Ry. Co., 72 App. Div. (N. Y.) 181—664.
 Lochner v. New York, 25 S. Ct. 539—909.

TABLE OF CASES.

(The references are to the pages.)

- Lockhart v. Lichtenhaler, 46 Pa. St. 151—699.
 Locke v. Sioux City, etc., R. Co., 46 Iowa, 109—596.
 Lockwood v. Manhattan, etc., Warehouseman Co., 28 App. Div. (N. Y.) 68—387.
 Loeser v. Chicago, etc., R. Co. (Wis.), 69 N. W. 372—524, 527, 530.
 Loeffler v. Keokuk, etc., Packet Co., 7 Mo. App. 185—213, 419.
 Loewenberg v. Arkansas, etc., R. Co., 56 Ark. 439—206, 437.
 Loftus v. Union Ferry Co., 84 N. Y. 455, 461—374, 604, 612, 670, 692.
 Logan v. Hannibal, etc., R. Co., 77 Mo. 663—666, 741.
 Logan v. Metropolitan St. R. Co., 183 Mo. 582—280.
 Logan v. Mobile Trade Co., 46 Ala. 514—295.
 Logan v. Ponchartrain R. Co., 11 Rob. (La.) 24—292, 716, 717, 720.
 Logwood v. Memphis, etc., R. Co., 23 Fed. 318—623.
 London, etc., R. Co. v. Bartlett, 7 H. & N. 400—187, 188, 313.
 London, etc., Fire Ins. Co. v. Rome, etc., R. Co., 68 Hun (N. Y.), 598, 144 N. Y. 200—28, 131, 133, 144, 298.
 Long v. Lehigh Valley R. Co. (U. S. C. C. A. N. Y.), 130 Fed. 870—580, 767.
 Long v. Mobile, etc., R. Co., 51 Ala. 512—428, 447.
 Long v. New York Cent. R. Co., 50 N. Y. 76—294.
 Long v. Pennsylvania R. Co., 147 Pa. St. 343—713.
 Losee v. Watervliet Turnp., etc., R. Co., 63 Hun (N. Y.), 404—862.
 Lord v. Midland R. Co., L. R. 2 C. P. 339—6, 325.
 Lord v. Steamship Co., 102 U. S. 541—910.
 Loomis v. Jewett, 35 Hun (N. Y.), 313—750.
 Loomis v. Wabash, etc., R. Co., 17 Mo. App. 340—183, 194, 367.
 Lorickio v. Brooklyn H. R. Co., 44 App. Div. (N. Y.) 628—797.
 Lorimer v. St. Paul City R. Co., 120 N. C. 557—604.
 Loring v. Mulcahey, 3 Allen (Mass.), 575—216.
 Lothrop v. Adams, 133 Mass. 471—641.
 Lott v. New Orleans City, etc., R. Co., 37 La. Ann. 337—644.
 Lotspeich v. Central R., etc., Co., 73 Ala. 305, 306—450, 462.
 Loud v. South Carolina, etc., R. Co., 4 Int. Com. Rep. 205—911, 913, 914.
 Loudoun v. Eighth Ave. R. Co., 162 N. Y. 380—769, 778.
 Lough v. Outerbridge, 143 N. Y. 271—18, 123.
 Louisiana Nat. Bank v. Lavielle, 52 Mo. 380—175.
 Louisville v. Berg, 17 Ky. L. Rep. 1105—869.
 Louisville, etc., Ferry Co. v. Nolan, 185 Ind. 60—642, 770, 780.
 Louisville, etc., Mail Co. v. Barnes Admr., 25 Ky. L. Rep. 2036—646.
 Louisville, etc., Packet Co. v. Bottorff, 25 Ky. L. Rep. 1324—415.
 Louisville, etc., Packet Co. v. Rogers, 20 Ind. App. 594—173.
 Louisville & N. R. Co. v. Hall, 19 Ky. Law Rep. 1651—684.
 Louisville Southern R. Co. v. Minogue, 90 Ky. 369—653, 697, 898.
 Louisville & N. R. Co. v. Ray, 101 Tenn. 1—60.
 Louisville City R. Co. v. Weams, 80 Ky. 420—653.
 Louisville, etc., R. Co. v. Allen, 78 Ala. 494—770.
 Louisville, etc., R. Co. v. Ballard, 88 Ky. 159—85 Ky. 307—637, 897, 901.
 Louisville, etc., R. Co. v. Barkhouse, 100 Ala. 543—178, 212.
 Louisville, etc., R. Co. v. Behlmer, 175 U. S. 648—917, 933, 934.
 Louisville, etc., R. Co. v. Bell, 100 Ky. 203—572, 760.
 Louisville, etc., R. Co. v. Bennett & Morgan, 25 Ky. L. Rep. 834—514.
 Louisville, etc., R. Co. v. Bernheim, 113 Ala. 489—191.
 Louisville, etc., R. Co. v. Berry, 88 Ky. 222—805.
 Louisville, etc., R. Co. v. Bigger, 66 Miss. 319—534.
 Louisville, etc., R. Co. v. Bisch, 120 Ind. 549—680, 695, 782, 817, 856.
 Louisville, etc., R. Co. v. Bourne (Ky.), 29 S. W. 975—488.
 Louisville, etc., R. Co. v. Buck, 116 Ind. 566—808.
 Louisville, etc., R. Co. v. Burke, 6 Coldw. (Tenn.) 45—697.
 Louisville, etc., R. Co. v. Breckinridge (Ky.), 34 S. W. 702—736.
 Louisville, etc., R. Co. v. Brinley (Ky.), 29 S. W. 305—241, 515.
 Louisville, etc., R. Co. v. Brownlee, 14 Bush (Ky.), 590—296, 755, 760.
 Louisville, etc., R. Co. v. Bowlds, 23 Ky. L. Rep. 1212—827.
 Louisville, etc., R. Co. v. Campbell, 7 Heisk. (Tenn.) 258, 253—272, 453, 463, 488.
 Louisville, etc., R. Co. v. Champion, 24 Ky. L. Rep. 87—898.
 Louisville, etc., R. Co. v. Case, 9 Bush (Ky.), 728—698.
 Louisville, etc., R. Co. v. S. D. Chestnut & Bro., 24 Ky. L. Rep. 1846—481.
 Louisville, etc., R. Co. v. Commonwealth (Ky.), 57 S. W. 508—122.
 Louisville, etc., R. Co. v. Conrad, 4 Ind. App. 83—744.
 Louisville, etc., R. Co. v. Cowherd, 120 Ala. 51—396.
 Louisville, etc., R. Co. v. Craycraft, 12 Ind. App. 203—302, 307, 406.
 Louisville, etc., R. Co. v. Crayton, 69 Miss. 152—623.
 Louisville, etc., R. Co. v. Crumpler, 122 Fed. 425—595.
 Louisville, etc., R. Co. v. Crunk, 119 Ind. 542—584, 847, 849, 850.
 Louisville, etc., R. Co. v. Cunningham, 88 Ill. App. 289—338.
 Louisville, etc., R. Co. v. Daney, 97 Ala. 338—671, 688.
 Louisville, etc., R. Co. v. Dies, 91 Tenn. 177—116, 504.
 Louisville, etc., R. Co. v. Du Bois, 120 Ga. 339—625.
 Louisville, etc., R. Co. v. Duncan & Orr, 137 Ala. 446—536.
 Louisville, etc., R. Co. v. Echols, 97 Ala. 556—137, 386.
 Louisville, etc., R. Co. v. Ellis, 97 Ky. 830—811.
 Louisville, etc., R. Co. v. Espenscheid, 17 Ind. App. 558—586.
 Louisville, etc., R. Co. v. Falvey, 104 Ind. 409—894.
 Louisville, etc., R. Co. v. Taylor, 126 Ind. 126—570, 571, 697, 778.
 Louisville, etc., R. Co. v. Flanagan, 118 Ind. 488—92, 99, 110, 116, 137.

TABLE OF CASES.

lxxvii

(The references are to the pages.)

- Louisville, etc., R. Co. v. Fleming, 14 Lea. (Tenn.) 128—589, 659, 684, 731, 826, 880, 889, 896.
 Louisville, etc., R. Co. v. Flinn, 16 Ky. L. Rep. 57—632.
 Louisville, etc., R. Co. v. Frazee, 24 Ky. L. Rep. 1273—528.
 Louisville, etc., R. Co. v. Ft. Wayne Electric Co. (Ky.), 55 S. W. 918—158.
 Louisville, etc., R. Co. v. Gains (Ky.), 36 S. W. 174—744.
 Louisville, etc., R. Co. v. Garret, 8 Lea. (Tenn.) 438—736.
 Louisville, etc., R. Co. v. Gerson, 102 Ala. 409—6.
 Louisville, etc., R. Co. v. Gilbert, 88 Tenn. 430—304, 344, 354, 758.
 Louisville, etc., R. Co. v. Gilmer, 89 Ala. 534—184, 399.
 Louisville, etc., R. Co. v. Godman, 104 Ind. 490—498, 515, 516.
 Louisville, etc., R. Co. v. Grant, 99 Ala. 325—314, 342.
 Louisville, etc., R. Co. v. Hailey, 94 Tenn. 333—534.
 Louisville, etc., R. Co. v. Harned, 23 Ky. L. Rep. 1651—507, 533.
 Louisville, etc., R. Co. v. Harris, 9 Lea. (Tenn.) 180—555.
 Louisville, etc., R. Co. v. Hartwell, 99 Ky. 436—155, 160, 420.
 Louisville, etc., R. Co. v. Hedger, 9 Bush (Ky.), 645—510, 534.
 Louisiana, etc., R. Co. v. Hendricks, 128 Ind. 462—600, 778.
 Louisville, etc., R. Co. v. Heilprin, 95 Ill. App. 402—213, 249, 411.
 Louisville, etc., R. Co. v. Hull, 24 Ky. L. Rep. 375—413, 421.
 Louisville, etc., R. Co. v. Jackson, 18 Ky. L. Rep. 296—687.
 Louisville, etc., R. Co. v. Johnson, 108 Ala. 62, 99 Ala. 204—553, 555, 689, 737, 750.
 Louisville, etc., R. Co. v. Johnson, 44 Ill. App. 56—668, 848.
 Louisville, etc., R. Co. v. Johnston, 79 Ala. 436—668.
 Louisville, etc., R. Co. v. Jones, 108 Ill. 551—779.
 Louisville, etc., R. Co. v. Jones, 83 Ala. 376, 100 Ala. 263—491, 605, 616, 673, 769, 779, 883.
 Louisville, etc., R. Co. v. Katzenberger, 16 Lea (Tenn.), 380—712.
 Louisville, etc., R. Co. v. Keefer, 146 Ind. 21—11.
 Louisville, etc., R. Co. v. Keller, 20 Ky. L. Rep. 957—691.
 Louisville, etc., R. Co. v. Kelly, 92 Ind. 371—627, 681, 692, 696, 817, 839.
 Louisville, etc., R. Co. v. Kelsey, 89 Ala. 287—342, 396.
 Louisville, etc., R. Co. v. Kice, 22 Ky. L. Rep. 1482—403.
 Louisville, etc., R. Co. v. Kelly, 92 Ind. 371—680.
 Louisville, etc., R. Co. v. Kingman, 18 Ky. Law Rep. 82—578.
 Louisville, etc., R. Co. v. Klyman (Tenn.), 67 S. W. 472—564.
 Louisville, etc., R. Co. v. Landers (Ala.), 33 So. 482—328.
 Louisville, etc., R. Co. v. Lee, 97 Ala. 325—350.
 Louisville, etc., R. Co. v. Lewis, 14 Ky. L. Rep. 770—687.
 Louisville, etc., R. Co. v. Long, 94 Ky. 410—697, 843.
 Louisville, etc., R. Co. v. Logan, 88 Ky. 232—648, 737, 739.
 Louisville, etc., R. Co. v. Logsdon, 24 Ky. L. Rep. 1566—374.
 Louisville, etc., R. Co. v. Lucas, 119 Ind. 583—613, 670, 673, 674.
 Louisville, etc., R. Co. v. Mahan, 8 Bush. (Ky.), 184—724, 726.
 Louisville, etc., R. Co. v. Manchester Mills, 88 Tenn. 653—285, 347, 377, 393, 395, 761.
 Louisville, etc., R. Co. v. Martin, 8 Ky. L. Rep. 432—505.
 Louisville, etc., R. Co. v. Mask, 64 Miss. 738—664, 688.
 Louisville, etc., R. Co. v. Mason, 11 Lea (Tenn.), 116—399, 401, 402, 412.
 Louisville, etc., R. Co. v. McClain, 23 Ky. L. Rep. 1878—897.
 Louisville, etc., R. Co. v. McCoy, 81 Ky. 403—898.
 Louisville, etc., R. Co. v. McGuire, 79 Ala. 395—23, 141, 264, 271, 444.
 Louisville, etc., R. Co. v. McEwan (Ky.), 31 S. W. 465—632, 642.
 Louisville, etc., R. Co. v. Meyer, 78 Ala. 597—208, 296, 307, 351, 462, 483, 759.
 Louisville, etc., R. Co. v. Miles, 100 Ky. 84—667.
 Louisville, etc., R. Co. v. Miller, 141 Ind. 533—883, 893, 902, 903.
 Louisville, etc., R. Co. v. Minogue, 90 Ky. 369—892, 904.
 Louisville, etc., R. Co. v. Natchez, etc., R. Co., 67 Miss. 399—377.
 Louisville, etc., R. Co. v. Nicholai, 4 Ind. App. 119—24, 712, 717, 721, 753, 756, 757, 758.
 Louisville, etc., R. Co. v. O'Dill, 96 Tenn. 61—185, 490.
 Louisville, etc., R. Co. v. Oden, 80 Ala. 38—271, 280, 340, 350, 759.
 Louisville, etc., R. Co. v. Orr, 84 Ind. 50—796.
 Louisville, etc., R. Co. v. Owen, 93 Ky. 201—345, 529.
 Louisville, etc., R. Co. v. Patterson, 69 Miss. 421—637, 696.
 Louisville, etc., R. Co. v. Parke, 96 Ky. 580—656.
 Louisville, etc., R. Co. v. Pedigo, 108 Ind. 481—653, 780.
 Louisville R. Co. v. Phillips, 22 Ky. Law Rep. 842—822.
 Louisville, etc., R. Co. v. Queen City Coal Co. (Ky.), 35 S. W. 626—107, 255.
 Louisville R. Co. v. Rammacher, 21 Ky. L. Rep. 250—677.
 Louisville, etc., R. Co. v. Richmond, 23 Ky. L. Rep. 2394—697.
 Louisville, etc., R. Co. v. Ricketts, 93 Ky. 116—844.
 Louisville, etc., R. Co. v. Ritter, 85 Ky. 368—599, 673, 778, 787, 788.
 Louisville, etc., R. Co. v. Robbins, 4 Tex. App. Civ. Cas. sec. 43—346.
 Louisville, etc., R. Co. v. Robinson (Ky.), 36 S. W. 6—515.
 Louisville, etc., R. Co. v. Scott's Admr., 22 Ky. Law Rep. 30—587.
 Louisville, etc., R. Co. v. Sherrod, 84 Ala. 178—314, 343.
 Louisville, etc., R. Co. v. Smith, 2 Duv. (Ky.) 556—779.
 Louisville, etc., R. Co. v. Snyder, 117 Ind. 435—596, 653, 770, 883, 894.
 Louisville, etc., R. Co. v. Sowell, 90 Tenn. 17—303, 318, 344, 526, 761.
 Louisville, etc., R. Co. v. Stacker, 86 Tenn. 343—574, 668, 852.
 Louisville, etc., R. Co. v. Steele, 6 Ind. App. 183—526.

TABLE OF CASES.

(The references are to the pages.)

- Louisville, etc., R. Co. v. Stewart, 56 Fed. 808—811.
 Louisville, etc., R. Co. v. Sullivan, 81 Ky. 624—689, 737, 739.
 Louisville, etc., R. Co. v. Tarter (Ky.), 39 S. W. 698—459, 475, 481.
 Louisville, etc., R. Co. v. Taylor, 126 Ind. 126—753, 761.
 Louisville, etc., R. Co. v. Tennessee Brewing Co., 96 Tenn. 677—468, 491.
 Louisville, etc., R. Co. v. Thompson, 107 Ind. 442—222, 545, 563, 568, 571, 596, 780.
 Louisville, etc., R. Co. v. Thompson, 64 Miss. 584—893.
 Louisville, etc., R. Co. v. Touart, 97 Ala. 514—94, 106, 238, 351, 393.
 Louisville, etc., R. Co. v. Trent, 16 Lea (Tenn.), 420, 11 Lea, 82—408, 416, 505.
 Louisville, etc., R. Co. v. Turner, 100 Tenn. 213—565, 624.
 Louisville, etc., R. Co. v. Walker, 23 Ky. Law Rep. 453—122, 128.
 Louisville, etc., R. Co. v. Weaver, 9 Lea (Tenn.), 38—463, 475, 722, 729, 730.
 Louisville, etc., R. Co. v. Wilson, 119 Ind. 352, 132 Ind. 517—119, 127, 430, 915.
 Louisville, etc., R. Co. v. Wilsey (Ky.), 12 S. W. 275—880, 888.
 Louisville, etc., R. Co. v. Witman, 79 Ala. 328—627, 638, 895.
 Louisville, etc., R. Co. v. Wolfe, 128 Ind. 347—883, 889, 896.
 Louisville, etc., R. Co. v. Wood, 113 Ind. 544—675, 678, 883, 892.
 Louisville, etc., R. Co. v. Wurl, 62 Ill. App. 381—895.
 Louisville, etc., R. Co. v. Wynn, 88 Tenn. 320, 230—318, 344, 346, 388, 510, 525, 533.
 Lowe v. East Tennessee, etc., R. Co., 90 Ga. 85—242, 250.
 Love v. Rose, 89 Iowa, 400—427.
 Lovejoy v. Murray, 3 Wall. (U. S.) 1—364.
 Loveland v. Burke, 210 Mass. 139—33, 152.
 Lovett v. Hobbs, 2 Show, 127—104, 136, 540.
 Low v. DeWolf, 8 Pick. (Mass.) 101—177.
 Lowe v. Martin, 18 Ill. 286—15.
 Lowell Wire Fence Co. v. Sargent, 8 Al. Len (Mass.), 189—35, 459.
 Lowenstein v. Lombard, Ayres & Co., 164 N. Y. 324—366, 367.
 Lowenstein v. Wabash R. Co., 63 Mo. App. 68—506.
 Lowery v. Manhattan R. Co., 99 N. Y. 158—378, 603, 772.
 Lowery v. Western Union Tel. Co., 60 N. Y. 198—814.
 Lowry v. Mt. Adams, etc., R. Co., 68 Fed. 827—893.
 Luby v. Hudson R. R. Co., 17 N. Y. 131—812.
 Lucas v. Burlington, etc., R. Co. (Iowa), 84 N. W. 673—345.
 Lucas v. Milwaukee, etc., R. Co., 33 Wis. 41—582, 625.
 Lucas, v. New Bedford, etc., R. Co., 6 Gray (Mass.), 64—830, 848.
 Lucas v. Nockells, 4 Bing. 729—445.
 Lucas v. Railway Co., 122 Ala. 529—415.
 Lucas v. Taunton, etc., R. Co., 6 Gray (Mass.), 64—585, 683.
 Lucesco Oil Co. v. Pennsylvania R. Co., 2 Pittsb. (Pa.) 477—399.
 Luckel v. Century Bldg. Co., 177 Mo. 608—654.
 Lucy v. Chicago, etc., R. Co., 64 Minn. 7—632, 648.
 Ludwig v. Meyre, 5 W. & S. (Pa.) 435—207, 240.
 Luke v. Lyde, 2 Burr. 887—187.
 Lundquist v. Grand Trunk Western Ry. Co., 121 Fed. 915—918.
 Lundy v. Central Pac. R. Co., 66 Cal. 191—567.
 Lygett v. Manhattan Ry. Co., 12 App. Div. (N. Y.) 326—60.
 Lygo v. Newbold, 9 Exch. 302—544, 550.
 Lyle v. Barker, 5 Bin. (Pa.) 457—364.
 Lynch v. New York Cent., etc., R. Co., & App. Div. (N. Y.) 458—599.
 Lynch v. Metropolitan Elev. R. Co., 90 N. Y. 77—555, 639.
 Lyng v. Michigan, 135 U. S. 161—205.
 Lynn v. Southern Pac. R. Co., 103 Cal. 7—661.
 Lyon v. Erie R. Co., 57 N. Y. 489—312.
 Lyon v. Mells, 5 East, 428—114.
 Lyon v. Western New York, etc., R. Co., 88 Hun (N. Y.), 27—471.
 Lyons v. Broadway, etc., R. Co., 32 St. Rep. (N. Y.) 232—631, 632.
 Lyons v. Hill, 46 N. H. 49—202.

M.

- Mabry v. City Electric R. Co., 116 Ga. 624—889.
 Mac Andrew v. Electric Tel. Co., 17 C. B. 3—76, 78, 324.
 MacDonald v. St. Louis Transit Co., 108 Mo. App. 374—853.
 Machu v. London, etc., R. Co., 2 Exch. 415—139.
 Mack v. Great Western Despatch, 2 O. C. D. 22—292.
 Mack v. Los Angeles Tract. Co. (Cal.), 1 St. Ry. Rep. 19—877.
 Mackay v. Western Union Tel. Co., 16 Neb. 226—422.
 Mackenzie v. Cox, 9 C. & P. 632—233, 296.
 Macklin v. New Jersey Steamboat Co., 7 Abb. Pr. N. S. (N. Y.) 229—715, 717.
 Macklin v. Waterhouse, 5 Bing. 212—360.
 Mackoy v. Missouri Pac. R. Co., 5 McCrary (U. S.), 538, 18 Fed. 236—652, 880, 891, 902.
 MacLennan v. Long Island R. Co., 52 N. Y. Super. Ct. 22—873.
 Macloon v. Chicago, etc., R. Co., 3 Int. Com. Rep. 711—922.
 Macon Consol. St. R. Co. v. Barnes, 113 Ga. 212—595, 596, 657.
 Macon, etc., R. Co. v. Johnson, 38 Ga. 409—589, 591, 789, 812, 902, 903.
 Macon, etc., R. Co. v. Moore, 108 Ga. 84—661, 867.
 Macon Ry. & L. Co. v. Vining, 120 Ga. 511—685, 853.
 Macrow v. Great Western R. Co., L. R. 6 Q. B. 612—701, 705.
 MacVeagh v. Atchison, etc., R. Co., 3 N. M. 205—229, 230, 231, 257.
 Madan v. Covert, 81 N. Y. 629—281.
 Madan v. Sherrard, 73 N. Y. 330—27, 291, 298, 308, 720.
 Mad River R. Co. v. Fulton, 20 Ohio, 318—704.
 Madden v. Missouri, etc., R. Co., 50 Mo. App. 664, 666—675, 770, 780, 849.
 Madison, etc., R. Co. v. Whitesel, 11 Ind. 55—188.
 Magar v. Hammond, 54 App. Div. (N. Y.) 532—634.
 Magdeburg General Ins. Co. v. Paulson, 29 Fed. 530—403.
 Maggioli v. St. Louis Transit Co., 108 Mo. App. 416—542.
 Maghee v. Camden, etc., R. Co., 45 N. Y. 514—169, 458, 477, ..
 Magnin v. Dinsmore, 56 N. Y. 168, 62 N. Y. 35—255, 321, 360, 387, 423, 765.

TABLE OF CASES.

lxxix

(The references are to the pages.)

- Magnin v. Dinsmore, 70 N. Y. 410-33, 217, 347, 349, 355, 357, 360.
 Magoffin v. Missouri Pac. R. Co., 102 Mo. App. 540-578, 778.
 Magorie v. Little, 26 Fed. 627-616.
 Magran v. St. Louis, etc., R. Co., 183 Mo. 119-274, 654, 778.
 Maguire v. Middlesex R. Co., 115 Mass. 238-302, 829, 861, 858.
 Maguire v. St. Louis Transit Co. (Mo.), 78 S. W. 838-842.
 Maher v. Atlantic, etc., R. Co., 64 Mo. 287-700.
 Maher v. New York Cent., etc., R. Co., 5 App. Div. (N. Y.) 22-664, 680.
 Maher v. Central Park, etc., R. Co., 39 N. Y. Super. Ct. 155-858.
 Mahon v. Blake, 125 Mass. 477-179, 183, 282.
 Mahoning Valley R. Co. v. De Pascale, 70 Ohio St. 179-635, 890.
 Maignan v. New Orleans, etc., R. Co., 24 La. Ann. 233-264.
 Maisels v. Dry Dock, etc., R. Co., 16 App. Div. (N. Y.) 391-812.
 Malcom v. Richmond, etc., R. Co., 106 N. C. 63-856.
 Malecek v. Tower Grove, etc., R. Co., 57 Mo. 17-636.
 Malhado v. Brooklyn City R. Co., 30 N. Y. 372-580.
 Mall v. Lord, 39 N. Y. 381-640.
 Mallard v. Ninth Ave. R. Co., 27 St. Rep. (N. Y.) 801-822.
 Malone v. Boston, etc., R. Co. Corp., 12 Gray (Mass.), 388-717, 720, 755.
 Malone v. Metropolitan Express Co., 86 N. Y. Supp. 1039-720.
 Maloney v. Metropolitan St. Ry. Co., 95 App. Div. (N. Y.) 393-853.
 Mallory v. Burritt, 1 E. D. Smith (N. Y.) 234-169, 434, 439, 474.
 Mallory v. Tioga R. Co., 39 Barb. (N. Y.) 488, affd. 32 How. Pr. (N. Y.) 616-45, 46, 95.
 Malott v. Woods, 109 Ill. App. 512-888.
 Malpass v. Hestonville, etc., R. Co., 129 Pa. St. 599-865.
 Maltby v. Chicago, etc., R. Co., 52 Mich. 108-596.
 Manahan v. Steinway, etc., R. Co., 125 N. Y. 760-823.
 Manchester, etc., R. Co. v. Brown, L. R. 8 H. L. 703-324.
 Manhattan Oil Co. v. Camden, etc., Transp. Co., 54 N. Y. 197-485.
 Mangam v. Brooklyn R. Co., 38 N. Y. 455-374, 823.
 Mann v. Birchard, 40 Vt. 326-240, 242, 251, 293, 318, 389, 476, 755, 761.
 Mann Boudoir Car Co. v. Dupre, 57 Fed. 646-807.
 Mann v. Pere Marquette R. Co. (Mich.), 97 N. W. 721-816.
 Mann v. Philadelphia Tract. Co., 175 Pa. St. 122-860.
 Mann v. White River Log, etc., Co., 46 Mich. 38-73.
 Manning v. Louisville, etc., R. Co., 132 Mass. 116-736.
 Manning v. Louisville, etc., R. Co., 95 Ala. 392-556.
 Manning v. West End. St. R. Co., 166 Mass. 230-783.
 Mannon v. Camden Interstate Ry. Co., 3 St. Ry. Rep. 928-820.
 Manser v. Eastern Counties R. Co., 3 L. T. N. S. 585-600, 606.
 Manter v. Holmes, 10 Metc. (Mass.) 402-66.
- Manufacturers', etc., Union v. Minneapolis, etc., R. Co., 3 Int. Com. Rep. 115-912, 922, 925.
 Maples v. New York, etc., R. Co., 38 Conn. 557-555, 733, 749.
 Marande v. Texas, etc., R. Co., 102 Fed. 246-185.
 Marine Bank v. Wright, 48 N. Y. 1-172, 178.
 Marine Ins. Co. v. St. Louis, etc., R. Co., 41 Fed. 643-94, 106, 118, 143, 248.
 Mariner v. Smith, 5 Heisk. (Tenn.) 208-6.
 Marion v. Chicago, etc., R. Co., 64 Iowa, 568-810.
 Marion St. Ry. Co. v. Shaffer, 4 Am. Electr. Cas. 458-858.
 Maris v. Baltimore, etc., R. Co., 175 N. Y. 409-163.
 Marmonstein v. Pennsylvania R. Co., 13 Misc. Rep. (N. Y.) 32-367, 479, 721, 729.
 Maroney v. Old Colony, etc., R. Co., 106 Mass. 153-755.
 Marquette v. Kirkwood, 45 Mich. 51-359, 386, 459, 491.
 Marquette, etc., R. Co. v. Langton, 32 Mich. 251-408.
 Marquis v. Wood, 29 Misc. Rep. (N. Y.) 590-322.
 Marr v. Western Union Tel. Co., 85 Tenn. 542-77, 759.
 Marriott v. London, etc., R. Co., 1 C. B. N. S. 499-121.
 Mars v. Delaware, etc., Canal Co., 54 Hun (N. Y.), 625-375, 697.
 Marrus v. New Haven Steamboat Co., 30 Misc. Rep. (N. Y.) 421-158, 332, 336.
 Marsden Co. v. Bullitt, 24 Ky. L. Rep. 1697-407.
 Marsh v. Union Pac. R. Co., 3 McCrary (U. S.) 236-401, 439.
 Marshall v. American Express Co., 7 Wis. 1-148, 192, 194, 201.
 Marshall v. Chicago, etc., R. Co., 48 Ill. 475-809.
 Marshall v. York, etc., R. Co., 111 C. B. 655-553.
 Marshall v. New York Cent. R. Co., 45 Barb. (N. Y.) 502, 48 N. Y. 660-32, 247, 400, 458.
 Marshall v. St. Louis, etc., R. Co., 78 Mo. 610, 616-667, 747.
 Marshall, etc., Grain Co. v. Kansas City, etc., R. Co., 176 Mo. 480-469, 484.
 Martin v. American Express Co., 19 Wis. 336-482, 486.
 Martin v. Chicago, etc., R. Co., 2 Int. Com. Rep. 32-924, 925.
 Martin v. Fort Worth, etc., R. Co., 3 Tex. Civ. App. 556-142.
 Martin v. Great Indian Peninsular R. Co., 3 Exch. 9-713.
 Martin v. McLaughlin, 9 Colo. 153-446.
 Martin v. New York, etc., R. Co., 103 N. Y. 626-807.
 Martin v. Second Avenue R. Co., 3 App. Div. (N. Y.) 448-774, 839, 861, 844.
 Martin v. St. Louis, etc., R. Co., 55 Ark. 510-118, 134, 142, 143, 378.
 Martin v. Southern Pac. R. Co., 2 Int. Com. Rep. 1-911, 916, 932, 933.
 Martin v. Southern Ry., 51 S. C. 150-546.
 Martindale v. Smith, 1 Q. B. 389-444.
 Martindale v. Kansas City, etc., R. Co., 50 Mo. 508-666.
 Marx v. Louisiana Western R. Co., 112 La. 1085-746.
 Maslin v. Baltimore, etc., R. Co., 14 W. Va. 180-30, 38, 344, 510, 515, 573, 754, 759, 761, 762.

TABLE OF CASES.

(The references are to the pages.)

- Mason v. Grand Trunk R. Co., 37 U. C. Q. B. 163—260, 453, 490.
 Mason v. Missouri Pac. R. Co., 25 Mo. App. 473—501, 516.
 Mason v. Richmond, etc., R. Co., 111 N. C. 482—317.
 Massachusetts L. & T. Co. v. Fitchburg R. Co., 143 Mass. 138—406.
 Massoth v. Delaware & Hudson Canal Co., 64 N. Y. 524—790.
 Masterson v. Macon City, etc., R. Co., 88 Ga. 436—852.
 Masterson v. Railway Co., 102 Wis. 571—629.
 Matter of Application of Clark, 2 Int. Com. Rep. 797—931.
 Matter of Boston, etc., R. Co., 5 Int. Com. C. Rep. 69—920.
 Matter of Chicago, etc., R. Co., 2 Int. Com. Rep. 137—908.
 Matter of Grand Trunk R. Co., 2 Int. Com. Rep. 496—637, 920, 935.
 Matter of Indian Supplies, 1 Int. Com. Rep. 22—938.
 Matter of Louisville, etc., R. Co., 5 Int. Com. C. Rep. 466—919, 920.
 Matter of Strauss, 197 U. S. 330—944.
 Matter of U. S. Commissions of Fish, etc., 1 Int. Com. Rep. 605—938.
 Matter of Webb, 8 Taunt. 443—194, 265, 369.
 Mathieson v. Burlington, etc., R. Co. (Iowa), 100 N. W. 51—873.
 Matteson v. New York Cent. R. Co., 76 N. Y. 381—725, 726.
 Matteson v. New York Cent. R. Co., 35 N. Y. 487—809, 810, 892.
 Matthews v. American Cent. Ins. Co., 154 N. Y. 449—335.
 Mathews v. Charleston, etc., R. Co., 38 S. C. 429—668.
 Mathews v. Wabash R. Co. (Mo. App.), 78 S. W. 271—621.
 Mathison v. Staten Island M. R. Co., 72 N. Y. Supp. 954—738.
 Mathis v. Thomas, 101 Ind. 119—445.
 Mattingly v. Pennsylvania Co., 2 Int. Com. Rep. 806—910, 915, 922.
 Mattison v. New York, etc., R. Co., 57 N. Y. 552—149, 725.
 Matz v. St. Paul City R. Co. (Minn.), 53 N. W. 1071—858.
 Mauritz v. New York, etc., R. Co., 23 Fed. 767—701, 702, 703, 705, 717, 718, 720, 728, 729.
 Maury v. Talmadge, 2 McLean (U. S.), 157—615, 652.
 Maverick v. Eighth Ave. R. Co., 36 N. Y. 378—542, 594, 652, 658.
 Maving v. Todd, 1 Stark. 72—70, 323, 341.
 Maximum Rate Case, 167 U. S. 479—807, 908.
 Maxwell v. McIvry, 2 Bibb. (Ky.), 211—71.
 May v. Hanson, 5 Cal. 360—52.
 May v. Ontario, etc., R. Co., 10 Ont. Rep. 70—586.
 Maybin v. South Carolina, etc., R. Co., 8 Rich. (S. C.) 420—68, 69.
 Mayell v. Potter, 2 Johns. Cas. (N. Y.) 371—148, 276, 279.
 Mayer v. Grand Trunk R. Co., 31 U. C. C. P. 248—269.
 Mayhew v. Eames, 3 B. & C. 601—323.
 Mayo v. Boston, etc., R. Co., 104 Mass. 137, 142—679, 830, 876.
 Mayor, etc., of New York v. Starin, 106 N. Y. 1—52.
 Mayor v. Oregon Short Line Co., 21 Utah, 141—655.
 Maysville, etc., R. Co. v. Herrick, 13 Bush. (Ky.) 122—893, 898.
 McAdoo v. Richmond, etc., R. Co., 105 N. C. 140—6.
 McAbsher v. Richmond, etc., R. Co., 108 N. C. 344—111, 118, 515.
 McAlan v. Trustees New York, etc., Bridge, 43 App. Div. (N. Y.) 274—846, 849.
 McAllister v. Chicago, etc., R. Co., 74 Mo. 351—96, 231, 233, 378, 422, 454, 504.
 McAllister v. People's Ry. Co. (Del.), 54 Atl. 743—598, 617, 657, 697.
 McAlister v. Southern Pac. Co. (U. S. D. C. N. Y.), 111 Fed. 938—151.
 McAndrew v. Whitlock, 52 N. Y. 40—196, 209, 246, 264, 274.
 McArthur v. Sears, 21 Wend. (N. Y.) 190—66.
 McBeath v. Wabash, etc., R. Co., 20 Mo. App. 445—534.
 McBride v. Northern Pac. R. Co., 19 Oreg. 64—791.
 McCaffrey v. Twenty-Third St. R. Co., 47 Hun (N. Y.), 404—321.
 McCaig v. Erie R. Co., 8 Hun (N. Y.), 599—793, 794.
 McCall v. Forsyth, 4 W. & S. (Pa.) 179—776.
 McCann v. Baltimore, etc., R. Co., 20 Md. 202—488.
 McCann v. Eddy, 133 Mo. 59—481.
 McCann v. Newark, etc., R. Co., 58 N. J. L. 642—684, 826.
 McCann v. Sixth Ave. R. Co., 117 N. Y. 505—633.
 McCance v. London, etc., R. Co., 7 H. & N. 477—355.
 McCarn v. International, etc., R. Co., 84 Tex. 352—482.
 McCarragher v. Rogers, 120 N. Y. 535—522.
 McCarten v. North Eastern R. Co., 54 L. J. Q. B. Div. 44—691.
 McCarthy v. Louisville, etc., R. Co., 102 La. Ann. 193—219, 224, 257, 381, 382, 395, 467.
 McCarthy v. Terre Haute, etc., R. Co., 9 Mo. App. 159—107, 459, 474, 475, 476.
 McCarty v. Gulf, etc., R. Co., 79 Tex. 33—109, 112, 322, 337.
 McCarty v. St. Louis, etc., R. Co. (Mo. App.), 80 S. W. 7—781.
 McCarty v. New York, etc., R. Co., 30 Pa. St. 247—262, 282.
 McCaslin v. Lake Shore, etc., R. Co., 93 Mich. 553—817, 851.
 McCaslin v. Louisville, etc., R. Co., 69 Miss. 136—680.
 McCauley v. Davidson, 10 Minn. 418—94.
 McCauley v. Tennessee, etc., Coal Co., 93 Ala. 356—544.
 McCawley v. Furnace R. Co., L. R. 8 Q. B. 57—754.
 McClary v. Sioux City, etc., R. Co., 8 Neb. 44—257, 772, 788, 881.
 McClelland v. Louisville, etc., R. Co., 94 Ind. 276—688, 738.
 McCleneghan v. Brock, 5 Rich. L. (S. C.) 17—540, 542.
 McClure v. Hammond, 1 Bay (S. C.) 99—21, 63, 66.
 McClure v. Philadelphia, etc., R. Co., 34 Md. 532—559, 564, 566, 732, 743, 749.
 McClure v. Richardson, Rice (S. C.), 215—11, 63.
 McCollom v. Indianapolis, etc., R. Co., 94 Ill. 534—510.
 McCombs v. North Carolina, etc., R. Co., 67 N. C. 193—284.
 McConnell v. Norfolk, etc., R. Co., 86 Va. 248—460.
 McCook v. Northup, 65 Ark. 225—624.

TABLE OF CASES.

lxxxii

(The references are to the pages.)

- McCormick v. Hudson River R. Co.**, 4 E. D. Sm. (N. Y.) 181—703, 730.
McCormick v. Pennsylvania Cent. R. Co., 49 N. Y. 303—404.
McCormick v. Pennsylvania Cent. R. Co., 80 N. Y. 353—712.
McCormick v. Pennsylvania Cent. R. Co., 99 N. Y. 65—706, 716, 723.
McCosson v. Grand Trunk R. Co., 23 U. C. C. P. 107—269.
McCord v. Atlanta, etc., R. Co. (N. C.), 45 S. E. 1031—775, 870.
McCoun v. New York Cent., etc., R. Co., 66 Barb. (N. Y.) 338—801.
McCourt v. London, etc., R. Co., 3 Ir. R. C. L. 107—139.
McCoy v. Erie, etc., Transp. Co., 42 Md. 498—516.
McCoy v. Keokuk, etc., R. Co., 44 Iowa, 424—287, 510, 533.
McCoy v. The K. & D. M. R. Co., 44 Iowa, 424—30.
McCranie v. Wood, 24 La. Ann. 406—227.
McCravy v. Chicago, etc., R. Co., 109 Mo. App. 567—531.
McCravy v. Missouri, etc., Ry. Co., 99 Mo. App. 518—507.
Mccullough v. Hellweg, 66 Md. 269—435.
Mccullough v. Wabash Western R. Co., 34 Mo. App. 23—307.
McCune v. Burlington, etc., R. Co., 52 Iowa, 600—315, 344, 360, 522.
McCurrie v. Southern Pac. Co., 122 Cal. 561—566, 776.
McDaniels v. Chicago, etc., R. Co., 24 Iowa, 412—220, 309, 499.
McDaniel v. Highland Ave. R. Co., 90 Ala. 64—587, 869.
McDermott v. Boston Elev. Ry. Co., 1 St. Ry. Rep. 325—823.
McDermott v. Chicago, etc., R. Co., 82 Wis. 246—845.
McDonald v. Central R. Co. (N. J.), 62 Atl. 405—686.
McDonald v. Chicago, etc., R. Co., 26 Iowa, 124, 29 Iowa, 170—672, 806, 816, 843.
McDonald v. Hospital, 120 Mass. 432—618.
McDonald v. Illinois Cent. R. Co., 88 Iowa, 345—665, 679, 845.
McDonald v. Long Island R. Co., 116 N. Y. 546—665, 674, 678, 680, 683, 844.
McDonald v. Montgomery St. R. Co., 11 Ala. 161—770, 799.
McDonald v. Western R. Corp., 34 N. Y. 497—260, 488, 489.
McDonough v. Third Ave. R. Co., 95 App. Div. (N. Y.) 311—650, 853.
McDonough v. Metropolitan R. Co., 137 Mass. 210—547, 549, 832, 838.
McDougal v. Central R. Co., 63 Cal. 431—798, 799.
McDuffee v. Portland, etc., R. Co., 52 N. H. 430, 451—93, 95, 120, 620.
McEachran v. Grand Trunk R. Co., 115 Mich. 318—103, 444.
McEacheran v. Michigan Cent. R. Co., 101 Mich. 264—478.
McElroy v. Nashua, etc., R. Corp., 4 Cush. (Mass.) 400—597, 653.
McElroy v. Railroad Co., 7 Phila. (Pa.) 206—565.
McElvane v. Railway Co., 109 Ga. 249—461.
McEntee v. New Jersey Steamboat Co., 45 N. Y. 34—178, 179, 180, 181, 217.
McEwen v. Jeffersonville, etc., R. Co., 33 Ind. 368—172, 176.
McFadden v. Missouri Pac. R. Co., 92 Mo. 343—300, 303, 316, 344, 508.
McFarland v. Wheeler, 26 Wend. (N. Y.) 467—15, 431, 441.
McGarrahan v. New York, etc., R. Co., 171 Mass. 211—894.
McGarry v. Holyoke St. R. Co., 182 Mass. 123—732, 748.
McGaw v. Adams, 14 How. Pr. (N. Y.) 461—362.
McGee v. Bast, 6 J. J. Marsh (Ky.) 455—6.
McGee v. Consol. St. R. Co., 102 Mich. 107—792.
McGee v. Missouri Pac. R. Co., 92 Mo. 208, 218—582, 591, 625, 665, 695, 747, 847.
McGee v. Railway Co., 71 Mo. App. 314—429.
McGeehan v. Lehigh aViley R. Co., 149 Pa. St. 188—874.
McGill v. Grand Trunk R. Co., 19 Ont. App. 245—474.
McGill v. Monette, 37 Ala. 49—208.
McGill v. Rowland, 3 Pa. St. 451—54, 703.
McGivray v. West End. St. R. Co. (Mass.), 41 N. E. 116—634.
McGinney v. Canadian Pac. R. Co., 7 Manitoba L. Rep. 151—826.
McGinnis v. Missouri Pac. R. Co., 21 Mo. App. 399—627, 636, 637, 888, 889.
McGowen v. Morgan's L., etc., Co., 41 La. Ann. 732—734.
McGovern v. New York Cent., etc., R. Co., 67 N. Y. 417—822.
McGowan v. Wilmington, etc., R. Co., 95 N. C. 417—245.
McGrath v. New York, etc., R. Co., 63 N. Y. 522—786.
McGrath v. Brooklyn, etc., R. Co., 5 Am. Elect. Cas. 422—558.
McGrw v. Baltimore, etc., R. Co., 18 W. Va. 361—30, 191, 223, 241, 247, 257.
McGraw v. Southern Ry. Co., 135 N. C. 264—732.
McGrell v. Buffalo Office Building Co., 153 N. Y. 265—83.
McGrew v. Missouri Pac. R. Co., 109 Mo. 582, 92 Mo. 208—109.
McGregor v. Kilgore, 6 Ohio, 358—66, 147, 399.
McGregory v. Gill (Tenn.), 86 S. W. 318—657.
McGuinn v. Forbes, 37 Fed. 639—590.
McGuire v. Steamship Golden Gate, 1 McAll. (U. S.) 104—627.
McHenry v. Philadelphia, etc., R. Co., 4 Har. (Del.) 448—55, 63, 264, 270, 411.
McIntire St. R. Co. v. Bolton, 43 Ohio St. 224—588.
McIntyre v. New York Cent. R. Co., 37 N. Y. 287—681, 869, 903.
McKay v. New York Cent., etc., R. Co., 50 Hun (N. Y.), 563—376, 454.
McKay v. Ohio River Co., 34 W. Va. 65—732, 743.
McKee v. Hecksher, 10 Daly (N. Y.), 393—127.
McKee v. Owen, 15 Mich. 115—715.
McKee v. St. Louis Transit Co., 108 Mo. App. 470—842.
McKean v. McIvor, L. R. 6 Exch. 36—157.
McKenzie v. Michigan Cent. R. Co. (Mich.), 100 N. Y. 260—507, 512.
McKeon v. Citizens R. Co., 42 Mo. 79—896.
McKeon v. Chicago, etc., R. Co., 64 Wis. 477—61.
McKernan v. Manhattan R. Co., 65 Conn. 201—546.

TABLE OF CASES.

(The references are to the pages.)

- McKimbie v. Boston, etc., R. Co., 139 Mass. 542—556.
 McKinney v. Jewett, 90 N. Y. 267—24, 264, 271, 272, 321.
 McKinney v. Neal, 1 McLean (U. S.) 540—615, 776, 801.
 McKinley v. Chicago, etc., R. Co., 44 Iowa, 314—627, 637, 740.
 McKinstry v. St. Louis Transit Co., 108 Mo. App. 12—853.
 McKone v. Michigan Cent. R. Co., 51 Mich. 601—584, 613.
 McKonkey v. Chicago, etc., R. Co., 40 Iowa, 205—700.
 McLagan v. Chicago, etc., R. Co. (Iowa), 89 N. W. 233—129, 372.
 McLaren v. Atlanta, etc., R. Co., 85 Ga. 504—850.
 McLaren v. Detroit, etc., R. Co., 23 Wis. 138—240, 253.
 McLean v. Burbank, 11 Minn. 277—781, 864.
 McLean v. Fleming, L. R. 2 Sc. App. Cas. 128—175.
 McLean v. Rutherford, 8 Mo. 109—10.
 McLane v. Sharp, 2 Harr. (Del.), 481—615.
 McLeod v. Ginther, 80 Ky. 399—810.
 McLeod v. New York, etc., R. Co., 72 App. Div. (N. Y.) 116—626, 638.
 McMahon v. Macy, 51 N. Y. 155—295.
 McMahon v. Northern Cent. R. Co., 39 Md. 438—825.
 McMahon v. New York El. R. Co., 50 N. Y. Super. Ct. 507—613.
 McMahon v. Third Ave. R. Co., 15 J. & S. (N. Y.) 282—565.
 McManus v. Lancashire, etc., R. Co., 4 H. & N. 327—324.
 McMaster v. Illinois Cent. R. Co., 65 Miss. 271—310.
 McMillan v. American Express Co. (Iowa), 98 N. W. 629—628.
 McMullan v. Michigan Southern, etc., R. Co., 16 Mich. 79—264, 290, 292, 297, 313, 316, 395, 459.
 McMorrin v. Canadian Pac. R. Co. (Can.), 1 Ont. Law Rep. 561—325, 328.
 McMorrin v. Grand Trunk R. Co., 2 Int. Com. Rep. 604—916, 917, 925.
 McMurray v. Pullman's Palace Car Co., 86 Mo. App. 619—58.
 McMurry v. Louisville, etc., R. Co., 67 Miss. 601—837.
 McNamara v. Great Northern R. Co., 61 Minn. 296—552.
 McNamara v. St. Louis Transit Co., 106 Mo. App. 349—842.
 McNeill v. Durham, etc., R. Co., 135 N. C. 682—542, 570.
 McNichol v. Pacific Express Co., 12 Mo. App. 401—200.
 McNulta v. Ensch, 134 Ill. 46—665, 847.
 McNulty v. Pennsylvania R. Co., 182 Pa. St. 479—587.
 MCPadden v. New York Cent. R. Co., 44 N. Y. 478—222, 601, 607, 612.
 McPherson v. Cox, 86 N. Y. 479—243.
 McPherson v. St. Louis, etc., R. Co., 97 Mo. 253—611.
 McPheeters v. Hannibal, etc., R. Co., 45 Mo. 22—6.
 McQuade v. Manhattan R. Co., 53 Super. Ct. (N. Y.) 91—669, 676.
 McQueen v. Central, etc., Pac. R. Co., 30 Kan. 689—586.
 McQuillen v. Central Pac. R. Co., 64 Cal. 433—814, 830.
 McQuillen v. Central Pac. R. Co., 50 Cal. 7—800.
 McRae v. Wilmington, etc., R. Co., 88 N. C. 526—565, 589, 591.
 McSwegan v. Pennsylvania R. Co., 7 App. Div. (N. Y.) 301—208.
 McVeety v. St. Paul, etc., R. Co., 45 Minn. 268—551, 561.
 Meade v. Boston Elev. Ry. Co. (Mass.), 70 N. E. 197—852.
 Mearns v. Central R. Co., 163 N. Y. 108 —664.
 Mears v. New York, etc., R. Co. (Conn.), 52 Alt. 610—210, 303, 330, 388, 481, 485.
 Medbury v. New York, etc., R. Co., 26 Barb. (N. Y.) 564—249, 411, 422, 423, 427.
 Meesel v. Lynn, etc., R. Co., 8 Allen (Mass.), 234—858, 859.
 Meier v. Pennsylvania R. Co., 4 U. C. C. P. 543—781.
 Meier v. Pennsylvania R. Co., 64 Pa. St. 225—44, 601, 603, 607, 655, 788.
 Melbourne v. Louisville, etc., R. Co., 88 Ala. 443—6, 185, 187, 451.
 Melendy v. Barbour, 78 Va. 544—522, 527.
 Mellier v. St. Louis, etc., Transp. Co., 14 Mo. App. 281—69, 376.
 Meloche v. Chicago, etc., R. Co., 116 Mich. 69—132, 134, 142.
 Mellor v. Missouri Pac. R. Co., 105 Mo. 456—578.
 Meloy v. Chicago, etc., R. Co. (Iowa), 37 N. W. 335—804.
 Memphis, etc., R. Co. v. Benson, 85 Tenn. 627—590, 695, 807.
 Memphis, etc., R. Co. v. Holloway, 9 Balt. (Tenn.) 188—336, 340.
 Memphis, etc., R. Co. v. Green, 52 Miss. 779—897, 899.
 Memphis, etc., R. Co. v. Reeves, 10 Wall. (U. S.) 176—236, 257.
 Memphis, etc., R. Co. v. Salinger, 46 Ark. 528—556.
 Memphis, etc., R. Co. v. Stringfellow, 44 Ark. 322—665, 847.
 Memphis, etc., R. Co. v. Whitfield, 44 Miss. 481—613, 670, 672, 673, 682, 880, 891, 896, 897.
 Memphis, etc., Packet Co. v. Abell (Ky.), 30 S. W. 658—410.
 Memphis, etc., Packet Co. v. McCool, 83 Ind. 392—775, 776.
 Memphis St. Ry. Co. v. Graves (Tenn.), 75 S. W. 729—733, 746.
 Memphis St. R. Co. v. Shaw (Tenn.), 75 S. W. 713—682, 683.
 Menauga v. Bedford Belt. Ry. Co., 157 Ind. 20—573.
 Mendenhall v. Atchison, etc., R. Co., 66 Kan. 438—560.
 Mensing v. Michigan Cent. R. Co., 117 Mich. 606—679.
 Menzell v. Chicago, etc., R. Co., 1 Dill. (U. S.) 531—351, 354.
 Mercantile Mut., etc., Ins. Co. v. Chase, 1 E. D. Smith (N. Y.), 115—36, 47, 68, 69.
 Merchant v. South Chicago City Ry. Co., 104 Ill. App. 122—656.
 Merchants' Bank v. Union R., etc., Co., 69 N. Y. 374—165, 177.
 Merchants' Cotton Press, etc., Co. v. Insurance Co. of North America, 151 U. S. 368—182.
 Merchants' Union v. Northern Pac. R. Co., 4 Int. Com. Rep. 183—932.
 Merchants' Wharf Boat Assoc. v. Wood, 64 Miss. 611, 661—313, 457, 489.
 Merchants Dispatch Trans. Co. v. Bloch, 86 Tenn. 392—47, 318, 388, 463, 482, 759.
 Merchants Despatch Transp. Co. v. Boles, 80 Ill. 473—47, 359, 360, 486.
 Merchants Dispatch, etc., Co. v. Cornforth, 3 Colo. 280—47, 287, 760.

TABLE OF CASES.

lxxxiii

(The references are to the pages.)

- Merchants' Despatch Transp. Co. v. Furthmann, 149 Ill. 66—297, 306, 310.
- Merchants' Despatch Transp. Co. v. Hallock, 64 Ill. 284—190, 262.
- Merchants' Despatch Transp. Co. v. Hately, 14 Can. Sup. Ct. 572—464, 487.
- Merchants' Despatch Transp. Co. v. Joesting, 89 Ill. 153—297, 315.
- Merchants' Despatch Transp. Co. v. Kahn, 76 Ill. 520—103.
- Merchants' Despatch Transp. Co. v. Leyson, 89 Ill. 43—297, 315.
- Merchants' Despatch, etc., Co. v. Merriam, 111 Ind. 5—162, 281.
- Merchants' Despatch, etc., Co. v. Moore, 88 Ill. 136—260, 262, 322, 478.
- Merchants' Despatch Transp. Co. v. Theilbar, 86 Ill. 71—697, 315, 322.
- Merdock v. Dumner, 22 Pick. (Mass.) 156—402.
- Merriweather v. Kansas City Cable R. Co., 45 Mo. App. 528—676.
- Merriam v. Hartford, etc., R. Co., 20 Conn. 354—92, 131, 133, 138.
- Merriman v. Great Northern Express Co., 63 Minn. 543—34, 234.
- Merritt v. Earle, 29 N. Y. 115—24, 27, 125, 256, 376.
- Merritt v. Old Colony, etc., R. Co., 11 Allen (Mass.), 82—144.
- Merrick v. Gordon, 20 N. Y. 96—493.
- Merrick v. Brainard, 38 Barb. (N. Y.) 574—362.
- Merrill v. American Express Co., 62 N. H. 514—295, 317, 336, 753.
- Merrill v. Eastern R. Co., 139 Mass. 238—561.
- Merrill v. Grinnell, 30 N. Y. 594—39, 702, 703, 704, 712.
- Merrill v. Metropolitan St. Ry. Co. (N. Y.), 73 App. Div. 401—657, 662.
- Mershon v. Hobensack, 22 N. J. L. 372—18, 619.
- Merwin v. Butler, 17 Conn. 188—55, 192.
- Merwin v. Manhattan R. Co., 48 Hun (N. Y.), 608—857.
- Meserole v. Brooklyn City R. Co., 57 Hun (N. Y.), 591—878.
- Messenger v. Pennsylvania R. Co., 37 N. J. L. 531, 36 N. J. L. 407—37, 92, 95, 120, 123.
- Messerno v. Nashville R. Co., 1 Sneed. (Tenn.) 220—639.
- Metcalf v. Baker, 2 J. & S. (N. Y.) 10—698.
- Metcalf v. McLaughlin, 122 Mass. 84—216.
- Mettlestadt v. Ninth Ave. R. Co., 4 Robt. (N. Y.) 377—337.
- Metropolitan R. Co. v. Collins, 1 App. Cas. (D. C.) 383—811, 812.
- Metropolitan R. Co. v. Falvey (D. C. App.), 23 Wash. L. Rep. 53—604.
- Metropolitan St. Ry. Co. v. Hanson, 1 St. Ry. Rep. 234—595, 655.
- Metropolitan St. Ry. Co. v. Ryan, 3 St. Ry. Rep. 259—877.
- Metropolitan Trust Co. v. Toledo, etc., R. Co., 107 Fed. 628—526, 527.
- Metropolitan R. Co. v. Snashall, 3 App. D. C. 420—770, 771, 777, 790, 864.
- Meiz v. Buffalo, etc., R. Co., 58 N. Y. 61—41.
- Metz v. California Southern R. Co., 86 Cal. 229—703.
- Metz v. St. Paul City R. Co. (Minn.), 92 N. W. 502—792.
- Meuer v. Chicago, etc., R. Co., 5 S. Dak. 568—753, 755, 757, 762.
- Mexican Cent. R. Co. v. Lauricella, 87 Tex. 277—778.
- Mexican Nat. R. Co. v. Ware (Tex. Civ. App.), 60 S. W. 343—703.
- Meyer v. Chicago, etc., R. Co., 24 Wis. 566—272, 382.
- Meyer v. Dresser, 15 C. B. (N. S.) 646—175.
- Meyer v. Harnden's Express Co., 24 How. Pr. (N. Y.) 290—313.
- Meyer v. Lemcke, 31 Ind. 208—199.
- Meyer v. Missouri Pac. R. Co., 2 Neb. 320—611.
- Meyer v. Second Ave. R. Co., 21 N. Y. Super. Ct. 305—547.
- Meyer v. St. Louis, etc., R. Co., 54 Fed. 116—622, 642, 652, 683.
- Meyer v. Vicksburg, etc., R. Co., 41 La. Ann. 639—138, 260.
- Meyerstein v. Barber, L. R. 44 L. 317—176.
- Miami Power Co. v. Fort Royal, etc., R. Co., 38 S. C. 78—213, 406, 407.
- Michaels v. New York Cent. R. Co., 30 N. Y. 564—24, 47, 220, 256, 392, 456, 464, 515.
- Michigan Cent. R. Co. v. Boyd, 91 Ill. 268—307, 310.
- Michigan Cent. R. Co. v. Burrows, 33 Mich. 6—32, 105, 106, 107, 125, 223, 247, 257, 456.
- Michigan Cent. R. Co. v. Carrow, 73 Ill. 348—703, 706, 708, 712, 809.
- Michigan Cent. R. Co. v. Chicago, etc., R. Co., 1 Ill. App. 399—232.
- Michigan Cent. R. Co. v. Coleman, 28 Mich. 440—84, 654, 657, 690, 833.
- Michigan Cent. R. Co. v. Curtis, 80 Ill. 324—31, 239, 240, 242, 456.
- Michigan Cent. R. Co. v. Hale, 6 Mich. 243—268, 280, 294, 316, 489.
- Michigan Cent. R. Co. v. Lantz, 32 Mich. 502—280, 489.
- Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318—259, 277, 280, 292, 295, 451, 458, 488, 499, 729.
- Michigan Cent. R. Co. v. Phillips, 60 Ill. 190—172, 177.
- Michigan Cent. R. Co. v. Smithson, 45 Mich. 212—96.
- Michigan Cent. R. Co. v. Ward, 2 Mich. 538—280, 316.
- Michigan Southern, etc., R. Co. v. Bivens, 13 Ind. 263—198, 207.
- Michigan, etc., R. Co. v. Caster, 13 Ind. 164—406, 411, 459.
- Michigan Southern, etc., R. Co. v. Day, 20 Ill. 375—147, 186, 239, 242, 470, 473.
- Michigan Southern, etc., R. Co. v. Heaton, 37 Ind. 448—315, 343.
- Michigan Southern R. Co. v. McDonough, 21 Mich. 165—99, 497, 511, 515.
- Michigan Southern R. Co. v. Oehm, 56 Ill. 293—702, 708.
- Michigan Southern, etc., R. Co. v. Shurtz, 7 Mich. 516—70, 131, 259, 284.
- Midland Nat. Bank v. Missouri Pac. R. Co., 132 Mo. 492—167, 168, 176.
- Mierson v. Hope, 2 Sweeny (N. Y.), 561—193, 229, 274.
- Miles v. James, 1 McCord (S. C.), 157—52, 65, 131.
- Millard v. Missouri, etc., R. Co., 86 N. Y. 441—708.
- Miller v. Baltimore, etc., R. Co., 89 App. Div. (N. Y.) 457—882, 885.
- Miller v. Chicago, etc., R. Co., 1 Mo. App. Rep. 474—243, 368, 369.
- Miller v. Hannibal, etc., R. Co., 90 N. Y. 430—387.
- Miller v. King, 166 N. Y. 394—882.
- Miller v. Mansfield, 112 Mass. 260—15, 280, 284, 429.

TABLE OF CASES.

(The references are to the pages.)

- Miller v. Ocean Steamship Co., 118 N. Y. 211, 199—595, 780, 782.
 Miller v. Pendleton, 8 Gray (Mass.), 574—52.
 Miller v. Railroad Co., 88 Ga. 563—429.
 Miller v. South Carolina R. Co., 33 S. C. 359—488.
 Miller v. South Covington & C. St. Ry. Co., 1 St. Ry. Rep. 246—664.
 Miller v. Southern Ry. Co., 69 S. C. 116—385.
 Miller v. Steam Nav. Co., 10 N. Y. 431—489.
 Miller v. St. Louis, etc., R. Co., 5 Mo. App. 471—778, 782, 872.
 Miller v. Texas, etc., R. Co., 83 Tex. 518—206, 460, 492, 493, 494.
 Miller v. Truesdale, 56 Minn. 274—793.
 Milligan v. Grand Trunk R. Co., 17 U. C. C. P. 115—204.
 Milliman v. New York Cent., etc., R. Co., 66 N. Y. 643—660, 738, 829.
 Milliman v. New York Cent., etc., R. Co., 4 Hun (N. Y.), 409—621, 659, 669, 829.
 Mills v. Michigan Cent. R. Co., 45 N. Y. 622—142, 186, 246, 260, 263, 280, 312, 313, 466, 489.
 Mills v. Missouri, etc., R. Co. (Tex.), 59 S. W. 574—837.
 Mills v. National Steamship Co., 5 N. Y. Supp. 258—198.
 Mills v. Weir, 82 App. Div. (N. Y.) 396—452, 480.
 Milne v. Douglass, 4 McCrary (U. S.), 368—493.
 Milnor v. New York, etc., R. Co., 53 N. Y. 362—729.
 Milloy v. Grand Trunk R. Co., 23 Ont. Rep. 454, 21 Ont. App. 404—70, 71, 259, 265.
 Miltimore v. Chicago, etc., R. Co., 37 Wis. 190—377, 503.
 Milton v. Denver, etc., R. Co., 1 Colo. App. 307—223, 314.
 Milwaukee Chamber of Commerce v. Chicago, etc., R. Co., 7 Int. Com. Rep. 48—922.
 Milwaukee Chamber of Commerce v. Flint, etc., R. Co., 2 Int. Com. Rep. 393—919, 923, 933.
 Milwaukee Malt Ext. Co. v. Chicago, etc., R. Co., 73 Iowa, 98—100.
 Milwaukee, etc., R. Co. v. Arms, 91 U. S. 494—6, 375, 419, 697, 762, 888.
 Milwaukee, etc., R. Co. v. Fairchild, 6 Wis. 403—265, 281.
 Milwaukee, etc., R. Co. v. Finnney, 10 Wis. 388—628, 811, 901.
 Milwaukee, etc., R. Co. v. Hunter, 11 Wis. 160—799.
 Milwaukee, etc., R. Co. v. Smith, 74 Ill. 197—310, 462.
 Minneapolis, etc., R. Co. v. Home Insurance Co., 55 Minn. 236—300, 373.
 Minor v. Chicago, etc., R. Co., 19 Wis. 40—725, 726.
 Minor v. Lehigh Valley R. Co., 21 App. Div. (N. Y.) 307—686, 687.
 Minock v. Detroit, etc., R. Co., 97 Mich. 425—665.
 Minter v. Chicago, etc., R. Co., 82 Mo. App. 130—514, 530.
 Minter v. Pacific R. Co., 41 Mo. 508—139, 140, 701.
 Minter v. Southern Kansas R. Co., 56 Mo. 282—367.
 Missouri, etc., Co. v. Cape Girardeau, etc., R. Co., 1 Int. Com. Rep. 607—910.
 Missouri Coal, etc., Co. v. Hannibal, etc., R. Co., 35 Mo. 84—140.
 Missouri Furnace Co. v. 'Abend, 107 Ill. 44—797.
 Missimer v. Philadelphia, etc., R. Co., 17 Phila. (Pa.) 172—601, 643.
 Mississippi Val. Transp. Co. v. Fosdick Mann. Unrep. Cas. (La.) 3—428.
 Mississippi, etc., R. Co. v. Harrison, 66 Miss. 419—681.
 Mississippi Cent. R. Co. v. Kennedy, 41 Miss. 671—37, 703, 705, 706, 708, 710.
 Mississippi Cent. R. Co. v. Miller, 40 Miss. 45—802.
 Missouri, etc., R. Co. v. Beard (Tex. Civ. App.), 78 S. W. 253—134.
 Missouri, etc., R. Co. v. Belcher, 88 Tex. 549—422.
 Missouri, etc., R. Co. v. Chittin (Tex. Civ. App.), 60 S. W. 284—519.
 Missouri, etc., Ry. Co. v. Clark (Tex. Civ. App.), 79 S. W. 827—504.
 Missouri, etc., R. Co. v. Clifton (Tex. Civ. App.), 80 S. W. 386—414.
 Missouri, etc., R. Co. v. Cobb (Tex. Civ. App.), 36 S. W. 500—409.
 Missouri, etc., R. Co. v. Darlington (Tex. Civ. App.), 30 S. W. 251—412.
 Missouri, etc., R. Co. v. Davidson (Tex. Civ. App.), 60 S. W. 278—222.
 Missouri, etc., R. Co. v. Dilworth (Tex.), 67 S. W. 88—536.
 Missouri R. R. Co. v. Evans, 71 Tex. 361—738.
 Missouri, etc., R. Co. v. Flood (Tex. Civ. App.), 70 S. W. 1106—600, 602, 761, 903.
 Missouri, etc., R. Co. v. Graves (Tex. App.), 16 S. W. 102—108, 109, 112, 337, 497.
 Missouri, etc., R. Co. v. Hewett, 2 Tex. App. Civ. Cas. sec. 273—420.
 Missouri, etc., R. Co. v. Huff (Tex. Civ. App.), 78 S. W. 249, 81 S. W. 525—581, 788.
 Missouri, etc., R. Co. v. Kirkham (Kan.), 65 Pac. 261—525.
 Missouri, etc., R. Co. v. Mazzie (Tex. Civ. App.), 68 S. W. 456—452, 468.
 Missouri, etc., R. Co. v. McFadden, 89 Tex. 138—94, 133, 163, 248.
 Missouri, etc., R. Co. v. Miller, 8 Tex. Civ. App. 241—586.
 Missouri, etc., R. Co. v. Olive (Tex. Civ. App.), 23 S. W. 626—251.
 Missouri, etc., R. Co. v. Quinn (Tex. Civ. App.), 29 S. W. 404—413.
 Missouri, etc., R. Co. v. Rines & Co. (Tex. Civ. App.), 84 S. W. 1092—419.
 Missouri, etc., R. Co. v. Sanders, 12 Tex. Civ. App. 5—809.
 Missouri, etc., R. Co. v. Seley, 31 Tex. Civ. App. 158—153, 179, 211, 215.
 Missouri, etc., R. Co. v. Simmons (Tex. Civ. App.), 33 S. W. 1096—550.
 Missouri, etc., R. Co. v. Tarwater (Tex. Civ. App.), 75 S. W. 937—889.
 Missouri, etc., R. Co. v. Truskett, 186 U. S. 479—405, 513, 521.
 Missouri, etc., R. Co. v. Truskett (Ind. T.), 53 S. W. 444—251.
 Missouri, etc., R. Co. v. Trinity County Lumber Co., 1 Tex. Civ. App. 553—557, 430, 936.
 Missouri, etc., R. Co. v. Turley, 85 Fed. 369—873.
 Missouri, etc., R. Co. v. Wells (Tex. Civ. App.), 58 S. W. 842—364, 535.
 Missouri, etc., R. Co. v. Williams, 91 Tex. 255—546.
 Missouri, etc., R. Co. v. Wood (Tex. Civ. App.), 31 S. W. 237, 81 S. W. 1187—374, 501.

TABLE OF CASES.

lxxxv

(The references are to the pages.)

- Missouri Pac. R. Co. v. Aiken, 71 Tex. 373-373, 894.
 Missouri Pac. R. Co. v. Barnes, 2 Tex. App. Civ. Cas. sec. 574-224, 399, 406.
 Missouri Pac. R. Co. v. Breeding, 4 Tex. App. Civ. Cas. sec. 154-391, 425.
 Missouri Pac. R. Co. v. Carter, 9 Tex. Civ. App. 677-302, 531, 907.
 Missouri Pac. R. Co. v. Carpenter, 44 Kan. 257-363.
 Missouri Pac. R. Co. v. Chicago, etc., R. Co., 25 Fed. 317-45, 197, 260, 266, 269.
 Missouri Pac. R. Co. v. Childers (Tex. Civ. App.), 29 S. W. 559-338.
 Missouri Pac. R. Co. v. China Mfg. Co., 79 Tex. 26-318, 339, 394, 396.
 Missouri Pac. R. Co. v. Collier, 62 Tex. 318-803.
 Missouri Pac. R. Co. v. Cornwall, 70 Tex. 611-30, 32, 247, 318, 339, 507, 530, 759.
 Missouri Pac. R. Co. v. Creath, 3 Tex. App. Civ. Cas. sec. 84-460.
 Missouri Pac. R. Co. v. Curtis, 3 Tex. Civ. App. Cas. sec. 311-692.
 Missouri Pac. R. Co. v. Divinney, 66 Kan. 776-628, 634.
 Missouri Pac. R. Co. v. Douglass, 2 Tex. App. Civ. Cas. sec. 28-142, 336, 390.
 Missouri Pac. R. Co. v. Edwards, 78 Tex. 307-350, 512, 536.
 Missouri Pac. R. Co. v. Fagan, 72 Tex. 127-30, 300, 350, 406, 427, 506, 510, 522.
 Missouri Pac. R. Co. v. Fennell, 79 Tex. 448-531.
 Missouri Pac. R. Co. v. Foreman, 73 Tex. 311-557, 771, 794, 833.
 Missouri Pac. R. Co. v. German, 84 Tex. 141-401.
 Missouri Pac. R. Co. v. Groesbeck (Tex. Civ. App.), 24 S. W. 702-460.
 Missouri Pac. R. Co. v. Hall, 66 Fed. 868-94.
 Missouri Pac. R. Co. v. Harris, 67 Tex. 166-18, 318, 336, 337, 338, 530, 759.
 Missouri Pac. R. Co. v. Haynes, 72 Tex. 175-150, 265, 270, 273.
 Missouri Pac. R. Co. v. Harmonson, 4 Tex. Civ. App. Cas. sec. 91-112.
 Missouri Pac. R. Co. v. Heath (Tex.), 18 S. W. 477-512.
 Missouri Pac. R. Co. v. Heidenheimer, 82 Tex. 195-170, 177, 208.
 Missouri Pac. R. Co. v. Holcomb, 44 Kan. 332-582.
 Missouri Pac. R. Co. v. International Marine Ins. Co., 84 Tex. 149-373.
 Missouri Pac. R. Co. v. Ivey, 71 Tex. 408-8, 318, 572, 573, 754, 768, 811, 812.
 Missouri Pac. R. Co. v. Ivy, 79 Tex. 444-509, 531.
 Missouri Pac. R. Co. v. Jarrard, 65 Tex. 560-892.
 Missouri Pac. R. Co. v. Johnson, 72 Tex. 95-611, 612.
 Missouri Pac. R. Co. v. Kaiser, 82 Tex. 144-895.
 Missouri Pac. R. Co. v. Kingsbury (Tex. Civ. App.), 25 S. W. 323-536, 537.
 Missouri Pac. R. Co. v. Levi, 4 Tex. App. Civ. Cas. sec. 8-227, 255.
 Missouri Pac. R. Co. v. Long, 81 Tex. 253-613, 670, 679, 845.
 Missouri Pac. R. Co. v. Martino, 2 Tex. Civ. App. 634-744, 890.
 Missouri Pac. Ry. Co. v. McCally, 41 Kan. 639-798.
 Missouri Pac. R. Co. v. McFadden, 154 U. S. 155-143.
 Missouri Pac. R. Co. v. McGrath, 3 Kan. App. 220-411.
 Missouri Pac. R. Co. v. Mitchell, 75 Tex. 77, 72 Tex. 171-612, 654, 802, 804, 894, 899, 900.
 Missouri Pac. R. Co. v. Neiswanger, 41 Kan. 621-804, 873.
 Missouri Pac. R. Co. v. L. Newberger & Bro. (Kan.), 73 Pac. 57-147.
 Missouri Pac. R. Co. v. Nevill, 60 Ark. 375-229, 264.
 Missouri Pac. R. Co. v. Nevin, 31 Kan. 335-422.
 Missouri Pac. R. Co. v. Northern, 73 Tex. 27-670.
 Missouri Pac. R. Co. v. Paine, 1 Tex. Civ. App. 621-337, 338, 416, 514.
 Missouri Pac. R. Co. v. Riggs (Kan. App.), 62 Pac. 712-260.
 Missouri Pac. R. Co. v. Rushing, 3 Tex. App. Civ. Cas. sec. 317-410.
 Missouri Pac. R. Co. v. Russell (Tex.), 18 S. W. 594-412.
 Missouri Pac. R. Co. v. Ryan, 2 Tex. App. Civ. Cas. sec. 430-350.
 Missouri Pac. R. Co. v. Scott, 4 Tex. Civ. App. 77-389, 770.
 Missouri Pac. R. Co. v. Sherwood, 84 Tex. 125-309, 353, 402.
 Missouri Pac. R. Co. v. Shuford, 72 Tex. 165-899.
 Missouri Pac. R. Co. v. Smith (Tex.), 16 S. W. 803-319, 530.
 Missouri Pac. R. Co. v. Stults, 31 Kan. 752-369.
 Missouri Pac. R. Co. v. Texas, etc., R. Co., 30 Fed. 879, 30 Fed. 2-836, 915.
 Missouri Pac. R. Co. v. Texas, etc., R. Co., 41 Fed. 913-285, 505, 508, 531, 532.
 Missouri Pac. R. Co. v. Texas, etc., R. Co., 31 Fed. 862-110, 933.
 Missouri Pac. R. Co. v. Twiss, 35 Neb. 267-459, 472, 475, 482.
 Missouri Pac. R. Co. v. United States, 189 U. S. 274-939.
 Missouri Pac. R. Co. v. Watson, 72 Tex. 631-833.
 Missouri Pac. R. Co. v. Weaver, 16 Kan. 456-626.
 Missouri Pac. R. Co. v. Weissman, 2 Tex. Civ. App. 86-100, 102, 240, 454, 460, 467.
 Missouri Pac. R. Co. v. Wichita, etc., Grocery Co., 55 Kans. 225, 525-86, 264, 883.
 Missouri Pac. R. Co. v. Wortham, 73 Tex. 25-613.
 Missouri Pac. R. Co. v. York, 2 Tex. Civ. App. Cas. sec. 638-357, 704, 705, 709.
 Missouri Pac. R. Co. v. Young, 25 Neb. 651-449, 488.
 Mitchell v. Carolina C. R. Co., 124 N. C. 236-396.
 Mitchell v. Chicago, etc., R. Co., 51 Mich. 236-663, 665, 771, 847.
 Mitchell v. Ede, 11 Ald. & El. 888-160, 188.
 Mitchell v. Georgia R. Co., 68 Ga. 644-315, 510.
 Mitchell v. Lancashire, etc., R. Co., L. R. 10 Q. B. 256-194, 265, 278, 284.
 Mitchell v. Marker, 62 Fed. 139-85.
 Mitchell v. Southern Pac. R. Co., 87 Cal. 62-779, 812, 816, 820, 856, 857.
 Mitchell v. United States Express Co., 46 Iowa, 214-393, 395.
 Mitchell v. Weir, 19 App. Div. (N. Y.) 183-197.
 Mitchell v. Western, etc., R. Co., 30 Ga. 22-669, 771.
 Moakler v. Willamette Valley R. Co., 18 Or. 189-815.
 Mobile, etc., R. Co. v. Ashcraft, 48 Ala. 15-804, 811, 812.
 Mobile, etc., R. Co. v. Copeland, 63 Ala. 219-462.

TABLE OF CASES.

(The references are to the pages.)

- Mobile, etc., R. Co. v. Dale, 61 Miss. 206—785.
 Mobile, etc., R. Co. v. Dismukes, 94 Ala. 131—936.
 Mobile, etc., R. Co. v. Francis (Miss.), 9 So. 508—459, 481.
 Mobile, etc., R. Co. v. Franks, 41 Miss. 494—316.
 Mobile, etc., R. Co. v. Hopkins, 41 Ala. 486—4, 242, 287, 712, 717, 725, 753, 759, 766.
 Mobile, etc., R. Co. v. Jay, 65 Ala. 113—798.
 Mobile, etc., R. Co. v. Jarboe, 41 Ala. 644—292, 314.
 Mobile, etc., R. Co. v. Jurey, 111 U. S. 584, 147 U. S. 391—398, 405, 406.
 Mobile, etc., R. Co. v. Klein, 43 Ill. App. 63—811.
 Mobile, etc., R. Co. v. McArthur, 43 Miss. 180—625, 687, 887.
 Mobile, etc., R. Co. v. Mullins, 70 Miss. 730—505.
 Mobile, etc., R. Co. v. Prewitt, 46 Ala. 63—37, 159, 264, 384.
 Mobile, etc., R. Co. v. Reeves, 25 Ky. Rep. 2236—675, 885.
 Mobile, etc., R. Co. v. Tupelo Furniture Mfg. Co., 67 Miss. 35—459, 491.
 Mobile, etc., R. Co. v. Weiner, 49 Miss. 725—24, 288, 292, 755.
 Moeh v. Los Angeles Tract. Co., 1 St. Ry. Rep. 19 (Cal.) 73 Pac. 455—601.
 Moebus v. Herrman, 108 N. Y. 353—823.
 Moffatt v. Great Western, etc., R. Co., 15 L. T. N. S. 630—14, 179, 260, 497, 512.
 Mogill v. Central R. of N. J., 25 Pa. Super. Ct. 164—718.
 Mogul S. S. Co. v. McGregor, Gow & Co., L. R. 21 Q. B. 544—124.
 Mohawk, etc., R. Co. v. Niles, 3 Hill (N. Y.), 162—494.
 Mohr v. Chicago, etc., R. Co., 40 Iowa, 579—262, 269, 270.
 Mohnke v. New Orleans City, etc., R. Co., 104 La. 411—599.
 Molloy v. New York Cent., etc., R. Co., 10 Daly (N. Y.), 453—630.
 Montgomery v. Buffalo Ry. Co., 165 N. Y. 139—700.
 Montgomery, etc., R. Co. v. Boring, 51 Ga. 582—879.
 Montgomery, etc., R. Co. v. Culver, 75 Ala. 587—462, 491, 712, 728, 730.
 Montgomery, etc., R. Co. v. Edmonds, 41 Ala. 667—314, 377, 402.
 Montgomery, etc., R. Co. v. Kolb, 73 Ala. 396—138, 140, 141.
 Montgomery, etc., R. Co. v. Moore, 51 Ala. 394—391, 392, 462.
 Montgomery, etc., R. Co. v. Stewart, 91 Ala. 421—667, 674, 815, 817, 836.
 Montgomery, etc., R. Co. v. Thompson, 77 Ala. 448—584.
 Montgomery El. R. Co. v. Mallette, 92 Ala. 209—656, 779, 883, 892.
 Montgomery St. Ry. Co. v. Shanks, 139 Ala. 489—808.
 Monitor Mut. F. Ins. Co. v. Buffum, 115 Mass. 343—296.
 Monk v. Town of New York, 104 N. Y. 552—829.
 Monnier v. New York, etc., R. Co., 175 N. Y. 281, 70 App. Div. 405—735, 897.
 Monroe v. Metropolitan St. R. Co., 79 App. Div. (N. Y.) 587—835.
 Monteith v. Merchants Despatch, etc., Co., 1 Ont. Rep. 47—416.
 Moore v. American Transp. Co., 24 How. (U. S.) 1—754.
 Moore v. Baltimore, etc., R. Co., 103 Va. 189—514.
 Moore v. Chicago, etc., R. Co., 59 Miss. 243—811.
 Moore v. Columbia, etc., R. Co., 38 S. C. 1—553, 732, 749, 751.
 Moore v. Des Moines, etc., R. Co., 69 Iowa, 491—653, 780.
 Moore v. Evans, 14 Barb. (N. Y.) 524—294, 319, 587, 763.
 Moore v. Erie R. Co., 7 Lans. (N. Y.) 39—204.
 Moore v. Fitchburg R. Corp., 4 Gray (Mass.), 465—637, 748.
 Moore v. Great Northern R. Co., L. R. 10 Ir. 95—511.
 Moore v. Great Western R. Co., L. R. 8 Ir. 95—335.
 Moore v. Henry, 18 Mo. App. 35—437, 472, 473.
 Moore v. Hitchcock, 4 Wend. (N. Y.) 292—15.
 Moore v. Metropolitan R. Co., L. R. 8 Q. B. 36—629, 630, 640.
 Moore v. Michigan Cent. R. Co., 3 Mich. 23—181, 489.
 Moore v. Midland R. Co., 25 W. R. 63—325.
 Moore v. Saginaw, etc., R. Co., 119 Mich. 613—834, 868.
 Moore v. Shreveport, 3 La. Ann. 645—796.
 Moore v. Wabash, etc., R. Co., 84 Mo. 481—614.
 Moody v. Springfield St. Ry. Co. (Mass.), 65 N. E. 29—860.
 Moon v. Interurban St. Ry. Co., 85 N. Y. Supp. 363—746, 897.
 Moorman v. Atchison, etc., R. Co. (Mo. App.), 78 S. W. 1098—660.
 Mooney v. Hudson River R. Co., 1 Sweeny (N. Y.), 325—893.
 Moran Bros. Co. v. Northern Pac. R. Co., 19 Wash. 266—102.
 Morehouse v. Texas Trunk R. Co., 4 Tex. Clv. App. Cas. sec. 266—109.
 Morel v. Mississippi Valley L. Ins. Co., 4 Bush. (Ky.) 535—782.
 Moreland v. Boston, etc., R. Co., 141 Mass. 31—595, 613.
 Morgan v. Camden, etc., R. Co. (Pa.), 16 Atl. 353—844.
 Morgan v. Dibble, 29 Tex. 107—195, 207.
 Morgan v. Ide, 8 Cush. (Mass.) 420—364.
 Morgan v. Southern Pac. R. Co., 95 Cal. 501—867, 880, 892, 902, 904.
 Moriarty v. Hay, 3 M. & R. 696—441.
 Moriarty v. Harnden's Express, 1 Daly (N. Y.), 227—11, 313.
 Moritz v. Interurban St. Ry. Co., 84 N. Y. Supp. 162—632.
 Morris v. Atlantic Ave. R. Co., 116 N. Y. 587—588.
 Morris, etc., R. Co. v. Ayres, 29 N. J. L. 393—210, 260, 273, 282, 285, 590.
 Morris v. Brown, 111 N. Y. 318—544.
 Morris v. Eighth Ave. R. Co., 68 Hun (N. Y.), 39—856.
 Morris v. New York Cent., etc., R. Co., 106 N. Y. 678—595, 613, 660, 693, 772.
 Morris v. Thirld Ave. R. Co., 1 Daly (N. Y.), 202—714, 716, 725.
 Morrison v. Broadway, etc., R. Co., 130 N. Y. 166, 8 N. Y. Supp. 436—676, 805.
 Morrison v. Charlotte, etc., R. Co., 123 N. C. 414—677.
 Morrison v. Davis, 20 Pa. St. 171—48, 225, 248, 257, 276, 416.
 Morrison v. Erie Ry. Co., 56 N. Y. 310—363.
 Morrison v. Erie R. Co., 56 N. Y. 305—689, 828, 830, 847, 849, 850, 851, 863.
 Morrison v. N. Y. Cent., etc., R. Co., 63 N. Y. 643—790.

TABLE OF CASES.

lxxxvii

(The references are to the pages.)

- Morrison v. Phillips, etc., Constr. Co.**, 44 Wis. 405—295, 296, 319, 499, 510.
Morrow v. Atlanta, etc., Air Line R. Co. (N. C.), 46 S. E. 12—848.
Morrow v. Pullman Palace Car Co., 98 Mo. App. 351—56.
Morville v. Great Northern R. Co., 1 Jur. 528—324.
Morse v. Auburn, etc., R. Co., 10 Barb. (N. Y.) 625, 621—880, 891.
Morse v. Brainerd, 41 Vt. 551, 550—41, 472, 474.
Morse v. Canadian Pac. R. Co., 97 Me. 77—287, 328, 524.
Morse v. Duncan, 14 Fed. 395—884, 885, 894.
Morse v. Minneapolis, etc., R. Co., 30 Minn. 465—384, 803, 804, 805.
Morse v. Slue, 1 Vent. 190, 238—65, 226, 294.
Mortland v. Philadelphia, etc., R. Co., 81 Hun (N. Y.), 473—725.
Morton v. Tibbett, 15 Q. B. 428—92.
Moseland v. Boston, etc., R. Co., 141 Mass. 31—655.
Moseley v. Lord, 2 Conn. 389—8, 202.
Moser v. South Covington & C. St. Ry. Co., 1 St. Ry. Rep. 240—860.
Moses v. Boston, etc., R. Co., 24 N. H. 71—24, 60, 63, 70, 94, 135, 245, 258, 290, 292, 341, 359, 654, 761.
Moses v. Boston, etc., R. Co., 32 N. H. 523—263, 269, 271, 755.
Moses v. Port Townsend Southern R. Co., 5 Wash. 595—169, 439, 502.
Moses v. Louisville, etc., R. Co., 39 La. Ann. 649—550, 670, 679.
Moses v. Norris, 4 N. H. 304—22, 61, 63.
Moskowitz v. Brooklyn H. R. Co., 85 N. Y. Supp. 960—863.
Moskowitz v. International Nav. Co., 84 N. Y. Supp. 297—711, 712.
Moss v. Bettis, 4 Heisk. (Tenn.) 661—21, 62.
Moss v. Johnson, 22 Ill. 633—586.
Mosher v. Southern Express Co., 38 Ga. 37—462.
Mote v. Chicago, etc., R. Co., 27 Iowa, 22 149, 283, 724, 727.
Mott v. Consumers' Ice Co., 73 N. Y. 543—631.
Mott v. Detroit, etc., R. Co., 120 Mich. 127—808.
Mott v. Hudson River R. Co., 8 Bosw. (N. Y.) 345—698.
Motteram v. Eastern Counties R. Co., 7 C. B. N. S. 58—591.
Moulton v. St. Paul, etc., R. Co., 31 Minn. 85—316, 345, 530.
Mouton v. Louisville, etc., R. Co. (Ala.), 29 So. 602—303, 387, 388.
Mullarkey v. Philadelphia R. Co., 9 Phila. (Pa.) 114—460.
Mowrey v. Central City R. Co., 66 Barb. (N. Y.) 43—599, 824.
Mowrey v. Central City R. Co., 51 N. Y. 666—822, 827.
Mowrey v. Western Union Tel. Co., 51 Hun (N. Y.), 126—77.
Moyland v. Second Ave. R. Co., 128 N. Y. 583—838, 841.
Moynahan v. Moore, 9 Mich. 9—444.
Morgan v. Congdon, 4 N. Y. 552—15.
Mt. Adams, etc., R. Co. v. Isaacs, 18 Ohio C. C. 177—782.
Mt. Pleasant Mfg. Co. v. Cape Fear, etc., R. Co., 106 N. C. 207—494.
Mt. Vernon Co. v. Alabama G. S. R. Co., 92 Ala. 296—488.
Muckle v. Rochester R. Co., 79 Hun (N. Y.), 32—588, 743, 745.
Muddle v. Stride, 9 Car. & P. 380—396.
Mudgett v. Bay State Steamboat Co., 1 Daly (N. Y.), 151—715.
Muehlhausen v. St. Louis R. Co., 91 Mo. 332—550, 552, 553, 560, 582.
Mueller v. St. Louis Transit Co., 3 St. Ry. Rep. 567—632.
Mulcairns v. Jamesville, 67 Wis. 24—772.
Muldoon v. Seattle City R. Co., 7 Wash. 528, 10 Wash. 311—580, 719, 754, 761, 764, 766, 858.
Mulhado v. Brooklyn City R. Co., 30 N. Y. 370—674.
Mullady v. Brooklyn H. R. Co., 65 App. Div. (N. Y.) 549—904.
Muller v. Second Ave. R. Co., 16 J. & S. (N. Y.) 546—777.
Muller v. Eno, 14 N. Y. 597—402.
Mullan v. Wisconsin Cent. Co., 46 Minn. 474—641.
Mulligan v. Illinois Cent. R. Co., 36 Iowa, 181—295, 296, 306, 463, 481, 483.
Mulligan v. Metropolitan St. Ry. Co., 87 App. Div. (N. Y.) 320, 89 App. Div. 207—833, 842.
Mulligan v. Northern Pac. R. Co., 4 Dak. 315—71, 259, 280, 370, 725.
Mulligan v. New York, etc., R. Co., 129 N. Y. 512, 506—631, 634, 638.
Mullins v. Chickering, 110 N. Y. 514—156, 363.
Munk v. Jackson, 66 Fed. Rep. 571—50.
Munster v. South Eastern R. Co., 4 C. B. N. S. 676—100, 703.
Munn v. Baker, 2 Stark. 255—299.
Munn v. Illinois, 94 U. S. 113—61, 908.
Munroe v. Third Ave. R. Co., 18 J. & S. (N. Y.) 114—838.
Murch v. Concord R. Corp., 29 N. H. 9, 28—39, 540, 609.
Murdock v. Boston, etc., R. Co., 133 Mass. 15, 137 Mass. 293—639, 744.
Murnahan v. Cincinnati, etc., R. Co. (Ky. L. Rep.), 86 S. W. 688—853.
Murphy v. Atlanta, etc., R. Co., 89 Ga. 832—660, 775.
Murphy v. City of Dayton, 7 Ohio, N. P. 227—610.
Murphy v. Coney Island, etc., R. Co., 36 Hun (N. Y.), 199—775.
Murphy v. Emigration Comrs., 28 N. Y. 154—725.
Murphy v. Holbrook, 20 Ohio St. 137—40, 41.
Murphy v. Rome, etc., R. Co., 32 St. Rep. (N. Y.) 381—851.
Murphy v. Metropolitan St. Ry. Co., 19 Misc. Rep. (N. Y.) 194—676.
Murphy v. Ninth Ave. R. Co., 6 Misc. Rep. (N. Y.) 298—599.
Murphy v. New York Cent. R. Co., 66 Barb. (N. Y.) 125—803, 808.
Murphy v. North Jersey St. Ry. Co. (N. J. L.), 58 Atl. 1018—842.
Murphy v. Staton, 3 Munf. (Va.) 239—25, 65, 389.
Murphy v. St. Louis, etc., R. Co., 43 Mo. App. 342—551, 552, 561, 694, 775.
Murphy v. Union R. Co., 118 Mass. 228—621, 737, 739.
Murphy v. Wabash R. Co., 3 Int. Com. Rep. 725—919.
Murphy v. Western, etc., R. Co., 23 Fed. 637—623, 644.
Murray v. Warner, 55 N. H. 546—199.
Murray v. Chicago, etc., R. Co., 92 Fed. 868, 62 Fed. 24—119, 915, 939.
Murray v. Pawtuxet Val. St. R. Cd., 25 R. I. 269—781.
Murray v. Metropolitan Dist. R. Co., 27 L. T. N. S. 762—776.
Murrell v. Pacific Express Co., 54 Ark. 22—611, 124.
Murrell v. Dixey, 14 La. Ann. 298—405, 413.

TABLE OF CASES.

(The references are to the pages.)

- Muschamp v. Lancaster, etc., R. Co., 8 M. & W. 421—463, 471.
 Muser v. Holland, 17 Blatchf. (U. S.) 412—287, 342, 758, 759.
 Mutual Ins. Co. v. Tweed, 7 Wall. (U. S.) 44—423.
 Myers v. Baltimore & O. R. Co., 150 Pa. St. 386—793.
 Myers v. Long Island R. Co., 10 St. Rep. (N. Y.) 430—676.
 Myers v. Nashville, etc., R. Co. (Tenn.), 72 S. W. 114—854.
 Myers v. New York Cent. R. Co., 88 Hun (N. Y.), 519—818.
 Myers v. Pennsylvania Co., 2 Int. Com. Rep. 403—912.
 Myers v. Wabash, etc., R. Co., 90 Mo. 98—518, 524.
 Myerson v. Woolverton, 9 Misc. Rep. (N. Y.) 186—730.
 Mykleby v. Chicago, etc., R. Co., 39 Minn. 54—638, 889.
 Mylton v. Midland R. Co., 4 H. & N. 615—463, 702.
 Mynung v. Detroit, etc., R. Co., 59 Mich. 257, 67 Mich. 677—771, 793, 795.
 Mynard v. Syracuse, etc., R. Co., 71 N. Y. 180—30, 255, 256, 320, 321, 351, 352, 497, 509, 765.
 Myres v. Diamond Joe Line, 58 Mo. App. 199—243.
 Myrrick v. Michigan Cent. R. Co., 107 U. S. 102—37, 267, 301, 453, 458, 461, 473, 479, 497, 502, 509, 515, 517, 729.

 N.
 Nagle v. Alleghany Val. R. Co., 88 Pa. St. 35—823, 825.
 Nagle v. California Southern R. Co., 88 Cal. 86—652, 830, 846.
 Najac v. Boston, etc., R. Co., 7 Allen (Mass.), 329—729.
 Nalley v. Hartford Carpet Co., 51 Conn. 524—384.
 Nance v. California Cent. R. Co., 94 N. C. 619—660, 678, 850.
 Nanson v. Jacobs, 93 Mo. 331, 12 Mo. App. 125—90, 157, 169, 449.
 Nash v. Sharp, 19 Hun (N. Y.), 365—892, 903.
 Nashua Lock Co. v. Worcester, etc., R. Co., 48 N. H. 339—463, 472, 492, 729.
 Nashville, etc., R. Co. v. David, 6 Heisk. (Tenn.) 261—25, 235, 251.
 Nashville, etc., R. Co. v. Erwin (Tenn.), 3 Am. & Eng. R. Cas. 465—576.
 Nashville, etc., R. Co. v. Estes, 10 Lea (Tenn.), 749—226, 233.
 Nashville, etc., R. Co. v. Estis, 7 Heisk. (Tenn.) 622—226.
 Nashville, etc., R. Co. v. Haslett (Tenn.), 79 S. W. 1031—306.
 Nashville, etc., R. Co. v. Heggie, 86 Ga. 210—508, 508.
 (Tenn.) 271—240, 250, 318, 497.
 Nashville, etc., R. Co. v. Jones, 9 Heisk. Nashville, etc., R. Co. v. King, 6 Heisk. (Tenn.) 27—609.
 Nashville, etc., R. Co. v. Johnson, 15 Lea (Tenn.), 677—319, 596, 801, 802, 803.
 Nashville, etc., R. Co. v. King, 6 Heisk. (Tenn.) 269—251.
 Nashville, etc., R. Co. v. Lillie (Tenn.), 78 S. W. 1055—57, 713.
 Nashville, etc., R. Co. v. Messino, 1 Sneed. (Tenn.) 220—39, 539, 540, 549, 552, 617, 802, 811.
 Nashville, etc., R. Co. v. Smith (Ala.), 31 So. 481—371.
 Nashville, etc., R. Co. v. Stone & Haslett (Tenn.), 79 S. W. 1931—388, 529, 531, 534.
 Nashville, etc., R. Co. v. Thomas, 5 Heisk. (Tenn.) 262—786.
 Nashville, etc., R. Co. v. Troxler, 1 Lea (Tenn.), 520—699.
 Nassau Elec. Ry. Co. v. Corliss, 126 Fed. 355—592, 843.
 Natchez, etc., R. Co. v. McNeil, 61 Miss. 434—604.
 Nathan v. Giles, 5 Taunt. 558—177.
 National Docks R. Co. v. Central R. Co., 32 N. J. Ed. 755—95.
 National Commercial Bank v. Lackawana Transp. Co., 172 N. Y. 596—163.
 National Bank v. Philadelphia, etc., R. Co., 163 Pa. St. 467—168, 169.
 National Bank v. Railroad Co., 44 Minn. 224—174, 175.
 National Line Steamship Co. v. Smart, 107 Pa. St. 492—262, 285.
 Naugatuck R. Co. v. Waterbury Button Co., 24 Conn. 468—458.
 Nave v. Flack, 90 Ind. 205—680.
 Naylor v. Maugles, 1 Esp. 109—15.
 Neal v. Saunderson, 2 Smed. & M. (Miss.) 572—24, 28.
 Neal v. Wilmington, etc., R. Co., 8 Jones L. (N. C.) 482—262, 283.
 Nealand v. Boston, etc., R. Co., 161 Mass. 67—261, 724.
 Nebenzahl v. Fargo, 15 Daly (N. Y.), 130—154.
 Nebraska Teleph. Co. v. State, Yeiser, 55 Neb. 627—79.
 Needy v. Western Maryland R. Co., 22 Pa. Super. Ct. 489—533.
 Neil v. American Express Co., Rap. Que. 20 C. S. 253—483.
 Neil v. Rogers Bros. Produce Co., 41 W. Va. 37—170, 173.
 Neilson v. Jessup, 30 Fed. 138—358.
 Nellis v. New York Cent. R. Co., 30 N. Y. 505—734.
 Nelson v. Atlantic, etc., R. Co., 68 Mo. 593—850.
 Nelson v. Chicago, etc., R. Co., 60 Wis. 320—691.
 Nelson v. Chicago, etc., R. Co., 2 Ill. App. 180—161.
 Nelson v. Great Northern R. Co., 28 Mont. 297—288, 513, 521, 526, 528, 533.
 Nelson v. Hudson River R. Co., 48 N. Y. 498—209, 305, 312, 320.
 Nelson v. Lehigh Valley R. Co., 25 App. Div. (N. Y.) 535—612, 777.
 Nelson v. Long Island R. Co., 7 Hun (N. Y.), 140—564, 566, 735.
 Nelson v. Mackintosh, 1 Stark. 237—12.
 Nelson v. National Steamship Co., 7 Ben. (U. S.) 340—314, 278.
 Nelson v. Odiorne, 45 N. Y. 489—243.
 Nelson v. Southern Pac. Co., 18 Utah, 244, 325—637, 869.
 Nelson v. Stephenson, 5 Duer (N. Y.), 538—331.
 Neslie v. Second, etc., Streets Pass. R. Co., 113 Pa. St. 300—632.
 Neston Colliery Co. v. London, etc., R. Co., 4 Ry. & C. T. Cas. 257—265.
 Nettles v. South Carolina R. Co., 7 Rich. L. (S. C.) 190—198, 240, 412, 415.
 Neun v. Rochester Ry. Co., 165 N. Y. 146—822.
 Neville v. St. Louis, etc., R. Co., 158 Mo. 293—869.
 Nevin v. Pullman Palace Car Co., 106 Ill. 222—58, 59, 540.

TABLE OF CASES.

lxxxix

(The references are to the pages.)

- Nevens v. Bay State Steamboat Co., 4 Bosw. (N. Y.) 225—702, 703, 724.
 Nevens v. Bank of Lansingburgh, 10 Mich. 547—78.
 Nevises v. Chicago, etc., R. Co. (Wis.), 102 N. W. 489—584.
 Newberger Cotton Co. v. Illinois Cent. R. Co., 75 Miss. 303—396.
 Newcomb v. Just, 2 C. & P. 76—323.
 Newby v. Chicago, etc., R. Co., 19 Mo. App. 391—519, 538.
 Newcomb v. Boston, etc., R. Corp., 115 Mass. 230—173.
 Newcomb v. New York Cent., etc., R. Co., 189 Mo. 687—670.
 Newell v. Smith, 49 Vt. 260, 255—42, 405, 412, 460.
 Newport News, etc., R. Co. v. Mendell (Ky.), 34 S. W. 1081—487.
 Newhall v. Vargas, 15 Me. 314—440, 447.
 Newport News, etc., R. Co. v. Mercer, 96 Ky. 475—498.
 Newton v. Pope, 1 Cow. (N. Y.) 109—87.
 Newman v. Alabama G. S. R. Co., 38 Fed. 819—597.
 Newman v. New York, etc., R. Co., 54 Hun (N. Y.), 335—640.
 Newman v. Smoker, 25 La. Ann. 303—756, 760.
 New Albany, etc., R. Co. v. Campbell, 12 Ind. 55—150, 268.
 New Brunswick Steamboat, etc., Transp. Co. v. Tiers, 24 N. J. L. 697—24, 137, 257.
 New England Exp. Co. v. Maine Cent. R. Co., 57 Me. 188—92.
 New England Mfg. Co. v. Starin, 60 Conn. 369—93.
 New Haven v. Campbell, 128 Mass. 104—442.
 New Jersey Express Co. v. Nichols, 23 N. J. L. 434—798, 800.
 New Jersey Fruit Exch. v. Central R. Co., 2 Int. Com. Rep. 84—910.
 New Jersey R. Co. v. Kennard, 21 Pa. St. 203—601.
 New Jersey R., etc., Co. v. Pollard, 22 Wall. (U. S.) 341—695, 769, 777, 867.
 New Jersey R. Co. v. Pennsylvania R. Co., 27 N. J. L. 100—27, 46, 95, 103.
 New Jersey Steamboat Co. v. Brockett, 121 U. S. 637—625, 810, 890.
 New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (U. S.) 344—27, 92, 287, 290, 291, 313, 328, 352, 384, 394, 754, 756, 758, 759, 768.
 New Orleans, etc., R. Co. v. A. H. George & Co., 82 Miss. 710—428.
 New Orleans, etc., R. Co. v. Allbritton, 38 Miss. 242—617, 778.
 New Orleans, etc., R. Co. v. Bailey, 40 Miss. 395—399.
 New Orleans, etc., R. Co. v. Burke, 53 Miss. 200—589, 642, 739, 890, 897.
 New Orleans Cotton Exch. v. Cincinnati, etc., R. Co., 2 Int. Com. Rep. 289—932, 933.
 New Orleans Cotton Exch. v. Illinois Cent. R. Co., 2 Int. Com. Rep. 777—912.
 New Orleans Cotton Exch. v. Louisville, etc., R. Co., 3 Int. Com. Rep. 523—935.
 New Orleans Exch. v. Ry. Co., 2 Int. Com. C. Rep. 375—910.
 New Orleans, etc., R. Co. v. Falter, 58 Miss. 911—316, 377.
 New Orleans, etc., R. Co. v. Hurst, 36 Miss. 660, 661—687, 880, 898.
 New Orleans, etc., R. Co. v. Jopes, 142 U. S. 18—635.
 New Orleans, etc., R. Co. v. McEwen & Murray, 49 La. Ann. 1184—375.
 New Orleans, etc., R. Co. v. Moore, 40 Miss. 39—408, 701.
 New Orleans Mut. Ins. Co. v. New Orleans, etc., R. Co., 20 La. Ann. 302—292, 328, 393, 395.
 New Orleans, etc., R. Co. v. Statham, 42 Miss. 607—621, 675, 682, 683, 688, 826.
 New Orleans, etc., R. Co. v. Toulme, 59 Miss. 284—786.
 New Orleans, etc., R. Co. v. Tyson, 46 Miss. 729—183, 198, 411.
 New Port News, etc., R. Co. v. Holmes, 14 Ky. L. Rep. 853—396.
 New Port News, etc., R. Co. v. Mendell (Ky.), 34 S. W. 1081—466.
 New Port News, etc., R. Co. v. Mercer, 96 Ky. 475—107, 369, 417.
 New Port News, etc., R. Co. v. United States, 61 Fed. 488—509.
 New York Board of Trade v. Pennsylvania R. Co., 3 Int. Com. Rep. 417—912, 916, 918, 935.
 New York Cent., etc., R. Co. v. Davis, 86 Hun (N. Y.), 86—441, 442.
 New York Cent., etc., R. Co. v. Eby (Pa.), 12 Atl. 482—388, 460.
 New York Cent. R. Co. v. Fraloff, 100 U. S. 24—701, 703, 709, 717.
 New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357—6, 12, 13, 287, 326, 329, 375, 570, 572, 694, 752, 759, 764, 768.
 New York Cent., etc., R. Co. v. Standard Oil Co., 87 N. Y. 486—127, 194, 243.
 New York, etc., R. Co. v. Ball, 53 N. J. L. 283—620, 816, 817, 818, 854, 855.
 New York, etc., R. Co. v. Bennett, 50 Fed. 496—568, 637.
 New York, etc., R. Co. v. Blumenthal, 160 Ill. 40—770.
 New York, etc., R. Co. v. Burns, 51 N. J. L. 340—587.
 New York, etc., R. Co. v. Coulbourn, 69 Md. 361—838, 850.
 New York, etc., R. Co. v. Doane, 115 Ind. 435—583, 672, 673, 694, 846.
 New York, etc., R. Co. v. Dougherty, 11 W. N. C. (Pa.) 437—601, 604, 654.
 New York, etc., R. Co. v. Enches, 127 Pa. St. 316—848, 852.
 New York, etc., R. Co. v. Estill, 147 U. S. 591—398, 403, 405, 406, 408, 427, 522.
 New York, etc., R. Co. v. Fremont, etc., R. Co. (Neb.), 92 N. W. 131—364, 481.
 New York, etc., R. Co. v. Lockwood, 17 Wall. (U. S.) 357—318, 323.
 New York, etc., R. Co. v. National Steamship Co., 137 N. Y. 23—495.
 New York, etc., R. Co. v. New Jersey Electric R. Co. (N. Y.), 37 Atl. 627—692.
 New York, etc., R. Co. v. New York, etc., R. Co., 50 Fed. 867—928, 929, 931.
 New York, etc., R. Co. v. Platt, 7 Int. Com. Rep. 323—909.
 New York, etc., Print Tel. Co. v. Dryburg, 35 Pa. St. 298—23, 78.
 New York, etc., R. Co. v. Sanders, 134 Mass. 53—442.
 New York, etc., R. Co. v. Schuyler, 34 N. Y. 30—173.
 New York, etc., Steamship Co. v. Wright (Tex. Civ. App.), 26 S. W. 106—482.
 New York, etc., R. Co. v. Steinbrenner, 47 N. J. L. 161—699.
 New York, etc., R. Co. v. Willing, 24 Ohio C. C. 474—732, 889.
 New York, etc., R. Co. v. Winter, 143 U. S. 60—559, 743, 745, 806.
 New York L. Ins. Co. v. Rohrbough, 2 Tex. App. Civ. Cas. sec. 217—369.
 New York, N. H. & H. R. Co. v. Bork, 23 R. I. 218—615.
 New York, N. H. & H. R. Co. v. Scovill, 71 Conn. 136—614.

TABLE OF CASES.

(The references are to the pages.)

- New York Produce Exch. v. Baltimore & O. R. Co., 7 Int. Com. Rep. 612-923, 924.
 New York Produce Exch. v. New York Cent., etc., R. Co., 2 Int. Com. Rep. 553-936.
 Nichols v. Brooklyn City R. Co., 30 Hun (N. Y.), 437-808.
 Nichols v. Chicago, etc., R. Co., 90 Mich. 203-61, 682, 688.
 Nichols v. Dubuque, etc., R. Co., 68 Iowa, 732-851.
 Nichols v. Lynn & B. R. Co., 168 Mass. 522-656, 677, 806.
 Nicholas v. New York Cent., etc., R. Co., 89 N. Y. 370-78, 256, 263, 320, 321, 348, 352, 766.
 Nichols v. Oregon Short Line R. Co. (Utah), 66 Pac. 768-110.
 Nichols v. Sixth Ave. R. Co., 38 N. Y. 131-830, 862, 867.
 Nichols v. Smith, 115 Mass. 332-42, 68, 70, 135, 139, 259.
 Nichols v. Southern Pac. R. Co., 23 Or. 123-559, 567.
 Nichols v. Union Pac. R. Co., 7 Utah, 510-751.
 Nicholson v. Great Western R. Co., 5 C. B. N. S. 366-123.
 Nicholson v. William, 5 East, 507-294, 335.
 Nicolette Lumber Co. v. Peoples' Coal Co., 26 Pa. Super. Ct. 575-433.
 Nickey v. St. Louis, etc., R. Co., 35 Mo. App. 79-231, 760.
 Nicoll v. East Tennessee, etc., R. Co., 89 Ga. 260-314, 354, 529.
 Niendorf v. Manhattan R. Co., 4 App. Div. (N. Y.) 46-890.
 Nieto v. Clark, 1 Cliff. (U. S.) 145-616, 637.
 Nines v. St. Louis, etc., R. Co., 107 Mo. 475-481.
 Nitro-glycerine Case, 15 Wall. (U. S.) 524, 17 Wall. (U. S.) 524-100, 379, 383, 384.
 Noble v. Atchison, etc., R. Co. (Okla.), 46 Pac. 483-741.
 Noble v. St. Joseph, etc., St. R. Co., 98 Mich. 249-639.
 Nolan v. Brooklyn City, etc., R. Co., 87 N. Y. 63-775, 858, 862.
 Nolan v. New York, etc., R. Co., 41 N. Y. Super. Ct. 541-565.
 Nolton v. Western R. Corp., 15 N. Y. 444-542, 544, 546, 569, 578, 579.
 Nordemeyer v. Loescher, 1 Hilt. (N. Y.) 499-438, 710, 711.
 Norfolk, etc., R. Co. v. Anderson, 90 Va. 6-543.
 Norfolk Southern R. Co. v. Barnes, 104 N. C. 25-200, 441.
 Norfolk R. Co. v. Burge, 84 Va. 70-798.
 Norfolk, etc., R. Co. v. Ferguson, 79 Va. 241-284.
 Norfolk, etc., R. Co. v. Galliher, 89 Vt. 639-546, 548, 551, 619.
 Norfolk, etc., R. Co. v. Groseclose, 88 Va. 267-548, 575.
 Norfolk, etc., R. Co. v. Harman, 91 Va. 601-461, 512.
 Norfolk, etc., R. Co. v. Irvine, 84 Va. 553, 85 Va. 217-100, 356, 710, 711, 718.
 Norfolk, etc., R. Co. v. Reed, 87 Va. 185-467.
 Norfolk, etc., R. Co. v. Reeves, 97 Va. 284-332.
 Norfolk, etc., R. Co. v. Shippers Compress Co., 83 Va. 272-249.
 Norfolk, etc., R. Co. v. Shott, 92 Va. 34-578.
 Norfolk, etc., R. Co. v. Sutherland, 89 Va. 703-461, 506, 637.
 Norfolk, etc., R. Co. v. Tanner (Va.), 41 S. E. 721-761.
 Norfolk & W. R. Co. v. Old Dominion Baggage Transfer Co., 99 Va. 111-614.
 Norfolk, etc., R. Co. v. Wysor, 82 Va. 250-555, 589, 591, 740.
 Norman v. Southern Ry. Co., 65 S. C. 517-584.
 Normile v. Northern Pac. R. Co. (Wash.), 67 L. R. A. 271-150, 195.
 Normile v. Oregon R. & Nav. Co., 41 Or. 177-508, 528, 530.
 Norris v. Litchfield, 35 N. H. 271-831.
 Norris v. Savannah, etc., R. Co., 23 Fla. 182-252, 257.
 North v. Merchants, etc., Transp. Co., 146 Mass. 315-171, 462, 470.
 North Baltimore Pass. R. Co. v. Kaskell, 75 Md. 517-770, 778.
 North Birmingham Ry. Co. v. Liddicoat, 97 Ala. 545-838.
 North Chicago St. Ry. Co. v. Baur, 179 Ill. 126-857, 863.
 North Chicago St. R. Co. v. Broms, 62 Ill. App. 127-893.
 North Chicago St. R. Co. v. Cook, 145 Ill. 551-653, 670, 674.
 North Chicago St. R. Co. v. Cotton, 104 Ill. 486-778, 856.
 North Chicago St. R. Co. v. Fitzgibbons, 180 Ill. 466-902.
 North Chicago St. R. Co. v. Kaspers, 186 Ill. 246-838.
 North Chicago City Ry. Co. v. Louis (Ill.), 27 N. E. 451-783, 796.
 North Chicago St. R. Co. v. Olds, 40 Ill. App. 421-557, 625.
 North Chicago St. R. Co. v. Polkey, 1 St. Ry. Rep. 94-599, 655, 859.
 North Chicago St. R. Co. v. Schwartz, 82 Ill. App. 493-775.
 North Chicago St. R. Co. v. Williams, 140 Ill. 275-541, 547, 857, 859.
 North Chicago St. R. Co. v. Wiswell, 168 Ill. 613-838.
 North Chicago, St. R. Co. v. Wrixon, 51 Ill. App. 307-604.
 North German Lloyd v. Heule, 44 Fed. 100-358.
 North Hudson County R. Co. v. May, 48 N. J. L. 401-811.
 North Missouri R. Co. v. Akers, 4 Kan. 453-400, 410, 489, 538.
 North Pennsylvania R. Co. v. Commercial Bank, 123 U. S. 727-171, 172, 178, 509.
 North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15-903.
 North River Bank v. Aymer, 3 Hill (N. Y.), 262-173.
 North River Steamboat Co. v. Livingston, 3 Cow. (N. Y.) 713-906.
 North Side St. R. Co. v. Want (Tex. App.), 15 S. W. 40-778, 783.
 Northern Central R. Co. v. Newman (Md.), 56 Atl. 973-896.
 Northern Cent. R. Co. v. O'Conner, 76 Md. 207-589, 590, 884, 885, 895.
 Northern, etc., R. Co. v. O'Brien, 1 Wash. 607-798.
 Northern Pac. R. Co. v. Adams, 192 U. S. 440-719, 759, 766.
 Northern Pac. R. Co. v. American Trading Co., 195 U. S. 39-467.
 Northern Pac. Express Co. v. Martin, 26 Can. Sup. Ct. 185-339.
 Northern Pac. R. Co. v. Pauson, 70 Fed. 685-713.
 Northern R. Co. v. Fitchburg R. Co., 6 Allen (Mass.), 254-459.
 Northern R. Co. v. Page, 22 Barb. (N. Y.) 130-591, 721.
 Northern Transp. Co. v. McClary, 66 Ill. 233-399, 468.

TABLE OF CASES.

xci

(The references are to the pages.)

- Northern Transp. Co. v. Sellick, 52 Ill. 249—208.
 Northern Securities Co. v. United States, 193 U. S. 343—943.
 Northington v. Norfolk Ry. & L. Co., 102 Va. 446—843.
 Northland v. Philadelphia, etc., R. Co., 81 Hun (N. Y.), 473—725. See Mortland.
 Northrup v. Railway Pass. Assur. Co., 43 N. Y. 516—551.
 Northrop v. Syracuse, etc., R. Co., 2 Trans. App. (N. Y.) 183—148, 269, 274.
 Northwestern Fuel Co. v. Burlington, etc., R. Co., 20 Fed. 712—93.
 Northwestern Iowa Grain, etc., Assoc. v. Chicago, etc., R. Co., 2 Int. Com. Rep. 431—920, 932.
 Northwestern U. P. Co. v. Clough, 22 Wall. (U. S.) 528—549.
 Norton v. North Carolina R. Co., 122 N. C. 910—790.
 Norwalk Bank v. Adams Express Co., 4 Blatchf. (U. S.) 455—157.
 Norway Plains Co. v. Boston, etc., R. Co., 1 Gray (Mass.), 263—37, 40, 261, 263, 284.
 Norwich Co. v. Wright, 13 Wall. (U. S.) 104—754.
 Nowack v. Metropolitan St. Ry. Co., 166 N. Y. 433—633, 634.
 Nowlen v. Colt, 6 Hill (N. Y.), 461—204.
 Notara v. Henderson, L. R. 5 Q. B. 225—31, 32.
 Noyes v. Rutland, etc., R. Co., 27 Vt. 110—38, 460, 472.
 Nudd v. Wells, 11 Wis. 407—240, 249, 412.
 Nugent v. Fair Haven & W. St. Ry. Co., 73 Conn. 339—365.
 Nugent v. Smith, L. R. 1 C. P. Div. 19, 27, 428—19, 21, 22, 25, 30, 62, 65, 511.
 Nugent v. Tract. Co., 181 Pa. St. 160—792.
 Nunn v. Georgia R. Co., 71 Ga. 710—687, 688.
 Nutter v. Southern Ry., 25 Ky. Law Rep. 1700—555, 732.
 Nutting v. Connecticut River R. Co., 1 Gray (Mass.), 502, 504—459, 474.
- O.
- Oakes v. Northern Pac. R. Co., 20 Or. 392—701, 702, 709, 712.
 Oakley v. Gordon, 7 La. Ann. 235—431.
 Oakley v. Russell, 18 Mar. (La.) 58—66.
 Oakley v. Portsmouth, etc., Steam Packet Co., 11 Exch. 618—14.
 O'Baunon v. Southern Express Co., 51 Ala. 481—136, 137.
 Ober v. Crescent City R. Co., 44 La. Ann. 1059—838.
 Ober v. Indianapolis, etc., R. Co., 13 Mo. App. 81—407.
 Oberndorfer v. Pabst, 100 Wis. 505—85.
 O'Brien v. Boston, etc., R. Co., 15 Gray (Mass.), 20—561, 732, 735.
 O'Brien v. Cunard Steamship Co., 154 Mass. 272—618.
 O'Brien v. McGlinchy, 68 Me. 557—257.
 O'Brien v. New York Cent., etc., R. Co., 80 N. Y. 236—735.
 Och v. Missouri, etc., R. Co., 130 Mo. 27—770, 776.
 O'Connell v. St. Louis Cable, etc., R. Co., 106 Mo. 482—654, 656.
 Oderkirk v. Fargo, 58 Hun (N. Y.), 347—389, 280.
 Odem v. St. Louis, etc., R. Co., 45 La. Ann. 1201—820.
 O'Donnell v. Allegheny Valley R. Co., 59 Pa. St. 239—587, 596.
 O'Donnell v. Chicago, etc., R. Co., 106 Ill. App. 287—545, 549.
 O'Donnell v. Louisville & N. R. Co., 19 Ky. L. Rep. 1005—870.
 O'Donnell v. St. Louis Transit Co. (Mo. App.), 80 S. W. 315—632, 633, 890.
 O'Dougherty v. Boston, etc., R. Co., 1 Sup. Ct. (N. Y.) 477—147, 153, 166, 208.
 O'Flaherty v. Nassau Elec. R. Co., 34 App. Div. (N. Y.) 75—605, 784.
 Ogden v. Marshall, 8 N. Y. 340—254, 417.
 Ogdensburg, etc., R. Co. v. Pratt, 22 Wall. (U. S.) 123, 133—287, 367, 458, 471, 474, 475, 480, 503, 759.
 Ogdensburg, etc., R. Co. v. Pratt, 49 How. Pr. (N. Y.) 84—471.
 Ogle v. Atkinson, 5 Taunt. 759—167, 363.
 O'Gorman v. New York, etc., R. Co., 99 App. Div. (N. Y.) 594—588.
 O'Hanlan v. Great Western R. Co., 6 B. & S. 484—400, 402.
 Ohio, etc., R. Co. v. Allender, 47 Ill. App. 484, 59 Ill. App. 620—550, 561, 836, 856.
 Ohio, etc., R. Co. v. Applewhite, 52 Ind. 540—666, 607, 686.
 Ohio, etc., R. Co. v. Burrows, 32 Ill. App. 161—887, 889.
 Ohio, etc., R. Co. v. Crosby, 107 Ind. 32—392.
 Ohio, etc., R. Co. v. Dickerson, 59 Ind. 317—382, 891, 892.
 Ohio, etc., R. Co. v. Dunbar, 20 Ill. 623—46, 515.
 Ohio, etc., R. Co. v. Emrich, 24 Ill. App. 245—239, 481.
 Ohio, etc., R. Co. v. Hamlin, 42 Ill. App. 441—513, 462.
 Ohio, etc., R. Co. v. Hatton, 60 Ind. 12—667, 741.
 Ohio, etc., R. Co. v. Hecht, 115 Ind. 443—483, 903.
 Ohio, etc., R. Co. v. McCarthy, 96 U. S. 258—471.
 Ohio, etc., R. Co. v. Muhling, 30 Ill. 9—552, 582, 731, 762.
 Ohio, etc., R. Co. v. Nickless, 71 Ind. 271—8, 553, 569, 753, 768.
 Ohio, etc., R. Co. v. Noe, 77 Ill. 513—428, 447.
 Ohio, etc., R. Co. v. People, 29 Ill. App. 561—690.
 Ohio, etc., R. Co. v. Schiebe, 44 Ill. 460—692, 816, 846, 852.
 Ohio, etc., R. Co. v. Selby, 47 Ind. 471—315, 569, 572, 753, 762.
 Ohio, etc., R. Co. v. Stransberry, 132 Ind. 532—545.
 Ohio, etc., R. Co. v. Stratton, 78 Ill. 88—848.
 Ohio, etc., R. Co. v. Tabor, 98 Ky. 503—337, 525.
 Ohio, etc., R. Co. v. Tyndall, 13 Ind. 366—586.
 Ohio, etc., R. Co. v. Voight, 122 Ind. 288—578, 779, 781.
 Ohio, etc., R. Co. v. Wood, 107 Ind. 32—393.
 Ohio, etc., R. Co. v. Yohe, 51 Ind. 181—229, 230.
 Ohio Valley R. Co. v. Lander, 20 Ky. L. Rep. 913—590.
 Ohio Valley R. Co. v. Watson, 93 Ky. 654—694, 803.
 Ohlinger v. Toledo Traction Co., 23 Ohio Cir. Ct. Rep. 65—895.
 Oil Creek, etc., R. Co. v. Clark, 72 Pa. St. 231—591, 955.
 O'Keefe v. Eighth Ave. R. Co., 33 App. Div. (N. Y.) 324—308.
 Olcott v. Fond du lac County, 16 Wall. (U. S.) 478—95, 267.

TABLE OF CASES.

(The references are to the pages.)

- Old Colony R. Co. v. Tripp, 147 Mass. 35
—614, 622, 711, 740.
Old Colony R. Co. v. Wilder, 137 Mass.
526—599.
Oldfield v. New York, etc., R. Co., 14 N.
Y. 310—799, 325.
Olds v. New York, etc., R. Co., 172 Mass.
73—695.
O'Leary v. Mankato, 21 Minn. 65—805.
Oliver v. Columbia, etc., R. Co., 61 S. C.
1—761, 895.
Oliver v. Louisville, etc., R. Co., 43 La.
Ann. 804—857.
Oliver v. New York, etc., R. Co., 1 Edm.
Sel. Cas. (N. Y.) 589—596, 652.
Olson v. Citizens Ry. Co., 152 Mo. 426—
699, 776.
Olson v. St. Paul, etc., R. Co., 45 Minn.
536—572, 680, 894.
Olwell v. Adams Express Co., 1 Cent. L.
J. 186—318.
Omaha, etc., R. Co. v. Chollette, 41 Neb.
578—810.
Omaha, etc., R. Co. v. Crow, 47 Neb. 84—
572, 573.
Omaha St. R. Co. v. Emminger, 57 Neb.
240—809.
Omaha St. R. Co. v. Martin, 48 Neb. 65—
799, 838.
O'Malley v. Great Northern R. Co., 36
Minn. 580—287, 354, 528.
O'Mara v. Hudson River R. Co., 38 N. Y.
445—822.
O'Mara v. St. Louis Transit Co., 102 Mo.
App. 202—547, 842.
Onderdonk v. New York, etc., R. Co., 74
Hun (N. Y.), 42—613, 670, 845.
One Hundred, etc., Tons of Coal, 4
Blatchf. (U. S.) 366—442, 443.
101 Live Stock Co. v. Kansas City, etc.,
R. Co., 100 Mo. App. 674—506, 526, 528, 536.
O'Neill v. Dry Dock, etc., R. Co., 129 N.
Y. 125—783.
O'Neill v. Great Western R. Co., 7 U. C.
C. P. 203—265.
O'Neill v. Lynn & B. R. Co., 29 N. E.
(Mass.) 630—737.
O'Neill v. New York Cent., etc., R. Co., 60
N. Y. 138—70, 132, 208, 259.
Ontario Bank v. New Jersey Steamboat
Co., 58 N. Y. 510—153.
Oppenheim v. Russell, 3 B. & P. 42—432,
441.
Oppenheimer v. Manhattan R. Co., 18 N.
Y. Supp. 411—638.
Oppenheimer v. United States Express Co.,
69 Ill. 62—33, 290, 291, 292, 341, 343, 347,
355, 754.
Opsahl v. Judd, 30 Minn. 129, 126—571, 831.
Orange County Bank v. Brown, 9 Wend.
(N. Y.) 85—33, 54, 341, 356, 358, 701, 704,
710, 712.
Orcutt v. Northern Pac. R. Co., 45 Minn.
368—573.
O'Regan v. Cunard Steamship Co., 160
Mass. 256—311, 758.
Oregon Short Line, etc., R. Co. v. Nor-
thern Pac. R. Co., 51 Fed. 465, 61 Fed.
160—96, 454, 924, 929, 930, 931.
Oregon Short Line, etc., R. Co. v. Ilwaco
R., etc., Co., 51 Fed. 611—502.
Ormond v. Hayes, 60 Tex. 180—556.
Ormsby v. Union Pac. R. Co., 4 Fed. 706—
242, 292, 340, 398, 523, 526.
Orndorff v. Adams Express Co., 3 Bush.
(Ky.) 194—293, 345, 359, 760.
O'Rorke v. Great Western R. Co., 23 U. C.
Q. B. 427—296, 306.
O'Rourke v. Chicago, etc., R. Co., 44
Iowa, 526—33, 382.
O'Rourke v. Citizens St. R. Co., 103 Tenn.
124—744.
Orr v. Chicago, etc., R. Co., 21 Mo. App.
333—491.
Ortt v. Minneapolis, etc., R. Co., 36 Minn.
396—316, 459, 475, 481.
Osborne v. Chicago, etc., R. Co., 48 Fed.
49—932.
Osborn v. Union Ferry Co., 53 Barb. (N.
Y.) 629—616.
Oscanyan v. Winchester Repeating Arms
Co., 103 U. S. 261—314.
Osgood v. Bauder, 75 Iowa, 550—310.
Osgood v. Carver, 43 Conn. 24—214.
Osgood v. Los Angeles Tract. Co., 137 Cal.
280—658.
Oskamp v. Gadsden, 35 Neb. 7—79.
Oskamp v. Southern Express Co. (Ohio),
55 N. E. 13—158.
Osterhoudt v. Southern Pac. Co., 47 App.
Div. (N. Y.) 146—333, 335.
Osteryoung v. St. Louis Transit Co., 108
Mo. App. 703—732.
Ostrander v. Brown, 15 Johns. (N. Y.) 39—
195, 197.
Oswego Bank v. Doyle, 91 N. Y. 22—179.
Otis Co. v. Missouri Pac. R. Co., 112 Mo.
622—132, 143, 309, 393.
Ouderkerk v. Central Nat. Bank, 119 N. Y.
263—12.
Ouimitt v. Henshaw, 35 Vt. 605—146, 265, 705,
724, 725, 726.
Outen v. North & S. St. R. Co., 94 Ga.
662—827.
Overby v. McGee, 15 Ark. 459—364.
Overland Mail, etc., Co. v. Carroll, 7
Colo. 43—760.
Oviatt v. Dakota Cent. R. Co., 43 Minn.
300—654.
Owen v. Louisville, etc., R. Co., 87 Ky.
626—334, 517.
Owen v. Macon, etc., R. Co., 119 Ga. 230—
622.
Owen v. Railway Co., 83 Mo. 464—429.
Owens v. Baltimore, etc., R. Co., 35 Fed.
715—882.
Owen v. Louisville, etc., R. Co., 87 Ky.
626—337, 501, 525, 537.
Owens v. Richmond, etc., R. Co., 88 N. C.
502—795.
Owens v. Wilmington & W. R. Co. (N.
C.), 35 S. E. 259—647.
Oxlade v. North Eastern R. Co., 15 C. B.
N. S. 680—92, 98, 99.
Oxley v. St. Louis, etc., R. Co., 65 Mo.
629—288, 338, 526, 538.
Oysterbank v. Gardner, 49 N. Y. Super.
Ct. 263—793.

P.

- Pacific Express Co. v. Black, 8 Tex. Civ.
App. 363—139.
Pacific Express Co. v. Critzer (Tex. Civ.
App.) 42 S. W. 1017—182.
Pacific Express Co. v. Darnell (Tex.), 33
Am. & Eng. R. Cas. 543—335, 422, 426.
Pacific Express Co. v. Foley, 46 Kan. 457
—344, 760.
Pacific Express Co. v. Hertzberg, 17 Tex.
Civ. App. 100—157.
Pacific Express Co. v. Redman (Tex. Civ.
App.), 60 S. W. 677—414.
Pacific Express Co. v. Seibert, 44 Fed. 318
—911.
Pacific Express Co. v. Shearer, 160 Ill. 255—
158, 180, 216.
Pacific Express Co. v. Wallace, 60 Ark.
100—201, 227, 340.

TABLE OF CASES.

xciii

(The references are to the pages.)

- Packard v. Getman, 6 Cow. (N. Y.) 757—132, 138, 141, 179, 211, 216.
 Packard v. Taylor, 35 Ark. 402—23, 458, 488, 489.
 Packet Co. v. Nagle, 97 Ky. 9—897.
 Paddock v. Atchison, etc., R. Co., 37 Fed. 841—60, 649.
 Paddock v. Missouri Pac. R. Co., 1 Mo. App. Rep. 87—302, 304, 500.
 Padley v. Catterlain, 64 Mo. App. 648—405.
 Paducah, etc., R. Co. v. Commonwealth, 80 Ky. 147—596.
 Paducah, etc., R. Co. v. Heehl, 12 Bush. (Ky.) 47—798.
 Paducah St. Ry. Co. v. Walsh, 22 Ky. L. Rep. 532—676.
 Paddock v. Missouri Pac. R. Co., 60 Mo. App. 328—408, 519.
 Paddock v. Toledo, etc., R. Co., 11 O. C. D. 789—147, 289.
 Padgett v. Moll, 159 Mo. 143—360.
 Paganini v. North Jersey St. Ry. Co. (N. J.), 57 Atl. 128—853.
 Page v. Chicago, etc., R. Co., 7 S. Dak. 297—474.
 Page v. Great Northern R. Co., 2 Ir. Rep. (C. L.) 288—125.
 Page v. London, etc., R. Co., 16 W. R. 566—370.
 Page v. Munro, 1 Holmes (U. S.) 232—126.
 Paige v. Hubbard, 1 Sprague (U. S.), 338—445.
 Paige v. Smith, 99 Mass. 395—41, 42.
 Palmer v. Atchison, etc., R. Co., 101 Cal. 187—94, 238, 251, 252, 309, 451.
 Palmer v. Charlotte, etc., R. Co., 3 S. C. 580—567, 897, 902.
 Palmer v. Chicago, etc., R. Co., 56 Conn. 137—186, 470, 488.
 Palmer v. Delaware, etc., Canal Co., 120 N. Y. 177, 170—542, 602, 605, 606, 607, 608, 613, 652.
 Palmer v. Grand Junction R. Co., 4 M. & W. 749—30, 88, 297.
 Palmer v. London, etc., R. Co., L. R. 1 C. P. 588, L. R. 6 C. P. 194—121.
 Palmer v. Pennsylvania Co., 111 N. Y. 488—595, 602, 613.
 Palmer v. Warren St. R. Co., 206 Pa. 574—775, 778, 819.
 Palmer v. Winona Ry. & Light Co., 80 N. W. 869—658.
 Palmer v. Winston-Salem Ry. & Elec. Co., 131 N. C. 250—634.
 Palmeri v. Manhattan R. Co., 133 N. Y. 261—543, 631, 632, 633, 636, 638.
 Palmeter v. Wagner, 11 Alb. L. J. 149—56.
 Parquin v. St. Louis & S. Ry. Co., 90 Mo. App. 118—854.
 Paradine v. Jane, Alleyn, 27—13.
 Paramore v. Western R. Co., 53 Ga. 833—454.
 Pardee v. Drew, 25 Wend. (N. Y.) 459—65, 66, 356, 705, 707.
 Pardonning v. South Wales R. Co., 1 H. & N. 392—325.
 Parill v. Cleveland, etc., R. Co., 23 Ind. App. 678—315.
 Parke v. Alta, etc., Tel. Co., 13 Cal. 422—76.
 Park v. O'Brien, 23 Conn. 339—795.
 Park v. Preston, 108 N. Y. 434—27, 142, 298, 307, 313, 378.
 Parker v. Atlantic, etc., R. Co., 133 N. C. 335—288, 304, 317.
 Parker v. Erie R. Co., 5 Hun (N. Y.), 57—630.
 Parker v. Flagg, 26 Me. 181—24, 66, 147.
 Parker v. Lombard, 100 Mass. 405—282.
 Parker v. Long Island R. Co., 13 Hun (N. Y.), 319—880, 895.
 Parker v. Metropolitan St. R. Co., 69 Mo. App. 64—656.
 Parker v. Milwaukee, etc., R. Co., 30 Wis. 683—265, 271.
 Parker v. North German Lloyd S. S. Co., 74 App. Div. (N. Y.) 16—716.
 Parker v. St. Louis Transit Co., 108 Mo. App. 465—853.
 Parker v. The Railway Co., 6 Exch. 702—127.
 Parker v. White, 27 New Burns. 442—687.
 Parker v. Winslow, 7 El. & Bl. 942—243.
 Parmelee v. Fischer, 22 Ill. 212—701, 705.
 Parmelee v. Lowitz, 74 Ill. 116—36, 54, 54, 360, 540.
 Parmelee v. McNulty, 19 Ill. 556—540.
 Parmelee v. Western Transp. Co., 26 Wis. 439—69, 478.
 Parmelee v. Wilks, 22 Barb. (N. Y.) 539—243.
 Parmenter v. American Box Machine Co., 162 N. Y. 648—216.
 Parsons v. Chicago, etc., R. Co., 63 Fed. 903, 167 U. S. 447—124, 919, 933.
 Parsons v. Hardy, 14 Wend. (N. Y.) 215—24, 48, 209, 222, 239, 250, 254.
 Parsons v. Monteath, 13 Barb. (N. Y.) 353—294, 319, 326, 763.
 Parsons v. New York Cent., etc., R. Co., 113 N. Y. 555—557, 631, 876.
 Partridge v. Woodland S. Co. (N. J.), 49 Atl. 726—642.
 Passmore v. Western Union Tel. Co., 78 Pa. St. 238—74.
 Passenger R. Co. v. Young, 21 Ohio St. 518—627, 633.
 Patchell v. Irish North Western R. Co., 6 Ir. R. C. L. 117—699.
 Pate v. Henry, 5 Stew. & P. (Ala.) 101—192.
 Patten v. Chicago, etc., R. Co., 5 Dak. 267—597, 803.
 Patten v. Magrath, Dudley L. (S. C.) 159—318, 755.
 Patton v. Southern R. Co., 82 Fed. 979—374.
 Patten v. Union Pac. R. Co., 29 Fed. 590—438, 470, 487, 495.
 Patterson v. Clyde, 67 Pa. St. 505, 506—393, 394, 395.
 Patterson v. Kansas City, etc., R. Co., 47 Mo. App. 570—56 Mo. App. 657—296, 367, 483.
 Patterson v. North Carolina R. Co., 64 N. C. 147—227.
 Patterson v. Omaha, etc., R. Co., 90 Iowa, 247—675.
 Patterson v. Wabash, etc., R. Co., 54 Mich. 91—801, 811.
 Paturzio v. Campagnie Francaise, 31 Fed. 611—378, 379.
 Paulitsch v. New York Cent., etc., R. Co., 102 N. Y. 280—678, 836.
 Paul v. Pennsylvania R. Co. (N. J. Sup.) 57 Atl. 139—288, 317, 505.
 Paulson v. Brooklyn City R. Co., 13 Misc. Rep. (N. Y.) 387—840.
 Pavitt v. Lehigh Valley R. Co., 153 Pa. St. 302—334, 335, 355, 376, 531.
 Payne v. Halstead, 44 Ill. App. 97—776.
 Payne v. Kansas, etc., R. Co., 46 Fed. 546—97, 453.
 Payne v. Spokane St. R. Co., 15 Wash. 522—656.
 Payne v. Terre Haute, etc., R. Co., 157 Ind. 616—766.
 Payne v. Troy, etc., R. Co., 9 Hun (N. Y.), 526—805.

TABLE OF CASES.

(The references are to the pages.)

- Paynter v. Brighton, etc., Tract. Co., 67 N. J. L. 619—771.
 Peabody v. Navigation Co. (Or.), 26 Pac. 1053—743.
 Peak's Admir. v. Louisville & M. R. Co., 23 Ky. L. Rep. 2157—850.
 Pearsall v. Western Union Tel. Co., 124 N. Y. 256—77, 298.
 Pearce v. Madison, etc., R. Co., 21 How. (U. S.) 441—492.
 Pearce v. Wabash R. Co., 89 Mo. App. 437—430.
 Pearce v. The Thomas Newton, 41 Fed. 106—236.
 Pearson v. Duane, 4 Wall. (U. S.) 605—23, 100, 554, 618, 624.
 Persons v. Tincker, 36 Me. 384—434.
 Pease v. Delaware, etc., R. Co., 101 N. Y. 367—700, 736.
 Peat v. Hartford St. Ry. Co., 72 Conn. 362—678.
 Peavey v. Georgia R., etc., Co., 81 Ga. 485—635, 647, 739.
 Peck v. New York Cent., etc., R. Co., 70 N. Y. 587—588, 631, 632, 637, 740, 895.
 Peck v. Neil, 3 McLean (U. S.), 22—615, 801, 802.
 Peck v. North Staffordshire R. Co., 10 H. L. Cas. 473—288, 293, 323.
 Peck v. St. Louis Transit Co., 178 Mo. 617—771, 852.
 Peck v. Weeks, 34 Conn. 145, 149—31, 292, 754.
 Peebles v. Boston, etc., R. Co., 112 Mass. 498—386.
 Peet v. Chicago, etc., R. Co., 20 Wis. 594, 19 Wis. 118—104, 107, 108, 247, 375, 412, 478, 479.
 Peeler v. Monmouthshire R. Co., 30 L. J. Exch. 249—38.
 Pegram v. Western Union Tel. Co., 97 N. C. 57—78.
 Feik v. Chicago, etc., R. Co., 94 U. S. 179—95, 266.
 Peizotti v. McLaughlin, 1 Strob. (S. C.) 468—55.
 Pellant v. Canadian Pac. R. Co., 7 Montreal Super. Ct. 131—712.
 Pelton v. Rensselaer, etc., R. Co., 54 N. Y. 214—268, 274.
 Pemberton Co. v. New York Cent. R. Co., 104 Mass. 144—481, 753.
 Pence v. Wabash R. Co., 116 Iowa, 279—817, 833.
 Pendall v. Rench, 4 McLean (U. S.), 259—23.
 Pender v. Robbins, 6 Jones L. (N. C.) 207—4, 12.
 Pendergast v. Adams Express Co., 101 Mass. 420—459, 451.
 Pendergast v. New York Cent., etc., R. Co., 58 N. Y. 652—822.
 Pendergast v. Union Ry. Co., 10 App. Div. (N. Y.) 207—758.
 Pendleton St. R. Co. v. Stallman, 22 Ohio St. 1—596.
 Pendleton v. Kingsley, 3 Cliff. (U. S.) 416, 420—626, 629, 652.
 Pendleton St. R. Co. v. Shires, 18 Ohio St. 255—596.
 Penfield v. Cleveland, etc., R. Co., 25 App. Div. (N. Y.) 413—592.
 Peniston v. Chicago, etc., R. Co., 34 La. Ann. 777—679.
 Penn v. Buffalo, etc., R. Co., 49 N. Y. 204—497, 511, 533.
 Pennnewill v. Cullen, 5 Harr. (Del.) 233—10.
 Fennifeather v. Baltimore Steam Packet Co., 58 Fed. 481—373.
 Pennington v. Philadelphia, etc., R. Co., 62 Md. 95—564, 757.
 Penny v. Atlantic Coast Line R. Co., 123 N. C. 221—645.
 Penny v. Rochester R. Co., 7 App. Div. (N. Y.) 595—604.
 Pennsylvania Canal Co. v. Bently, 66 Pa. St. 30—794.
 Pennsylvania Canal Co. v. Burd, 90 Pa. St. 281—68.
 Pennsylvania Nav. Co. v. Daudridge, 8 Gill & J. (Md.) 248—51.
 Pennsylvania Steel Co. v. Georgia R., etc., Co., 94 Ga. 636—440.
 Pennsylvania Cent. R. Co. v. Schwarzenberger, 45 Pa. St. 208—293, 460, 482.
 Pennsylvania R. Co. v. Allen, 53 Pa. St. 276—892, 902.
 Pennsylvania R. Co. v. American Oil Works, 126 Pa. St. 485—349, 431, 441.
 Pennsylvania R. Co. v. Anoka Nat. Bank, 108 Fed. 482—391.
 Pennsylvania R. Co. v. Aspell, 23 Pa. St. 147—673, 686, 688, 816, 820, 848, 852, 881, 886.
 Pennsylvania R. Co. v. Baldauf, 16 Pa. 67—727.
 Pennsylvania R. Co. v. Baltimore, etc., R. Co., 60 Md. 263—449, 935.
 Pennsylvania R. Co. v. Berry, 68 Pa. St. 272—236, 473.
 Pennsylvania R. Co. v. Books, 57 Pa. St. 339—517, 545, 582, 802, 880, 891, 903.
 Pennsylvania Co. v. Bray, 125 Ind. 229—745, 888.
 Pennsylvania R. Co. v. Butler, 57 Pa. St. 335—569.
 Pennsylvania R. Co. v. Clark, 2 Ind. App. 146—94, 240, 245, 515.
 Pennsylvania R. Co. v. Connell, 127 Ill. 419, 112 Ill. 295—727, 883, 888, 889.
 Pennsylvania Co. v. Dean, 92 Ind. 459—692.
 Pennsylvania Co. v. Dickson (Ind. App.), 67 N. E. 538—451.
 Pennsylvania R. Co. v. Fries, 87 Pa. St. 234—761.
 Pennsylvania R. Co. v. Greso, 102 Ill. App. 252—572.
 Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315—8, 553, 572, 753, 768, 805.
 Pennsylvania R. Co. v. Hensil, 70 Ind. 569—736.
 Pennsylvania Co. v. Hine, 41 Ohio St. 276—565, 746.
 Pennsylvania Co. v. Hoagland, 78 Ind. 203—680, 847.
 Pennsylvania R. Co. v. Hughes, 191 U. S. 477—931, 937.
 Pennsylvania Co. v. Kean, 41 Ill. App. 317—875.
 Pennsylvania Co. v. Kennard Glass & Paint Co. (Neb.), 81 S. W. 372—317.
 Pennsylvania Co. v. Kenwood Bridge Co., 170 Ill. 645—144.
 Pennsylvania R. Co. v. Kilgore, 32 Pa. St. 294, 292—675, 683, 688, 849, 852.
 Pennsylvania R. Co. v. Knight, 58 N. J. L. 287—719.
 Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21—816, 855.
 Pennsylvania Co. v. Lenhart, 120 Fed. 61—732.
 Pennsylvania Co. v. Liveright, 14 Ind. App. 518—388, 724.
 Pennsylvania R. Co. v. Lyons, 129 Pa. St. 113—683, 771, 808, 848.
 Pennsylvania Co. v. Marion, 104 Ind. 239, 123 Ind. 415—613, 772, 782, 803, 849, 891.
 Pennsylvania Co. v. McCaffrey, 173 Ill. 169—875.
 Pennsylvania R. Co. v. McCloskey, 23 Pa. St. 532—680, 753, 762

TABLE OF CASES.

XCV

(The references are to the pages.)

- Pennsylvania R. Co. v. McKinney, 124 Pa. St. 462—772.
 Pennsylvania R. Co. v. Miller, 35 Ohio St. 541—706, 727.
 Pennsylvania R. Co. v. Miller, 87 Pa. St. 395—388.
 Pennsylvania R. Co. v. Moody, 126 Pa. St. 244—793.
 Pennsylvania R. Co. v. Naive (Tenn.), 79 S. W. 124—150, 389.
 Pennsylvania R. Co. v. Pennock, 51 Pa. St. 244—231, 233.
 Pennsylvania R. Co. v. Peters, 116 Pa. St. 208—654, 820, 849.
 Pennsylvania R. Co. v. Price, 96 Pa. St. 267—541, 543, 563.
 Pennsylvania R. Co. v. Raiordon, 119 Pa. St. 577—317, 389, 393, 395, 534, 761.
 Pennsylvania R. Co. v. Reed, 60 Fed. 694—815.
 Pennsylvania R. Co. v. Righter, 42 N. J. L. 180—793.
 Pennsylvania Co. v. Roy, 102 U. S. 451—60, 504, 541, 601, 607, 610, 652.
 Pennsylvania Co. v. Scofield, 121 Fed. 814—888.
 Pennsylvania, etc., R. Co. v. Spearen, 47 Pa. St. 300—793.
 Pennsylvania R. Co. v. Spicker, 105 Pa. St. 142—564.
 Pennsylvania R. Co. v. Stageneier, 118 Ind. 305—819.
 Pennsylvania R. Co. v. Stern, 119 Pa. St. 24—162, 167, 178.
 Pennsylvania v. The Wheeling Bridge Co., 18 How. (U. S.) 421—944.
 Pennsylvania R. Co. v. Titusville, etc., Plank Road Co., 71 Pa. St. 350—425.
 Pennsylvania R. Co. v. Vandiver, 42 Pa. St. 365—617, 628, 637, 749.
 Pennsylvania R. Co. v. Weber, 76 Pa. St. 157—799.
 Pennsylvania R. Co. v. White, 88 Pa. St. 327—665, 668, 875.
 Pennsylvania Co. v. Woodworth, 26 Ohio St. 585—580.
 Pennsylvania Co. v. Yoder, 25 Ohio C. C. R. 32—288, 317, 338, 394.
 Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318—843.
 People v. Cary, 3 Park Crim. Rep. (N. Y.) 326—739.
 People v. Chicago, etc., R. Co., 55 Ill. 95, 67 Ill. 188—281, 596.
 People v. Colorado Cent. R. Co., 42 Fed. 638—97.
 People v. Douglass, 87 Cal. 281—545, 563, 788.
 Peoples Pass. R. Co. v. Green, 65 Md. 84—588, 862.
 People v. Hudson River Tel. Co., 10 St. Rep. (N. Y.) 284—622, 740.
 People v. Illinois, etc., R. Co., 122 Ill. 506—112.
 People v. Jillison, 3 Park Cr. Rep. (N. Y.) 234—553, 557.
 People v. Louisville, etc., R. Co., 120 Ill. 48—668.
 People v. Manhattan Gas Light Co., 45 Barb. (N. Y.) 136—79.
 People v. New York Cent., etc., R. Co., 28 Hun (N. Y.) 543—95, 97, 255, 619.
 People v. New York, etc., R. Co., 22 Hun (N. Y.) 533—98, 417.
 People v. New York, etc., R. Co., 55 Hun (N. Y.) 409—602.
 People v. New York, etc., R. Co., 89 N. Y. 266—596.
 People v. Raymond, 34 Cal. 492—906.
 Peoria Bank v. Northern R. Co., 58 N. H. 203—187.
 Peoria, etc., R. Co. v. Chicago, etc., R. Co., 109 Ill. 135—46, 86, 92, 95.
 Peoria, etc., R. Co. v. Lane, 83 Ill. 448—597, 855.
 Peoria, etc., R. Co. v. Reynolds, 88 Ill. 418—596, 597, 606, 779.
 Peoria, etc., R. Co. v. U. S. Rolling Stock Co., 136 Ill. 643—27, 37, 45, 86, 95, 278, 468.
 Pepper v. Western Union Tel. Co., 87 Tenn. 554—77.
 Percy v. Railroad Co., 58 Mo. App. 75—743.
 Pereira v. Central Pac. R. Co., 66 Cal. 92—454, 472, 473, 474, 478.
 Perishable Freight Transp. Co. v. O'Neill, 41 Ill. App. 423—376.
 Perrine v. North Jersey St. Ry. Co. (N. J.), 55 Atl. 799—733.
 Perkins v. Chicago, etc., R. Co., 60 Miss. 726—582, 583.
 Perkins v. Missouri, etc., R. Co., 55 Mo. 201—627, 637, 749.
 Perkins v. New York Cent. R. Co., 24 N. Y. 186—5, 320, 327, 375, 547, 598, 608, 616, 719, 752, 754, 762, 763, 765, 766.
 Perkins v. Portland, etc., R. Co., 47 Me 573—399, 459, 472, 728, 729.
 Perley v. New York Cent. R. Co., 65 N. Y. 375—707, 708.
 Perlmutter v. Highland St. Ry Co., 121 Mass. 497—507.
 Perry v. Central R. Co., 66 Ga. 746—878.
 Perry v. Chicago, etc., R. Co., 89 Mo. App. 49—520.
 Perry v. Florida Cent., etc., R. Co., 3 Int. Com. Rep. 740—812, 925.
 Perry v. Malarin, 107 Cal. 363—612.
 Perry v. Thompson, 98 Mass. 249—308, 755, 758.
 Pershing v. Chicago, etc., R. Co., 71 Iowa, 561—596, 597, 605, 779.
 Peters v. Elliott, 78 Ill. 321—172.
 Peters v. N. Y. Cent. R. Co., 34 Barb. (N. Y.) 353—748.
 Peters v. New Orleans, etc., R. Co., 16 La. Ann. 222—503, 510.
 Peters v. Rylands, 20 Pa. St. 497—65.
 Peterson v. Case, 21 Fed. 885—487, 489, 490.
 Peterson v. Chicago, etc., R. Co., 80 Iowa. 92—127.
 Peterson v. Chicago, etc., R. Co., 119 Wis. 197—266.
 Peterson v. Delaware, etc., R. Co., 9 Kulp. (Pa.) 552—833, 840.
 Pettigrew v. Barnum, 11 Md. 449—705.
 Petrie v. Pennsylvania R. Co., 42 N. J. L. 449—559, 732.
 Petty v. Great Western R. Co., L. R. 5 C. P. 461—665.
 Pfaelzer v. Palace Car Co., 4 W. N. C. (Pa.) 240—58.
 Pfeifer v. Buffalo Ry. Co., 4 Misc. Rep. (N. Y.) 465—678, 839.
 Pfaster v. Central Pac. R. Co., 70 Cal. 169—92, 98, 580, 701, 704.
 Pharr v. Collins, 35 La. Ann. 939—431.
 Phelps v. Bank, 2 McGloin (La.), 19—178.
 Phelps v. Illinois Cent. R. Co., 94 Ill. 548—100.
 Phelps v. London, etc., R. Co., 19 C. B. (N. S.) 321—701, 702, 704.
 Phelps v. Mankato, 23 Minn. 276—805.
 Phettiplace v. Northern Pac. R. Co., 34 Wis. 412—751.
 Phifer v. Carolina Cent. R. Co., 89 N. C. 311—459, 481, 483, 493.
 Philleo v. Sanford, 17 Tex. 231—25.
 Philadelphia City Pass. Ry. Co. v. Henrice, 92 Pa. St. 481—783.

TABLE OF CASES.

(The references are to the pages.)

- Philadelphia Tract. Co. v. Orbann, 119 Pa. St. 37-562.
 Philadelphia, etc., R. Co. v. Anderson, 94 Pa. St. 351-222, 597, 609, 654, 780.
 Philadelphia, etc., R. Co. v. Anderson, 72 Md. 519-653, 770, 875.
 Philadelphia, etc., R. Co. v. Anthony, 43 Ind. 183-337.
 Philadelphia, etc., R. Co. v. Barnard, 3 Ben. (U. S.) 39-358.
 Philadelphia, etc., R. Co. v. Derby, 14 How. (U. S.) 468-542, 544, 554, 569, 571, 627, 652, 694, 762, 862.
 Philadelphia, etc., R. Co. v. Dows, 15 Phila. (Pa.) 101-442.
 Philadelphia, etc., R. Co. v. Edelstein, 23 W. N. C. (Pa.) 342-465.
 Philadelphia, etc., R. Co. v. Harper, 29 Md. 330-226, 730.
 Philadelphia, etc., R. Co. v. Hassard, 75 Pa. St. 367-822, 824, 862.
 Philadelphia, etc., R. Co. v. Hoeflich, 62 Md. 300-732, 880, 888, 896.
 Philadelphia, etc., R. Co. v. Kerr, 25 Md. 521-786.
 Philadelphia, etc., R. Co. v. Larkin, 47 Md. 155-389, 390, 397.
 Philadelphia, etc., R. Co. v. Lehman, 56 Md. 209-191, 424, 498, 515, 831.
 Philadelphia, etc., R. Co. v. McCormick, 124 Pa. St. 427-665.
 Philadelphia, etc., R. Co. v. Ramsey, 89 Pa. St. 474-474.
 Philadelphia, etc., R. Co. v. Rice, 64 Md. 63-74, 745.
 Philadelphia, etc., R. Co. v. State, 58 Md. 372-492.
 Philadelphia, etc., Steamship Co. v. Pennsylvania, 122 U. S. 326-906.
 Philadelphia, etc., R. Co. v. Stebbing, 62 Md. 504-771, 786, 794.
 Philadelphia, etc., R. Co. v. Wireman, 88 Pa. St. 264-159, 160.
 Phillips v. De Wade (Ga.), 7 S. E. 151-697.
 Phillips v. Duquesne Tract. Co., 8 Pa. Super. Ct. 42 W. N. C. 528-823.
 Phillips v. Earle, 8 Pick. (Mass.) 182-139, 356, 359, 360.
 Phillips v. Georgia R., etc., R. Co., 93 Ga. 366, 356-754, 757, 760.
 Phillips v. London, etc., R. Co., 5 Q. B. Div. 78-891, 893, 902, 903.
 Phillips v. Louisville & N. R. Co., 8 Int. Com. Rep. 93-915.
 Phillips v. Northern R. Co., 62 Hun (N. Y.), 233-843.
 Phillips v. North Carolina R. Co., 78 N. C. 294-459, 472, 478, 492.
 Phillips v. Railroad Co., 93 Ga. 356-219.
 Phillips v. Rensselaer, etc., R. Co., 49 N. Y. 177-806, 830, 836, 837.
 Phillips v. Rodie, 15 East. 547-431.
 Phoenix Clay Pot Works v. Pittsburgh, etc., R. Co., 139 Pa. St. 284-377, 338, 390, 394.
 Phoenix Ins. Co. v. Erie, etc., Transp. Co., 117 U. S. 312-314, 350, 373, 752.
 Phoenix Powder Mfg. Co. v. Wabash R. Co. (Mo. App.), 74 S. W. 492-303.
 Picard v. Ridge Ave. Pass. R. Co., 147 Pa. St. 195-338.
 Pickens v. Richmond, etc., R. Co., 104 N. C. 312-735, 736.
 Pickering v. Weld, 159 Mass. 522-195.
 Pickering v. Barkley, Style, 132-226.
 Pickford v. Grand Junction R. Co., 12 M. & W. 766, 8 M. & W. 372-99, 101, 102, 127, 139, 244.
 Picquet v. McKay, 2 Blackf. (Ind.) 465-14.
 Pier v. Finch, 24 Barb. (N. Y.) 514-564.
 Piedmont Mtg. Co. v. Columbia, etc., R. Co., 19 S. C. 353-20, 23, 37, 38, 80, 318, 460, 475, 476, 755, 757, 761.
 Pierce v. Milwaukee, etc., R. Co., 22 Wis. 337-8.
 Pierce v. Randolph, 12 Tex. 290-589.
 Pierce v. Southern Pac. R. Co., 120 Cal. 156-224.
 Pierce v. Van Dusen, 78 Fed. 706-810.
 Pierce v. Winsor, 2 Cliff. (U. S.) 18-378.
 Piggott v. Eastern, etc., R. Co., 3 C. B. 229-772.
 Pike v. Nash, 3 Abb. App. Dec. (N. Y.) 610-11, 12, 72.
 Pim v. St. Louis Transit Co., 108 Mo. App. 713-853.
 Pindell v. St. Louis, etc., R. Co., 34 Mo. App. 675, 41 Mo. App. 84-150, 262, 270, 274.
 Pinder v. Brooklyn Heights R. Co., 65 App. Div. (N. Y.) 521-632.
 Pingree v. Detroit, etc., R. Co., 66 Mich. 143-33, 229, 434.
 Pinney v. First Div. St. Paul, etc., R. Co., 19 Minn. 251-264, 274.
 Pinney v. Wells, 10 Conn. 104-428, 445.
 Piper v. New York Cent., etc., R. Co., 156 N. Y. 224-60, 655.
 Pitcher v. Lake Shore, etc., R. Co., 61 Hun (N. Y.), 623-572, 833.
 Pitcher v. Peoples St. R. Co., 154 Pa. St. 560-840.
 Pitkin v. New York Cent., etc., R. Co., 94 App. Div. (N. Y.) 31-672.
 Pitlock v. Wells Fargo & Co., 109 Mass. 452-99.
 Pittman v. Pacific Express Co., (Tex. Civ. App.), 59 S. W. 949-309.
 Pittsburgh, etc., R. Co. v. Andrews, 39 Md. 329-782, 860, 870, 893.
 Pittsburgh, etc., R. Co. v. Baltimore, etc., R. Co., 2 Int. Com. Rep. 729-921, 938.
 Pittsburgh, etc., R. Co. v. Barrett, 36 Ohio St. 448-27, 70, 138, 259, 297, 298.
 Pittsburgh, etc., R. Co. v. Bennett (Ind. App.), 35 N. E. 1033-797.
 Pittsburgh, etc., R. Co. v. Bingham, 29 Ohio St. 364-562, 613.
 Pittsburgh, etc., R. Co. v. Caldwell, 74 Pa. St. 421-569, 582, 823, 828, 862.
 Pittsburgh, etc., R. Co. v. Dunn, 56 Pa. St. 280-596.
 Pittsburgh, etc., R. Co. v. Gray, 28 Ind. App. 588, 59 N. E. 1000-554, 556, 794, 818, 849.
 Pittsburgh, etc., R. Co. v. Hazen, 84 Ill. 36-192, 228, 255, 389.
 Pittsburgh, etc., R. Co. v. Hennigh, 39 Ind. 509-744.
 Pittsburgh, etc., R. Co. v. Hinds, 53 Pa. St. 512-22, 542, 619, 621, 641, 648.
 Pittsburgh, etc., R. Co. v. Hollowell, 65 Ind. 188-33, 110, 192, 227, 389.
 Pittsburgh, etc., R. Co. v. Krouse, 30 Ohio St. 222-549, 554, 557, 817, 852.
 Pittsburgh, etc., R. Co. v. Lightcap, 7 Ind. App. 249-636.
 Pittsburgh, etc., R. Co. v. Lyon, 123 Pa. St. 140-590, 711, 880, 896, 899.
 Pittsburgh, etc., R. Co. v. Martin, 3 Ohio Dec. 23-554, 556.
 Pittsburgh, etc., R. Co. v. McClurg, 56 Pa. St. 294-601, 782, 860, 870.
 Pittsburgh, etc., R. Co. v. Morton, 61 Ind. 539-94, 95, 458.
 Pittsburgh, etc., R. Co. v. Nash, 43 Ind. 423-262, 270.
 Pittsburgh, etc., R. Co. v. Nuzum, 50 Ind. 141-663, 667, 686, 741.

TABLE OF CASES.

xcvii

(The references are to the pages.)

- Pittsburgh, etc., R. Co. v. Pillow, 76 Pa. St. 510—589, 621, 642, 737, 739, 775, 788.
 Pittsburgh, etc., R. Co. v. Racer, 5 Ind. App. 209—108, 108, 117, 243.
 Pittsburgh, etc., R. Co. v. Redding, 140 Ind. 101—174.
 Pittsburgh, etc., R. Co. v. Russ, 57 Fed. 822—900.
 Pittsburgh, etc., R. Co. v. Sheppard, 55 Ohio St. 68—403.
 Pittsburgh, etc., R. Co. v. Slusser, 19 Ohio St. 157—627, 633.
 Pittsburgh, etc., R. Co. v. Spencer, 98 Ind. 186—698.
 Pittsburgh, etc., R. Co. v. Street (Ind. App.), 59 N. E. 404—744.
 Pittsburgh, etc., R. Co. v. Theobald, 51 Ind. 247—627.
 Pittsburgh, etc., R. Co. v. Thompson, 56 Ill. 138—507, 596, 597, 605, 779, 787, 903.
 Pittsburgh, etc., R. Co. v. Vandyne, 57 Ind. 576—621, 739.
 Pittsburgh, etc., R. Co. v. Van Houston, 48 Ind. 90—695, 739.
 Pittsburgh, etc., R. Co. v. Williams, 74 Ind. 462—596, 780.
 Pittsburgh, etc., R. Co. v. Wright, 80 Ind. 182—799.
 Place v. Union Express Co., 2 Hilt. (N. Y.) 19—35, 36, 243, 250, 387.
 Plant Investment Co. v. Cook, 85 Fed. 611—833.
 Plantation No. 4 v. Hall, 61 Me. 517—69, 459.
 Planz v. Boston, etc., R. Co., 157 Mass. 577—583.
 Platz v. City of Cohoes, 89 N. Y. 219—831.
 Platt v. Hibbard, 7 Cow. (N. Y.) 497—68, 69, 70, 250.
 Platt v. Richmond, etc., R. Co., 108 N. Y. 358—395.
 Platt v. Forty-Second St., etc., R. Co., 2 Hun (N. Y.), 124—557.
 Platt v. Wells, 26 How. Pr. (N. Y.) 442—153, 159, 209.
 Pledger v. Chicago, etc., R. Co. (Neb.), 95 N. W. 1057—748.
 Popper v. New York Cent. R. Co., 13 Hun (N. Y.), 625—845.
 Ploett v. Chicago, etc., R. Co., 63 Wis. 511—589, 666, 667, 686.
 Plum v. Metropolitan St. Ry Co., 91 App. Div. (N. Y.) 420—843.
 Plummer v. Ossipee, 59 N. H. 55—801.
 Pollock v. Brooklyn, etc., R. Co., 15 N. Y. Supp. 189—779.
 Pollard v. New York, etc., R. Co., 7 Bosw. (N. Y.) 437—868.
 Pollard v. Vinton, 105 U. S. 7—165, 174.
 Pomaski v. Grant, 119 Mich. 657—865.
 Pomeroy v. Ainsworth, 22 Barb. (N. Y.) 118—312.
 Pomeroy v. Donaldson, 5 Mo. 36—52.
 Pompilj v. Manhattan Delivery Co., 84 N. Y. Supp. 210—307.
 Pontifex v. Hartley, 62 L. J. Q. B. 196—476.
 Pool v. Chicago, etc., R. Co., 53 Wis. 657—56 Wis. 227—553, 577, 587.
 Poole v. Northern Pac. R. Co., 16 Or. 261—553.
 Poole v. Georgia R. etc., Co., 89 Ga. 320—666.
 Pope v. Nickerson, 3 Story (U. S.), 485—312.
 Popham v. Barnard, 77 Mo. App. 619—332.
 Porcher v. Northeastern R. Co., 14 Rich. L. (S. C.) 181—24, 101, 226.
 Port Blakely Mill Co. v. Sharkey, 102 Fed. 259—415.
 Porter v. Steamboat New England, 17 Mo. 290—686.
 Porter v. Southern Express Co., 4 S. C. 135—318, 337.
 Porter v. Chicago, etc., R. Co., 20 Ill. 407—151, 262, 463.
 Porter v. Chicago, etc., R. Co., 80 Mich. 156—671, 688.
 Porter v. Chicago, etc., R. Co., 20 Iowa, 73, 41 Iowa, 358—139, 210.
 Porter v. Chicago, etc., R. Co., 41 Iowa, 358—139.
 Porter v. Erie R. Co., 32 N. J. L. 261—899, 900.
 Porter v. Hildebrand, 14 Pa. St. 129—706.
 Porter v. New York, etc., R. Co., 59 Hun (N. Y.), 177—573.
 Porter v. New York Cent. R. Co., 34 Barb. (N. Y.) 353—734.
 Porter v. Raleigh, etc., R. Co. (N. C.), 43 S. E. 547—92.
 Porterfield v. Humphreys, 8 Humph. (Tenn.) 497—66, 537.
 Portuchek v. Wabash R. Co. (Mo. App.), 74 S. W. 368—660.
 Posch v. Southern El. R. Co., 76 Mo. App. 601—656.
 Post v. Chicago, etc., R. Co., 14 Neb. 110—568.
 Post v. Koch, 30 Fed. 208—229.
 Post v. West Shore Co., 123 N. Y. 580—596.
 Posten v. Denver Consol. Tramway Co. (Colo. App.), 78 Pac. 1067—849, 853.
 Potter v. Bunnell, 20 Ohio St. 150—46.
 Potter v. Faulkner, 1 B. & S. 800—588.
 Potter Mfg. Co. v. Chicago, etc., R. Co., 4 Int. Com. Rep. 223, 5 Int. Com. Rep. 514—912, 923.
 Potts v. Chicago City R. Co., 33 Fed. 610—596, 778, 783.
 Potts v. New York, etc., R. Co., 131 Mass. 455—437, 440, 442.
 Potts v. Wabash, etc., R. Co., 17 Mo. App. 394—294, 316, 525, 535.
 Poucher v. New York Cent. R. Co., 49 N. Y. 263—320, 548, 572, 752, 763, 768.
 Poughkeepsie Iron Co. v. New York Cent., etc., R. Co., 3 Int. Com. Rep. 248—908, 919.
 Poulin v. Broadway, etc., R. Co., 61 N. Y. 621—676, 681, 863.
 Poulin v. Canadian Pac. R. Co., 52 Fed. 197—742.
 Poulton v. London & S. W. R. Co., L. R. 2 Q. B. 534—640.
 Poulsom v. Nassau Elec. R. Co., 18 App. Div. (N. Y.) 221—605, 607, 821.
 Pounder v. North Eastern R. Co., 1 Q. B. 335—645.
 Powelson v. Union Tract. Co., 204 Pa. St. 474—839.
 Powell v. East Tennessee, etc., R. Co. (Miss.), 8 So. 738—584.
 Powell v. Hudson Valley R. Co., 88 App. Div. (N. Y.) 133—602, 775.
 Powell v. Mills, 30 Miss. 231, 37 Miss. 691—24, 53, 55, 71.
 Powell v. Myers, 26 Wend. (N. Y.) 591—39, 54, 55, 65, 148, 179, 542, 710, 724, 726.
 Powell v. Pennsylvania, etc., R. Co., 32 Pa. St. 414—317, 500, 510, 519, 530.
 Powell v. Pittsburgh, etc., R. Co., 25 Ohio St. 70—565.
 Powers v. Boston & M. R. Co., 153 Mass. 183—533.
 Powers v. Davenport, 7 Blackf. (Ind.) 497 62, 63, 104.
 Powers Mercantile Co. v. Wells, Farg, & Co. (Minn.), 100 N. W. 735—331, 394.

TABLE OF CASES.

(The references are to the pages.)

- Powers v. Sixty Tons of Marble, 21 La. Ann. 402—440.
 Praeger v. Bristol, etc., R. Co., 24 L. T. N. S. 105—671, 679.
 Frather v. Richmond & D. R. Co., 80 Ga. 427—796.
 Pratt v. Bryant, 20 Vt. 333—204.
 Pratt v. Chicago, etc., R. Co., 38 Minn. 455—698.
 Pratt v. Grand Trunk R. Co., 95 U. S. 43—133, 186, 487.
 Pratt v. Ogdenburg, etc., R. Co., 102 Mass. 557—115, 459, 499, 518.
 Pray v. Omaha St. Ry. Co., 5 Am. Electl. Cas. 407—656, 857.
 Prentice v. Decker, 49 Barb. (N. Y.) 21—320, 756.
 Prescott, etc., R. Co. v. Atchison, etc., R. Co., 73 Fed. 438—931.
 Pressley v. Mobile, etc., R. Co., 15 Fed. 199—640.
 Prettyman v. Oregon R., etc., Co., 13 Or. 341—399.
 Price v. Denver, etc., R. Co., 12 Colo. 402—438, 495.
 Price v. Hartshorn, 44 N. Y. 94—21, 126.
 Price v. Oswego, etc., R. Co., 50 N. Y. 213—157, 180.
 Price v. Powell, 3 N. Y. 322—188, 264.
 Price v. St. Louis, etc., R. Co., 72 Mo. 414—815, 850.
 Price v. The Uriel, 10 La. Ann. 413—393, 398.
 Prickett v. New Orleans Anchor Line, 13 Mo. App. 436—554.
 Pridereaux v. Mineral Point, 43 Wis. 513—699, 799.
 Priest v. Hudson River R. Co., 40 How. Pr. (N. Y.) 456—632.
 Priestly v. Northern Indiana R. Co., 26 Ill. 205—425.
 Prince v. Denver, etc., R. Co., 12 Colo. 402—437.
 Prince v. International, etc., R. Co., 64 Tex. 144—544, 548, 550, 552, 561, 583.
 Prince v. Pennsylvania R. Co., 113 U. S. 219—578.
 Prior v. Wilson, 8 W. R. 260—422.
 Pritchard v. Norton, 106 U. S. 124—310.
 Proctor v. Cincinnati, etc., R. Co., 3 Int. Com. Rep. 131—911.
 Propeller Niagara v. Cordes, 21 How. (U. S.) 26—754.
 Prothero v. Citizens St. R. Co., 134 Ind. 431—680.
 Proud v. Philadelphia, etc., R. Co. (N. J.), 46 Atl. 710—606.
 Providence Coal Co. v. Providence, etc., R. Co., 1 Int. Com. Rep. 363—919.
 Pruitt v. Hannibal, etc., R. Co., 62 Mo. 527—257, 369, 371, 515, 516.
 Purcell v. Richmond, etc., R. Co., 108 N. C. 414—94, 238, 623.
 Purcell v. Southern Express Co., 34 Ga. 315—287, 298, 380, 381, 388.
 Purcell v. St. Paul City R. Co., 48 Minn. 134—654.
 Purdy v. New York, etc., R. Co., 61 N. Y. 353—600.
 Purington-Kimball Brick Co. v. Eckman, 102—Ill. App. 183—859.
 Pullman Palace Car Co. v. Adams, 120 Ala. 581—56, 57.
 Pullman Palace Car Co. v. Arents (Tex. Civ. App.), 66 S. W. 329—57.
 Pullman Palace Car Co. v. Balles, 80 Tex. 211—59.
 Pullman's Palace Car Co. v. Barker, 4 Colo. 344—540, 622, 881, 884.
 Pullman Palace Car Co. v. Blum, 109 Ill. 20—882, 883.
 Pullman Palace Car Co. v. Cain, 15 Tex. Civ. App. 503—59.
 Pullman Palace Car Co. v. Fielding, 62 Ill. App. 577—540.
 Pullman Palace Car Co. v. Gardner, 3 Penny (Pa.), 78—56.
 Pullman Palace Car Co. v. Gavin (Tenn.), 20 S. W. 70—56.
 Pullman Palace Car Co. v. Gaylord, 6 Ky. L. Rep. 279—56, 713.
 Pullman Palace Car Co. v. Hatch (Tex. Civ. App.), 70 S. W. 771—57.
 Pullman Palace Car Co. v. Hall, 106 Ga. 765—59.
 Pullman Palace Car Co. v. Hunter (Ky.), 54 S. W. 845—57.
 Pullman Palace Car Co. v. Lawrence, 74 Miss. 784—56.
 Pullman Palace Car Co. v. Lowe, 28 Neb. 239—57, 58.
 Pullman Palace Car Co. v. Marsh (Ind.), 53 N. E. 782—59.
 Pullman Palace Car Co. v. Matthews, 74 Tenn. 654—56, 58.
 Pullman's Palace Car Co. v. Missouri Pac. R. Co., 115 U. S. 587—450.
 Pullman Palace Car Co. v. Nelson, 22 Tex. Civ. App. 223—59.
 Pullman Palace Car Co. v. Pollock, 69 Tex. 120—56, 58, 713.
 Pullman's Palace Car Co. v. Reed, 75 Ill. 125—896.
 Pullman Palace Car Co. v. Smith, 73 Ill. 360—56.
 Pullman Palace Car Co. v. Taylor, 65 Ind. 153—59.
 Purple v. Union Pac. R. Co., 114 Fed. 123—6, 375, 560, 562, 581, 762.
 Putman v. Broadway, etc., R. Co., 55 N. Y. 108—588, 620, 621, 622, 641, 648, 737, 739.
 Fyne v. East Tennessee, etc., R. Co., 1 Int. Com. Rep. 767—916.
 Fym v. Great Northern R. Co., 2 F. & F. 619—597, 609, 780.
 Fyne v. Broadway, etc., R. Co., 19 N. Y. Supp. 217—802.

Q.

- Quackenbush v. Chicago, etc., R. Co., 72 Iowa, 458—692, 854.
 Quaife v. Chicago, etc., R. Co., 48 Wis. 513—893.
 Quarrier v. Baltimore, etc., R. Co., 20 W. Va. 424—139, 400.
 Quigley v. Central Pac. R. Co., 11 Nev. 350—627, 880, 882, 896, 901.
 Quimby v. Boston, etc., R. Co., 150 Mass. 365—296, 719, 721, 753, 757, 762, 764, 766.
 Quimby v. Vanderbilt, 17 N. Y. 306, 313—721, 729, 806.
 Quincy, etc., R. Co. v. Wellhoener, 72 Ill. 60—786.
 Quinlan v. Sixth Ave. R. Co., 4 Daly (N. Y.), 488—778.
 Quinn v. Long Island R. Co., 34 Hun (N. Y.), 331—892, 895.
 Quinn v. Manhattan R. Co., 7 St. Rep. (N. Y.) 252—851.
 Quinn v. Shamokin & M. C. Elec. R. Co., 7 Pa. Super. Ct. 19—821.
 Quinn v. South Carolina R. Co., 29 S. C. 381—870, 901.

TABLE OF CASES.

xcix

(The references are to the pages.)

R.

- Raben v. Central Iowa R. Co., 73 Iowa, 579, 74 Iowa, 732—666, 682, 683, 830, 849, 851.
 Radley v. Columbia Southern Ry. Co. (Or.), 75 Pac. 212—575, 584.
 Rae v. Grand Trunk R. Co., 14 Fed. 401—96.
 Ragan v. Aiken, 9 Lea (Tenn.), 609—124.
 Ragsdale, Harper & Weathers v. Southern Ry. Co., 119 Ga. 627—524.
 Railroad Co. v. Adams (Va.), 18 S. E. 675—429.
 Railroad Co. v. Aller, 56 Ohio St. 754—873.
 Railroad Co. v. Atkins, 46 Ark. 423—838.
 Railroad Co. v. Boyer, 97 Pa. 91—698.
 Railroad v. Butler, 57 Pa. 335—570.
 Railroad Com'r v. Portland, etc., R. Co., 63 Me. 269—95, 97, 619.
 Railroad Commission v. Savannah, etc., R. Co., 3 Int. Com. Rep. 414—914.
 Railroad Co. v. Connell, 112 Ill. 295—742.
 Railroad Co. v. Cook, 145 Ill. 551—864.
 Railroad v. Crudup, 63 Miss. 291—571.
 Railroad Co. v. Davis, 17 Tex. Civ. App. 340—578.
 Railroad Co. v. Gants, 38 Kan. 618—742.
 Railroad Co. v. Griffin, 68 Ill. 499—742.
 Railroad v. Hurst, 11 Heisk. (Tenn.) 625—227.
 Railroad Co. v. Meacham, 91 Tenn. 428—551.
 Railroad Co. v. McCandless, 33 Kan. 366—838.
 Railroad Co. v. Mitchell, 98 Tenn. 31—682.
 Railroad v. Myers, 87 Fed. 149—891.
 Railroad Co. v. O'Hara, 12 W. N. C. (Pa.) 473—569.
 Railroad Co. v. Stanley, 89 Tex. 42—525.
 Railroad Co. v. Stein (Ind.), 31 N. E. 180—812.
 Railroad v. Sullivan, 120 Fed. 799—571.
 Railroad v. Trautwein, 52 N. J. L. 169—570.
 Railroad Co. v. Walrath, 38 Ohio St. 461—58.
 Railroad Co. v. Williams, 140 Ill. 275—838.
 Railway Co. v. Bennett, 50 Fed. 496—742.
 Railway Co. v. Gants, 38 Kan. 608—561.
 Railway Co. v. McCleave (Ky.), 38 S. W. 1055—864.
 Railway Co. v. McGown, 65 Tex. 640—571.
 Railway v. Nlx, 68 Ga. 572—736.
 Railway Co. v. Rude, 62 Ill. App. 550—864.
 Railway Co. v. Scott, 86 Va. 902—864.
 Railway Co. v. Spaher, 7 Ind. App. 23—838.
 Railway Co. v. Stevens, 95 U. S. 655—571.
 Railway Co. v. Valleyey, 32 Ohio St. 345—648, 689, 737, 739.
 Railway Co. v. Wright, 176 U. S. 498—329.
 Raleigh, etc., R. Co. v. Lowe, 101 Ga. 320—165, 171.
 Raming v. Metropolitan St. Ry. Co., 157 Mo. 477—563, 858.
 Ramm v. Minneapolis, etc., R. Co., 94 Iowa, 296—576.
 Ramsden v. Boston, etc., R. Co., 104 Mass. 117—627.
 Rand v. Merchants Dispatch Transp. Co., 59 N. H. 363—753.
 Randall v. Baltimore, etc., R. Co., 109 U. S. 478—604.
 Randall v. Chicago, etc., R. Co., 113 Mich. 115—624.
 Randall v. New Orleans, etc., R. Co., 45 La. Ann. 778—566, 760.
 Randall v. Richmond, etc., R. Co., 108 N. C. 612—102, 125.
 Randall v. South Frankford, etc., R. Co., 139 Pa. St. 464—643, 650.
 Randall v. Brodhead, 60 App. Div. (N. Y.) 567—373.
 Randall v. Chicago, etc., R. Co., 102 Mo. App. 342—736, 748.
 Randolph v. Hannibal, etc., R. Co., 13 Mo. App. 609—629, 890, 895, 901.
 Rankin v. Memphis, etc., Packet Co., 9 Heisk. (Tenn.) 564—148, 196, 197, 428, 436, 446.
 Rankin v. Pacific R. Co., 55 Mo. 167—94, 238, 262, 412, 415.
 Ransome v. Eastern Counties R. Co., 1 C. B. N. S. 437—124.
 Ransome v. New York, etc., R. Co., 15 N. Y. 415—881, 892.
 Raphael v. Pickford, 5 M. & G. 558—240.
 Rathbone v. Neal, 4 La. Ann. 563—389.
 Rathbone v. New York Cent., etc., R. Co., 140 N. Y. 48—321, 328, 348.
 Rathbone v. Oregon R. Co. (Or.), 66 Pac. 909—577.
 Rathbun v. Citizens' Steamboat Co., 76 N. Y. 376—201.
 Ratican v. Terminal R. Ass'n of St. Louis, 114 Fed. 666—122.
 Ratterel v. Galveston, etc., R. Co. (Tex. Civ. App.), 81 S. W. 566—554, 671.
 Ratzer v. Burlington, etc., R. Co., 64 Minn. 245—167, 169.
 Rawitsky v. Louisville, etc., R. Co., 40 La. Ann. 47—564.
 Rawlings v. Wabash R. Co., 97 Mo. App. 515—887, 894.
 Raworth v. Northern Pac. R. Co., 3 Int. Com. Rep. 857—922, 932.
 Rawson v. Holland, 59 N. Y. 611—256, 264, 313, 320, 451, 455, 458.
 Rawson v. Pennsylvania R. Co., 48 N. Y. 212—291, 308, 717, 718, 720, 754, 756.
 Ray v. Cortland, etc., Traction Co., 46 N. Y. Supp. 521—743, 881.
 Ray v. United Tract. Co., 96 App. Div. (N. Y.) 48—634.
 Raymond v. Burlington, etc., R. Co., 65 Iowa, 152—653.
 Raymond v. Chicago, etc., R. Co., 1 Int. Com. Rep. 827—923.
 Raymond v. Tyson, 17 How. (U. S.) 53—445.
 Read v. St. Louis, etc., R. Co. (Tex.), 73 S. W. 555—611.
 Read v. Spaulding, 30 N. Y. 630, 5 Bosw. 395—24, 35, 36, 47, 70, 220, 256.
 Read v. St. Louis, etc., R. Co., 60 Mo. 199—240, 317, 393, 395.
 Readhead v. Midland R. Co., L. R. 2 Q. B. 412—22, 607.
 Reading City Pass. R. Co. v. Eckert (Pa.), 4 Atl. 530—779, 788.
 Readington v. Philadelphia Tract. Co., 132 Pa. St. 154—840.
 Reagan v. Farmers L. & T. Co., 154 U. S. 162—913.
 Re Indianapolis, etc., R. Co., 1 Int. Com. Rep. 315—910.
 Reary v. Louisville, etc., R. Co., 40 La. Ann. 32—550, 820.
 Reber v. Board, 38 Fed. 822—552, 694.
 Re Boston, etc., R. Co., 3 Int. Com. Rep. 717—938.
 Re Charge to Grand Jury, 66 Fed. 146—928.
 Reddon v. Union Pac. Ry. Co., 5 Utah, 355—798.
 Redfield v. Oakland Consol. St. R. Co., 110 Cal. 277—657.
 Redington v. Harrisburg Tract. Co., 210 Pa. St. 648—833.
 Redmon v. Chicago, etc., R. Co., 90 Mo. App. 68—215, 484.

TABLE OF CASES.

(The references are to the pages.)

- Redmond v. Liverpool, etc., R. Co., 46 N. Y. 578-196.
 Redmond v. Rome, etc., R. Co., 16 N. Y. Supp. 330-847.
 Redner v. Lehigh, etc., R. Co., 73 Hun (N. Y.), 562-670.
 Redpath v. Western Union Tel. Co., 112 Mass. 71-78.
 Reed v. Axtell, 84 Va. 231-674, 873.
 Reed v. Duluth, etc., R. Co., 100 Mich. 507-671, 688.
 Reed v. Fargo, 7 N. Y. Supp. 185-291, 298.
 Reed v. Muscogee R. Co., 48 Ga. 102-832.
 Reed v. New York Cent. R. Co., 45 N. Y. 574, 56 Barb. 493-597, 802, 805.
 Reed v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 176-102, 110, 132, 144, 380.
 Reed v. Rome, etc., R. Co., 48 Hun (N. Y.), 231-409.
 Reed v. United States Express Co., 48 N. Y. 462, 470-47, 458, 479.
 Reem v. St. Paul City Ry. Co., 77 Minn. 503-658, 811.
 Reeves v. Texas, etc., R. Co., 11 Tex. Civ. App. 514-333.
 Re Express Co., 1 Int. Com. Rep. 677-911.
 Re Export Rates, 8 Int. Com. Rep. 185, 214-923.
 Regan v. Grand Trunk R. Co., 61 N. H. 579-241, 252, 256.
 Regensburg v. Nassau Elec. R. Co., 58 App. Div. (N. Y.) 566-657, 658.
 Regner v. Glens Falls, etc., R. Co., 74 Hun (N. Y.), 202-700, 738, 827.
 Reichla v. Gruenfelder, 52 Mo. App. 43-790.
 Reichman v. Second Ave. R. Co., 1 N. Y. Supp. 836-802.
 Reidy v. Metropolitan St. R. Co., 27 Misc. Rep. (N. Y.) 527-837.
 Re Inmates of National Homes, 1 Int. Com. Rep. 75-938.
 Reineman v. Covington, etc., R. Co., 51 Iowa, 338-441.
 Reiser v. Metropolitan Express Co., 91 N. Y. Supp. 170-387.
 Reiss v. Texas, etc., R. Co., 98 Fed. 533-185.
 Re Joint Water, etc., Lines, 2 Int. Com. C. Rep. 645-911.
 Reif v. Rapp, 3 W. & S. (Pa.) 21-356, 359, 360.
 Rend v. Chicago, etc., R. Co., 2 Int. Com. Rep. 313-919.
 Renneker v. South Carolina R. Co., 20 S. C. 219-654, 873.
 Rennie v. Northern R. Co., 27 U. C. C. P. 153-200, 464.
 Re Order of Railway Conductors, 1 Int. Com. Rep. 18-938.
 Re Passenger Tariffs, etc., Wars, 2 Int. Com. Rep. 340, 445-912, 921, 935, 936.
 Re Relative Tank, etc., Rates on Oil, 2 Int. Com. Rep. 245-918.
 Re Religious Teachers, 1 Int. Com. Rep. 21-938.
 Re Southern R., etc., Assoc., 1 Int. Com. Rep. 278-932, 933.
 Re Tariffs of Columbus, etc., R. Co., 2 Int. Com. Rep. 11-935.
 Re Tariff of Transcontinental Lines, 2 Int. Com. C. Rep. 203-922, 936.
 Re Underbilling, 1 Int. Com. Rep. 813-915, 920.
 Reynolds v. Boston, etc., R. Co., 121 Mass. 291-455, 456, 488.
 Reynolds v. Richmond & M. R. Co., 92 Va. 400-656.
 Reynolds v. New York Cent., etc., R. Co., 3 N. Y. Supp. 331-154.
 Reynolds v. New York Cent., etc., R. Co., 58 N. Y. 252-790, 822.
 Reynolds v. Railroad Co., 43 N. H. 580-349.
 Reynolds v. Texas, etc., R. Co., 37 La. Ann. 697-674.
 Reynolds v. Western New York, etc., R. Co., 1 Int. Com. Rep. 685-917.
 Rhodes v. Iowa, 170 U. S. 412-906.
 Rhodes v. Louisville, etc., R. Co., 9 Bush (Ky.), 688-499, 511, 529.
 Rhodes v. Northern Pac. R. Co., 34 Minn. 87-112.
 Rice v. Atchison, etc., R. Co., 3 Int. Com. Rep. 263-933.
 Rice v. Baxendale, 7 H. & N. 96-412.
 Rice v. Boston, etc., R. Corp., 98 Mass. 212-203, 261, 281.
 Rice v. Cincinnati, etc., R. Co., 3 Int. Com. Rep. 841-920, 931.
 Rice v. Hart, 118 Mass. 201-150, 261, 257.
 Rice v. Illinois Cent. R. Co., 22 Ill. App. 643-712, 713.
 Rice v. Indianapolis, etc., R. Co., 3 Mo. App. 27-356, 357, 386, 399, 419, 492.
 Rice v. Kansas Pac. R. Co., 63 Mo. 314-317, 334, 336, 525, 526.
 Rice v. Louisville, etc., R. Co., 1 Int. Com. Rep. 722-919.
 Rice v. Ontario Steamboat Co., 56 Barb. (N. Y.) 384-402.
 Rice v. Wabash R. Co. (Mo. App.), 80 S. W. 976-528.
 Rice v. Western New York, etc., R. Co., 2 Int. Com. Rep. 298-911.
 Rice v. Western New York, etc., R. Co., 3 Int. Com. Rep. 162-917, 918, 919, 920.
 Rich v. Lambert, 12 How. (U. S.) 352-377, 378.
 Richards v. Fuqua, 28 Miss. 793-53.
 Richards v. Gilbert, 5 Day (Conn.), 415-65.
 Richards v. London, etc., R. Co., 18 L. J. C. P. 251, 62 E. C. L. 839-38, 147, 179, 180, 708.
 Richards v. Michigan Southern, etc., R. Co., 20 Ill. 404-262.
 Richards v. Pitts Agricultural Works, 37 Hun (N. Y.), 1-216.
 Richards v. Westcott, 2 Bosw. (N. Y.) 589-36, 63, 89.
 Richardson v. Canadian Pac. R. Co., 19 Ont. Rep. 369-265, 269, 274, 275, 464.
 Richardson v. Chicago, etc., R. Co., 61 Wis. 596-112, 245, 762.
 Richardson v. Chicago, etc., R. Co., 1 Mo App. Rep. 401-337.
 Richardson v. Goddard, 23 How. (U. S.) 28-165, 192, 195.
 Richardson v. Goss, 3 B. & P. 119-194.
 Richardson v. Great Eastern R. Co., 1 C. P. Div. 342-601, 605, 607.
 Richardson v. Metropolitan R. Co., 37 L. J. C. P. 300-266.
 Richardson v. Nathan, 167 Pa. St. 513-177.
 Richardson v. Northeastern R. Co., L. R. 7 C. B. 75-82, 537.
 Richardson v. The Charles P. Chouteau, 37 Fed. 532-458, 464.
 Richer v. Fargo, 77 App. Div. (N. Y.) 550-135.
 Richmond & D. R. Co. v. Scott, 88 Va. 958-870.
 Richmond City R. Co. v. Scott, 86 Va. 902-599, 655.
 Richmond, etc., R. Co. v. Benson, 86 Ga. 203-241, 257, 282, 408.
 Richmond, etc., R. Co. v. Greenwood, 99 Ala. 501-898.

TABLE OF CASES.

ci

(The references are to the pages.)

- Richmond, etc., R. Co. v. Jefferson, 89 Ga. 554—644, 890.
- Richmond, etc., R. Co. v. Morris, 31 Gratt. (Va.) 200—551.
- Richmond, etc., R. Co. v. Payne, 86 Va. 481—294, 344, 347, 761.
- Richmond, etc., R. Co. v. Shomo, 90 Ga. 496—481.
- Richmond, etc., R. Co. v. Smith, 92 Ala. 287—847.
- Richmond, etc., R. Co. v. Trousdale, 99 Ala. 389—388, 506, 510, 515, 533.
- Richmond, etc., R. Co. v. Vance, 93 Ala. 144—803, 898, 900.
- Richmond, etc., R. Co. v. White, 88 Ga. 805—220, 235, 271, 274, 392, 393, 394.
- Richmond R., etc., Co. v. Bowles, 92 Va. 738—540.
- Richmond R., etc., Co. v. Burnsed, 70 Miss. 437—573.
- Richmond Ry. & Elec. Co. v. Hudgins (Va.), 41 S. E. 736—784.
- Richmond Tract. Co. v. Williams, 102 Va. 253—655, 852.
- Richmond v. Bronson, 5 Den. (N. Y.), 55—400, 402, 404.
- Richmond v. Quincy, etc., R. Co., 49 Mo. App. 104—850.
- Richmond v. Railway Co., 87 Mich. 374—698.
- Richmond v. Southern Pac. R. Co. (Or.), 67 Pac. 947—761.
- Ricketts v. Baltimore, etc., R. Co., 59 N. Y. 637, 61 Barb. 18—479, 483, 485.
- Ricketts v. Birmingham St. R. Co., 85 Ala. 600—850, 851.
- Ricketts v. Chesapeake, etc., R. Co., 33 W. Va. 433—629, 901.
- Ricks v. Georgia, etc., R. Co., 118 Ga. 255—836.
- Rickerson Roller Mill Co. v. Grand Rapids, etc., R. Co., 67 Mich. 110—459, 462.
- Ridenhour v. Kansas City Cable R. Co., 102 Mo. 270—659, 685, 822, 826.
- Rider v. Wabash, etc., R. Co., 14 Mo. App. 529—707, 709, 723.
- Riddle v. Baltimore, etc., R. Co., 1 Int. Com. Rep. 773—924.
- Riddle, Dean & Co. v. New York, etc., R. Co., 1 Int. Com. R. 594—14.
- Riddle v. New York, etc., R. Co., 1 Int. Com. Rep. 787—913, 927.
- Riddlesbarger v. Hartford Ins. Co., 7 Wall. (U. S.) 386—332.
- Riggins v. Missouri River, etc., R. Co., 73 Mo. 598—110.
- Riland v. Hirshler, 7 Pa. Super. Ct. 384—85.
- Riley v. Chicago City Ry. Co., 189 Ill. 384—742.
- Riley v. Horne, 5 Bing. 217—25, 26, 104, 389.
- Riley v. New York, etc., R. Co., 34 Hun (N. Y.), 97—473.
- Rind v. Stake, 28 Misc. Rep. (N. Y.) 177—387.
- Ringgold v. Haven, 1 Cal. 108—390, 399, 411.
- Rintoul v. New York, etc., R. Co., 17 Fed. 905—314, 373, 390.
- Rio Grand Western R. Co. v. Rubenstein, 5 Colo. App. 121—903.
- Ripley v. New Jersey R., etc., Co., 31 N. J. L. 388—555.
- Rixford v. Smith, 52 N. H. 355—30, 510, 511.
- Roach v. Canadian Pac. R. Co., 1 Manitoba, 158—449, 468.
- Roadbridge v. Delaware, etc., R. Co., 105 Pa. St. 460—611.
- Robb v. Pittsburgh, etc., R. Co., 14 Pa. Super. Ct. 282—746.
- Roberts v. Chittenden, 88 N. Y. 33—387.
- Robert C. White Live Stock, etc., Co. v. Chicago, etc., R. Co., 87 Mo. App. 330—161, 216, 468, 524, 535.
- Roberts v. Johnson, 58 N. Y. 613—674, 775.
- Roberts v. Koehler, 30 Fed. 94—558, 711.
- Roberts v. Riley, 15 La. Ann. 103—292, 757.
- Roberts v. Stuyvesant Safe Deposit Co., 123 N. Y. 57—229.
- Roberts v. Turner, 12 Johns. (N. Y.) 232—68, 69.
- Robertson v. Kennedy, 2 Dana (Ky.), 430—24, 55, 63.
- Robertson v. National Steamship Co., 1 App. Div. (N. Y.) 61—308.
- Robertson v. National Steamship Co., 42 St. Rep. (N. Y.) 649—408, 410, 411.
- Robertson v. New York, etc., R. Co., 22 Barb. (N. Y.) 91—575.
- Robertson v. Old Colony R. Co., 156 Mass. 525—80, 229.
- Robinson v. Baker, 5 Cush. (Mass.) 137—434.
- Robinson v. Burleigh, 5 N. H. 225—214.
- Robinson v. Chamberlain, 34 N. Y. 389—72.
- Robinson v. Chicago, etc., R. Co., 10 Det. Leg. N. 727—602.
- Robinson v. Chittenden, 69 N. Y. 533—209.
- Robinson v. Cornish, 13 N. Y. Supp. 577—36.
- Robinson v. Dunmore, 2 Bos. & P. 417, 416—13, 243.
- Robinson v. Great Western R. Co., 1 H. & R. 97—240.
- Robinson v. London, etc., R. Co., 19 C. B. N. S. 51—325.
- Robinson v. Manhattan R. Co., 5 Misc. Rep. (N. Y.) 209—836.
- Robinson v. Memphis, etc., R. Co., 9 Fed. 129—174.
- Robinson v. Memphis, etc., R. Co., 16 Fed. 57—229, 230, 231, 234.
- Robinson v. Merchant Dispatch Transp. Co., 45 Iowa, 470—47, 309, 313, 389, 405.
- Robinson v. New York Cent., etc., R. Co., 20 Blatchf. (U. S.) 338—600, 772, 781.
- Robinson v. New York, etc., S. Co., 63 App. Div. (N. Y.) 211—331.
- Robinson v. New York Cent., etc., R. Co., 66 N. Y. 11—698.
- Robinson v. Rockland, etc., St. R. Co., 87 Me. 387—739.
- Robinson v. Southern Pac. R. Co., 105 Cal. 526—589.
- Robinson v. St. Louis, etc., R. Co. (Mo. App.), 77 S. W. 493—632, 778.
- Robinson v. Superior R. T. Ry. Co., 94 Wis. 345—310.
- Robinson v. Threadgill, 13 Ired. L. (N. C.) 29—4.
- Roblin v. Jackson, 13 Man. R. (Can.) 328—204.
- Robostelli v. New York, etc., R. Co., 33 Fed. 796—568, 845.
- Robson v. Buffalo, etc., R. Co., 10 U. C. C. P. 279—402.
- Robson v. North Eastern R. Co., 2 Q. B. Div. 85—688.
- Roche v. Brooklyn, etc., R. Co., 105 N. Y. 294—809.
- Rockford, etc., R. Co. v. Coultas, 67 Ill. 398—836.
- Rock Island, etc., R. Co. v. Potter, 36 Ill. App. 590—451, 518.
- Rocky Mount Mills v. Wilmington, etc., R. Co., 119 N. C. 693—492.
- Rodrian v. New York, etc., R. Co., 125 N. Y. 526—792.
- Roe v. Birkenhead, etc., R. Co., 7 Exch. 36—640.
- Roedecker v. Metropolitan St. R. Co., 87 App. Div. (N. Y.) 227—862.

TABLE OF CASES.

(The references are to the page.)

- Rogan v. Wabash R. Co., 51 Mo. App. 665—350, 422, 425.
 Rogers v. Atlantic City R. Co. (N. J.), 34 Atl. 11—731.
 Rogers v. Great Western R. Co., 16 U. C. Q. B. 389—478.
 Rogers v. Head, Cro. Jac. 262—8, 11.
 Rogers v. Kennebec Steamboat Co., 86 Me. 261—549, 753, 764, 766.
 Rogers Locomotive, etc., Works v. Erie R. Co., 20 N. J. Eq. 379—39, 95, 97, 120.
 Rogers v. Long Island R. Co., 2 Lans. (N. Y.) 269—140, 722, 723.
 Rogers v. Missouri, etc., R. Co. (Tex. Civ. App.), 28 S. W. 1024—432.
 Rogers v. Murray, 3 Bosw. (N. Y.) 357—32.
 Rogers v. New York Brooklyn Bridge, 11 App. Div. (N. Y.) 141—672.
 Rogers v. Wheeler, 43 N. Y. 598—41, 42.
 Rogers v. Wheeler, 52 N. Y. 262—70, 132, 139, 258.
 Rogers v. Weir, 34 N. Y. 463—229, 230.
 Rogers v. Wendell, 54 Hun (N. Y.) 543—41.
 Rohr v. Parr, 1 Esp. N. P. 445—30.
 Rolfs v. Atchison, etc., R. Co. (Kan.), 71 Pac. 526—564.
 Roll v. Raguet, 4 Ohio, 400—752.
 Roller v. Sutter St. R. Co., 66 Cal. 230—596, 783.
 Rollette v. Great Northern R. Co. (Minn.), 97 N. W. 431—782, 816, 857.
 Rome R. Co. v. Sloan, 35 Ga. 636—401.
 Rome R. Co. v. Sullivan, 14 Ga. 279—207, 239, 261, 275, 284, 317.
 Rome R. Co. v. Sullivan, 25 Ga. 228—472.
 Rome R. Co. v. Winberly, 75 Ga. 316—730.
 Romero v. McKernan, 88 N. Y. Supp. 365—728.
 Romine v. Evansville, etc., R. Co. (Ind. App.), 56 N. E. 245—867.
 Rommel v. Schambacher, 120 Pa. 519—642.
 Ronan v. Midland R. Co., L. R. 14 Ir. 157—325.
 Root v. Chandler, 10 Wend. (N. Y.) 110—364.
 Root v. Des Moines Ry. Co. (Iowa), 99 N. W. 291—629.
 Root v. Great Western R. Co., 45 N. Y. 524—37, 39, 455, 458, 467.
 Root v. Long Island R. Co., 114 N. Y. 300—123.
 Root v. New York C. Sleeping Car Co., 28 Mo. App. 199—56, 58.
 Root v. New York, etc., R. Co., 83 Hun (N. Y.), 111—114, 500, 518.
 Root v. North Eastern R. Co., 36 L. J. Exch. 83—325.
 Root v. Wilson, 1 B. & Ald. 59—10.
 Rose v. Des Moines Valley R. Co., 39 Iowa, 246—552, 553, 571, 753, 762, 766.
 Rose v. King, 76 App. Div. (N. Y.) 308—885.
 Rose v. Louisville, etc., R. Co. (Miss.), 12 So. 825—623.
 Rose v. Stephens Transp. Co., 11 Fed. 483, 20 Blatchf. (U. S.) 411—783, 787.
 Rose v. Wilmington, etc., R. Co., 106 N. C. 170, 168—629, 637, 896.
 Roseman v. Carolina Cent. R. Co., 112 N. C. 709—689, 738.
 Rosen v. Chicago, etc., R. Co., 83 Fed. 300—374.
 Rosenbaum v. St. Paul, etc., R. Co., 38 Minn. 173—563, 574, 587, 694.
 Rosenberg v. Third Ave. R. Co., 47 App. Div. (N. Y.) 323—547.
 Rosencranz v. Swofford Bros. Dry Goods Co., 175 Mo. 518—444.
 Rosenfield v. Express Co., 1 Woods (U. S.), 131—156, 419.
 Rosenfield v. Teoria, etc., R. Co., 103 Ind. 121—343, 350, 357, 753.
 Rosenthal v. Wall, 54 App. Div. (N. Y.) 275—341, 349.
 Ross v. Hill, 2 C. B. 877—14.
 Ross v. Missouri, etc., R. Co., 4 Mo. App. 583—709, 725, 726.
 Ross v. New York Cent., etc., R. Co., 74 N. Y. 617—586.
 Ross v. Philadelphia, etc., R. Co., 199 Pa. 378, 49 Atl. 344—346.
 Ross v. Railroad Co., 15 R. I. 149—665.
 Ross v. Troy, etc., R. Co., 49 Vt. 364—33, 282, 376.
 Rosted v. Railway Co., 76 Minn. 123—632.
 Rosted v. St. Louis, etc., R. Co. (Mo. App.), 77 S. W. 493—632.
 Roth v. Buffalo, etc., R. Co., 34 N. Y. 548—148, 268, 724.
 Roth Clothing Co. v. Marine Steamship Co., 44 Misc. Rep. (N. Y.) 277—195.
 Roth v. Hamburg Am. Packet Co., 12 N. Y. Supp. 462—387, 389.
 Rothschild v. Michigan Cent. R. Co., 69 Ill. 164—262, 263.
 Rounds v. Delaware, etc., R. Co., 64 N. Y. 129—630, 633, 638, 641, 748.
 Rouser v. North Park St. R. Co., 97 Mich. 565—744, 745.
 Roussel v. Anmais, Rep. Jud. Que. 18 C. S. 474—21.
 Rowan v. Wells, Fargo & Co., 80 App. Div. (N. Y.) 31—234, 348, 403.
 Rowdin v. Pennsylvania R. Co., 203 Pa. 623—572, 778.
 Rowe v. Brooklyn, etc., R. Co., 71 App. Div. (N. Y.) 474—588, 592.
 Rowe v. Pickford, 8 Taunt. 83—265, 269.
 Rowland v. Miln, 2 Hilt. (N. Y.) 150—19, 195, 196.
 Rowland v. New York, etc., R. Co., 61 Conn. 103—430.
 Rowen v. Christopher, etc., R. Co., 34 Hun (N. Y.), 471—639, 731.
 Royston v. Illinois Cent. R. Co., 67 Miss. 376—642, 645.
 Rozwadoski v. International, etc., R. Co., 1 Tex. Civ. App. 487—556, 674.
 Rubens v. Ludgate Hill Steamship Co., 30 N. Y. Supp. 481—142, 305, 386.
 Rubin v. Wells, Fargo Express Co., 85 N. Y. Supp. 1108—213.
 Rudy v. Rio Grande Western R. Co., 8 Utah, 165—689, 749.
 Ruck v. Hatfield, 5 B. & Ald. 632—160.
 Rucker v. Donovan, 13 Kan. 251—440.
 Rucker v. Missouri Pac. R. Co., 61 Tex. 499—560.
 Rudell v. Ogdensburg Transit Co., 117 Mich. 568—368, 371.
 Rudy v. Midland Great Western R. Co., L. R. 8 Ir. 224—242.
 Ruebsam v. St. Louis Transit Co., 108 Mo. App. 437—733.
 Ruffin v. Ruggiero, 10 Misc. Rep. (N. Y.) 739—155.
 Ruggie v. Buchner, 1 Paine (U. S.), 363—445.
 Rumsey v. North Eastern R. Co., 14 C. B. N. S. 641—711.
 Ruppel v. Alleghany Val. R. Co., 167 Pa. St. 166—95, 115, 249, 399.
 Ruschenberg v. Southern El. Ry. Co., 161 Mo. 70—811.
 Rushford v. Hadfield, 8 East, 519—15, 431.
 Russ v. Steamboat War Eagle, 14 Iowa, 363—541, 552.
 Russell v. Hudson River R. Co., 17 N. Y. 134—586.
 Russell v. Livingston, 16 N. Y. 516, 19 Barb. 346—36, 151, 158.

TABLE OF CASES.

ciii

(The references are to the pages.)

- Russell v. Madden**, 95 Ill. 485—266.
Russell Mfg. Co. v. New Haven Steamboat Co., 52 N. Y. 657—127, 274.
Russell v. Neiman, 17 Com. B. (N. S.) 163—226.
Russell v. New Jersey Steamboat Co., 10 Misc. Rep. (N. Y.) 593—385.
Russell v. Pittsburgh, etc., R. Co., 157 Ind. 305—766, 768.
Rutherford v. McGowen, 1 Nott & M. (S. C.) 19—53.
Rutherford v. Shreveport, etc., R. Co., 41 La. Ann. 893, 793—891, 899, 900.
Rutherford v. St. Louis, etc., R. Co. (Tex. Civ. App.), 67 S. W. 161—567.
Ruthvan Woollen Mfg. Co. v. Great Western R. Co., 18 U. C. C. P. 316—425.
Ryan v. Cumberland Valley R. Co., 23 Pa. St. 384—586.
Ryan v. Gilmer, 2 Mont. 518—654.
Ryan v. Great Northern R. Co. (Minn.), 95 N. W. 758—156.
Ryan v. Manhattan R. Co., 121 N. Y. 126—613, 672.
Ryan v. Missouri, etc., R. Co., 65 Tex. 13—296, 309, 312, 313, 389, 394, 396.
Ryder v. Burlington, etc., R. Co., 51 Iowa, 460—158.
Ryder v. Hathaway, 21 Pick. (Mass.) 298—204.
Ryder v. Kinsey, 62 Minn. 85—773.
Ryland v. Peters, 5 Pa. Law J. Rep. 126—38.
Ryland & Rankin v. Chesapeake, etc., R. Co. (W. Va.), 46 S. E. 923—208, 214.
- S.**
- Sabine**, etc., R. Co. v. Cruse, 83 Tex. 460—207.
Sage v. Gittner, 11 Barb. (N. Y.) 120—68.
Sager v. Portsmouth, etc., R. Co., 31 Me. 228—293, 323, 376, 393, 395, 438, 717, 755, 756, 762.
Sahlgaard v. St. Paul City R. Co., 48 Minn. 232—337.
Saleebey v. Central R. Co. of N. J., 99 App. Div. (N. Y.) 163—706, 709, 719.
Sales v. Western Stage Co., 4 Iowa, 547—617.
Sallingr v. Simmons, 57 Barb. (N. Y.) 513—138, 141, 269.
Salters v. Delaware, etc., Canal Co., 3 Hun (N. Y.), 340—604.
Saltonstall v. Stockton, Taney (U. S.), 11 617, 619, 787, 819.
Saltsman v. Brooklyn City R. Co., 73 Hun (N. Y.), 567—650.
Saltsman v. New York Cent., etc., R. Co., 65 Hun (N. Y.), 448—301.
Saltus v. Everett, 20 Wend. (N. Y.) 267—65, 434, 446.
Sambuck v. Southern Pac. Co. (Cal.), 71 Pac. 174—697.
Samms v. Stewart, 20 Ohio, 69—11, 12, 22.
Sample v. Consol. L. & Ry. Co., 50 W. Va. 472—810.
Samuel v. Cheney, 135 Mass. 278—157.
Samuels v. Richmond R. Co., 35 S. C. 493, 495—688, 897, 901.
San Antonio, etc., R. Co. v. Avery, 19 Tex. Civ. App. 235—111.
San Antonio, etc., R. Co. v. Bailley, 4 Tex. Civ. App. Cas. sec. 67—112.
San Antonio, etc., R. Co. v. Barnett (Tex. Civ. App.), 66 S. W. 474, 27 S. W. 676—251, 373, 535.
San Antonio, etc., Ry. Co. v. Bennett, 76 Tex. 151—798, 799.
San Antonio, etc., R. Co. v. Choate, 22 Tex. Civ. App. 618—868.
San Antonio, etc., R. Co. v. Dolan (Tex. Civ. App.), 85 S. W. 302—520, 524, 525.
San Antonio, etc., R. Co. v. Josey (Tex. Civ. App.), 71 S. W. 606—412.
San Antonio, etc., R. Co. v. Lynch, 8 Tex. Civ. App. 618, 40 S. W. 631—581, 583.
San Antonio, etc., R. Co. v. Mayfield (Tex. App.), 15 S. W. 503—475, 482.
San Antonio, etc., R. Co. v. Moore (Tex. Civ. App.), 39 S. W. 960—467.
San Antonio, etc., R. Co. v. Pratt (Tex.), 34 S. W. 445—412, 515, 518.
San Antonio, etc., R. Co. v. Robinson, 73 Tex. 277—779, 811.
San Antonio, etc., R. Co. v. Thompson (Tex. Civ. App.), 66 S. W. 792—413, 414, 455.
San Antonio, etc., R. Co. v. Turney (Tex. Civ. App.), 75 S. W. 256—903.
San Antonio, etc., R. Co. v. Williams (Tex. Civ. App.), 57 S. W. 883—370.
San Antonio, etc., R. Co. v. Wright, 20 Tex. Civ. App. 136—111.
San Antonio Tract. Co. v. Bryant (Tex.), 70 S. W. 1015—841.
San Antonio Tract. Co. v. Crawford (Tex. Civ. App.), 71 S. W. 306—636.
San Antonio Tract. Co. v. Weiler (Tex.), 2 St. Ry. Rep. 900—853.
Sanchez v. San Antonio, etc., R. Co., 3 Tex. Civ. App. 89—875.
Sanders v. McLean, 11 Q. B. Div. 327—176.
Sanders v. Reister, 1 Dak. 172—798.
Sanders v. Southern Elec. R. Co., 147 Mo. 411—785.
Sanders v. Vanzeller, 4 Q. B. 294—358.
Sanders v. Young, 1 Head (Tenn.), 219—52.
Sanderson v. Northern Pac. R. Co., 88 Minn. 162—895.
Sandford v. Catawissa, etc., R. Co., 24 Pa. St. 378—37, 95, 120.
San Diego Land Co. v. National City, 174 U. S. 754—909.
San Diego Flume Co. v. Souther, 112 Fed. 228—89.
Sanford v. American District Tel. Co., 6 Misc. Rep. (N. Y.) 534, 13 Misc. Rep. (N. Y.) 88—19, 86.
Sanford v. Eighth Ave. R. Co., 23 N. Y. 343—547, 630, 638, 731, 890.
Sanford v. Hestonville, etc., R. Co., 136 Pa. St. 84—857.
Sanford v. Housatonic R. Co., 11 Cush. (Mass.) 155—335, 339.
Sangamon, etc., R. Co. v. Henry, 14 Ill. 156—411, 415.
Sanquer v. London, etc., R. Co., 16 C. B. 163—208.
Sansom v. Southern R. Co., 111 Fed. 887—602.
Santa Fe Pac. R. Co. v. Bossut (N. M.), 62 Pac. 977—231, 440.
Sargent v. B. & L. R. Corp., 115 Mass. 422—124.
Sargent v. Gile, 8 N. H. 325—214.
Saratoga, etc., R. Co. v. Row, 24 Wend. (N. Y.) 74—430.
Satterlee v. Groat, 1 Wend. (N. Y.) 272—11, 62, 550, 561.
Saunders v. Chicago, etc., R. Co., 6 S. Dak. 40—771.
Saunders v. Southern Ry. Co., 128 Fed. 115—702, 710, 712, 717.
Saunders v. Southern Pac. R. Co., 13 Utah, 275—573.
Sauter v. New York Cent., etc., R. Co., 66 N. Y. 50, 6 Hun, 446—660, 674, 681.
Savage v. Corn Exch. F., etc., Co., 8 Bosw. (N. Y.) 1—373.

TABLE OF CASES.

(The references are to the pages.)

- Savannah, etc., R. Co., v. Bonand, 58 Ga. 180-690, 691.
 Savannah, etc., R. Co. v. Boyle, 115 Ga. 836-642.
 Savannah St. R. Co. v. Bryan, 86 Ga. 312-634.
 Savannah, etc., R. Co. v. Bundick, 94 Ga. 775-430.
 Savannah Bureau of Freight, etc., v. Charleston, etc., R. Co., 7 Int. Com. Rep. 479-933.
 Savannah, etc., R. Co. v. Collins, 77 Ga. 376-356, 402, 474.
 Savannah, etc., R. Co. v. Flaherty, 110 Ga. 335-833.
 Savannah, etc., R. Co. v. Godkin, 104 Ga. 655-748.
 Savannah, etc., R. Co. v. Harris, 26 Fla. 148, 152-388, 458, 466, 491.
 Savannah, etc., R. Co. v. Holland, 82 Ga. 257-807.
 Savannah, etc., R. Co. v. Pritchard, 77 Ga. 412-410, 416, 425, 462, 478.
 Savannah, etc., R. Co. v. Sloat, 93 Ga. 803-211, 343, 419.
 Savannah, etc., R. Co. v. Steininger, 84 Ga. 579-386.
 Savannah, etc., R. Co. v. Wilcox, 48 Ga. 432-229, 231, 232.
 Savage v. Marlborough St. R. Co., 186 Mass. 203-778.
 Savery v. New York Cent., etc., R. Co., 2 Int. Com. Rep. 210, 338-910, 921.
 Saville v. Campion, 2 B. & Ald. 503-445.
 Sawyer v. Chicago, etc., R. Co., 22 Wis. 403-155.
 Sawyer v. Corse, 17 Gratt. (Va.) 230-71, 72.
 Sawyer v. Dulany, 30 Tex. 479-617, 618.
 Sawyer v. Hannibal, etc., R. Co., 37 Mo. 240-611, 654, 780, 788.
 Saxton v. Missouri Pac. R. Co., 98 Mo. App. 494-660.
 Scalfi v. Farrant, L. R. 10 Exch. 358-14.
 Scalving v. Pullman Palace Car Co., 24 Mo. App. 29-56.
 Scannell v. St. Louis Transit Co. (Mo.), 76 S. W. 660-853.
 Scarlett v. Great Western R. Co., 41 U. C. C. P. 211-325.
 Schaeffer v. Philadelphia, etc., R. Co., 168 Pa. St. 209-395, 532.
 Schaefer v. St. Louis, etc., R. Co., 128 Mo. 64-541, 547.
 Schaefer v. Gilmer, 13 Nev. 330-617.
 Schaffr v. Meyer, 133 Mo. 428-177.
 Scheff v. Washington City, etc., R. Co., 105 U. S. 249-881.
 Schenkel v. Pittsburgh & B. Tract. Co., 194 Pa. St. 182-658.
 Schepers v. Union Depot R. Co., 126 Mo. 665-541, 561, 562, 838.
 Scheu v. Benedict, 116 N. Y. 510-192, 197, 281.
 Scheu v. Erie R. Co., 10 Hun (N. Y.), 498-179.
 Schiff v. New York Cent., etc., R. Co., 16 Hun (N. Y.), 278-483, 485.
 Schieffelin v. Harvey, 6 Johns. (N. Y.) 170-65.
 Schiffler v. Chicago, etc., R. Co., 96 Wis. 141-686.
 Schiller v. Dry Dock, etc., R. Co., 26 Misc. Rep. (N. Y.) 392-685, 826.
 Schlesinger & Son v. New York, etc., R. Co., 85 N. Y. Supp. 372-153.
 Schlesinger v. West Shore R. Co., 88 Ill. App. 273-153.
 Schlichting v. Chicago, etc., R. Co. (Iowa), 96 N. W. 959-166.
 Schloss v. Atchison, etc., R. Co., 85 Tex. 601-142, 145, 206.
 Schloss v. Wood, 11 Colo. 287-19, 21, 37, 40, 64, 69.
 Schmidt v. Blood, 9 Wend. (N. Y.) 268-15, 387.
 Schmidt v. Chicago, etc., R. Co., 90 Wis. 504-70, 259.
 Schmidt v. Chicago, etc., R. Co., 83 Ill. 405-618.
 Schmidt v. Cleveland, etc., R. Co., 25 Ky. L. Rep. 11-746, 884.
 Schmidt v. Coney Island, etc., R. Co., 49 N. Y. Supp. 777-803.
 Schmidt v. Dry Dock, etc., R. Co., 3 St. Rep. (N. Y.) 257-805.
 Schmidt v. Humphrey, 48 Iowa, 652-831.
 Schmidt v. North Jersey St. R. Co. (N. J.), 58 Atl. 72-835, 842.
 Schneider v. Evans, 25 Wis. 241-437, 439, 494.
 Schneider v. Market St. Ry. Co. (Cal.), 66 Pac. 734-878.
 Schneider v. Second Ave. R. Co., 15 N. Y. 556-607.
 Schneider v. Second Ave. R. Co., 133 N. Y. 583-605.
 Schoenfelt v. Metropolitan St. Ry. Co., 40 Misc. Rep. (N. Y.) 201-824.
 School Dist. v. Boston, etc., R. Co., 102 Mass. 556-760.
 Schopman v. Boston, etc., R. Corp., 9 Cush. (Mass.) 24-548.
 Schroeder v. Hudson River R. Co., 5 Duer (N. Y.), 55-193, 207, 471, 473.
 Schroyer v. Lynch, 8 Watts (Pa.), 453-71.
 Schuback v. McDonald, 179 Mo. 163-568.
 Schuler v. Third Ave. R. Co., 1 Misc. Rep. (N. Y.) 35-809.
 Schulze v. Great Eastern R. Co., 19 Q. B. Div. 30-414, 421.
 Schultz v. Third Ave. R. Co., 46 N. Y. Super. Ct. 211-630.
 Schum v. Pennsylvania R. Co., 107 Pa. St. 8-791.
 Schumacher v. Chicago, etc., Ry. Co., 108 Ill. App. 520, 207 Ill. 199-147, 429, 436.
 Scunur v. Houston, 10 St. Rep. (N. Y.) 262-544, 548, 551, 817, 851.
 Schwab v. Union Line, 13 Mo. App. 159-238, 240, 242, 252.
 Schwartz v. Atlantic, etc., Tel. Co., 18 Hun (N. Y.), 157-73, 78.
 Schwartzman v. Brooklyn H. R. Co., 84 App. Div. (N. Y.) 608-632.
 Schwartzschild & S. Co. v. Savannah, etc., R. Co., 76 Mo. App. 623-161.
 Schwerin v. McKle, 51 N. Y. 180-235, 404.
 Schwerin v. North Pac. C. R. Co., 36 Fed. 710-624.
 Scott v. Allegheny Valley R. Co., 172 Pa. St. 646-387.
 Scott v. Baltimore, etc., R. Co., 19 Fed. 56-94, 248.
 Scott v. Bergen Co. Tract. Co., 63 N. J. L. 407-661, 775, 776, 857.
 Scott v. Bergen Co. Tract. Co., 64 N. J. L. 362-655, 663.
 Scott v. Boston, etc., Steamship Co., 106 Mass. 468-411.
 Scott v. Central Park, etc., R. Co., 53 Hun (N. Y.), 414-635.
 Scott v. London, etc., Docks Co., 3 Hurl & Colt. 596-772, 773.
 Scott v. Great Western R. Co., 23 U. C. C. P. 182-325.
 Scott v. Province, 1 Pittsb. (Pa.) 189-195.
 Scott v. Third Ave. R. Co., 16 N. Y. Supp. 350-877.

TABLE OF CASES.

CV

(The references are to the pages.)

- Scofield v. Lake Shore, etc., R. Co.**, 43 Ohio St. 571—57, 40.
Scofield v. Lake Shore, etc., R. Co., 2 Int. Com. Rep. 67, 116—916, 919, 928, 931.
Scothorn v. South Staffordshire R. Co., 8 Exch. 341—187, 463.
Scoville v. Griffith, 12 N. Y. 509—106, 217, 706.
Scranton v. Bank, 24 N. Y. 424—229.
Scruggs v. Baltimore, etc., R. Co., 18 Fed. 318—314, 343.
Sculley v. New York, etc., R. Co., 80 Hun (N. Y.), 197—844.
Seaboard, etc., R. Co. v. Cauthen, 115 Ga. 422—505.
Seaboard Air Line Ry. v. Main, 132 N. C. 445—761.
Seaboard, etc., R. Co. v. Spencer, 111 Ga. 868—610.
Seaman v. Koehler, 122 N. Y. 646—789.
Searle v. Kanawha, etc., R. Co., 32 W. Va. 370—595, 655, 673.
Searle v. Laverick, L. R. 9 Q. B. 122—87, 282.
Searles v. Alabama, etc., R. Co., 69 Miss. 186—461, 491.
Searles v. Manhattan R. Co., 101 N. Y. 661—793.
Searles v. Mann Boudoir Car. Co., 45 Fed. 330—58.
Sears v. Eastern R. Co., 14 Allen (Mass.), 433—666, 691.
Sears v. Seattle Consol. St. R. Co., 6 Wash. 227—833.
Sears v. Willis, 4 Allen (Mass.), 212—15, 443.
Sears v. Wingate, 3 Allen (Mass.), 103—174.
Seasongood v. Tennessee, etc., Transp. Co. (Ky.), 54 S. W. 193—32.
Seaver v. Boston, etc., R. Co., 14 Gray (Mass.), 466—586.
Seaver v. Bradley (Mass.), 69 N. E. 795—84.
Second v. St. Paul, etc., R. Co., 5 McCrary (U. S.), 515, 18 Fed. 221—548, 582, 618, 652, 882, 883, 891.
Secor v. Toledo, etc., R. Co., 10 Fed. 15—848.
Security Trust Co. v. Wells, Fargo & Co. Express, 178 N. Y. 620—153, 158, 178, 211, 332, 333, 336, 340.
Seelig v. Metropolitan St. Ry. Co., 18 Misc. Rep. (N. Y.) 383—658.
Segal v. St. Louis, etc., R. Co. (Tex. Civ. App.), 80 S. W. 233—644.
Seibert v. Philadelphia, etc., R. Co., 15 Pa. Super. Ct. 435—157.
Seigel v. Eisen, 47 Cal. 109—858.
Seipp v. Dry Dock, etc., R. Co., 45 App. Div. (N. Y.) 489—812.
Selby v. Detroit Ry. (Mich.), 81 N. W. 106—682.
Selby v. Wilmington, etc., R. Co., 113 N. C. 588—339, 353, 499, 525.
Self v. Dunn, 42 Ga. 528—10, 53.
Seller v. Market St. Ry. Co., 1 St. Ry. Rep. 8—825, 859, 860.
Seller v. Steamship Pacific, 1 Or. 409—145, 313, 317, 328, 755, 761.
Sellers v. Union Tract. Co., 21 Pa. Super. Ct. 5—835.
Selma, etc., R. Co. v. Butts, 43 Ala. 385—37, 453, 470.
Selma, etc., R. Co. v. United States, 139 U. S. 560—336.
Selma St., etc., R. Co. v. Owen, 132 Ala. 420—698, 819.
Selway v. Holloway, 1 Ld. Raym. 46—136.
Senf v. St. Louis & Sub. Ry. Co., 112 Mo. App. 74—853.
Sessions v. Western R. Corp., 16 Gray (Mass.), 132—151, 268.
Sevier v. Vicksburg, etc., R. Co., 61 Miss. 8—61, 688.
Sewall v. Allen, 6 Wend. (N. Y.) 349—360, 713.
Sexton v. Graham, 53 Iowa, 181—204.
Sexton v. Metropolitan St. R. Co., 57 N. Y. Supp. 577—838.
Seybolt v. New York Cent., etc., R. Co., 95 N. Y. 562—578, 752, 757, 758, 767, 772, 777, 779, 793, 794.
Seymore v. Chicago, etc., R. Co., 3 Biss. (U. S.) 43—652, 670, 891, 899.
Seymour v. Greenwood, 7 H. & H. 355—637.
Seymour v. Town of Lake, 66 Wis. 651—829.
Shackt v. Illinois Cent. R. Co., 94 Tenn. 665—257.
Shaefer v. Missouri Pac. R. Co., 98 Mo. App. 154—810.
Shaller-Schniglan Co. v. Corcoran, 11 O. C. D. 599—610.
Shamberg v. Delaware, etc., R. Co., 3 Int. Com. Rep. 502—919.
Shankenburg v. Metropolitan St. R. Co., 46 Fed. 177—821.
Shannon v. Boston, etc., R. Co., 78 Me. 52, 60—551, 830, 847, 850.
Shanahan v. St. Louis Transit Co., 109 Mo. App. 228—342.
Sharp v. Grey, 9 Bing. 457—606.
Sharer v. Paxson, 171 Pa. St. 26—556, 561, 633.
Shaughnessy v. Consol. Tract. Co., 17 Pa. Super. Ct. 588—827.
Shaw v. Canadian Pac. R. Co., 5 Manitoba L. Rep. 334—718.
Shaw v. Grand Trunk R. Co., 7 U. C. C. P. 493—708.
Shaw v. Merchant's Nat. Bank, 101 U. S. 557—165.
Shaw v. Northern Pac. R. Co., 40 Minn. 144—712, 722, 723.
Shaw v. South Carolina R. Co., 5 Rich. L. (S. C.) 462—197, 399.
Shaw v. York, etc., R. Co., 13 Q. B. 347—114.
Shea v. Camden, etc., R. Co. (N. J.), 49 Atl. 547—778.
Shea v. Chicago, etc., R. Co., 66 Minn. 102—461, 467.
Shea v. Manhattan R. Co., 27 St. Rep. (N. Y.) 33—638.
Shea v. Minneapolis, etc., R. Co., 63 Minn. 228—350, 393, 396, 441.
Sheels v. Davies, 6 Taunt. 65—447.
Shedd v. Troy, etc., R. Co., 40 Vt. 88—559, 565.
Sheff v. Huntington, 16 W. Va. 317—798.
Shelby v. Cincinnati, etc., R. Co., 85 Ky. 224—544.
Shelby v. Guy, 11 Wheat. (U. S.) 67, 367—266.
Shelbyville R. Co. v. Louisville, etc., R. Co., 82 Ky. 541—449.
Sheldon v. Robinson, 7 N. H. 157, 163—11, 19, 55, 360.
Sheldon v. Sherman, 42 N. Y. 484—610.
Shellenberg v. Fremont, etc., R. Co., 45 Neb. 487—156, 157.
Shelton v. Louisville & N. R. Co., 19 Ky. L. Rep. 215—870.
Shelton v. Merchants' Despatch Transp. Co., 59 N. Y. 258—131, 141, 152, 192, 312, 313, 376, 489.
Shelton v. Railroad Co., 29 Ohio St. 214—743.
Shenandoah Val. R. Co. v. Moose, 83 Va. 827—684, 826.

TABLE OF CASES.

(The references are to the pages.)

- Shenk v. Philadelphia Steam Propeller Co., 60 Pa. St. 109—179, 195, 262, 275.
 Shepherd v. Bristol, etc., R. Co., L. R. 3 Exch. 189—265.
 Shepherd v. Buffalo, etc., R. Co., 35 N. Y. 641—600.
 Shepard v. Chicago, etc., R. Co., 77 Iowa, 54—895.
 Sherman, etc., R. Co. v. Beebe (Tex. Civ. App.), 39 S. W. 1102—494.
 Sherman v. Chicago, etc., R. Co., 40 Iowa, 45—555, 566.
 Sherman v. Hannibal, etc., R. Co., 72 Mo. 62—550, 552, 560, 569, 582, 588.
 Sherman v. Hudson River R. Co., 64 N. Y. 254—196, 248, 263, 411, 458.
 Sherman v. Inman Steamship Co., 26 Hun (N. Y.), 107—31, 249.
 Sherman v. Toronto, etc., R. Co., 34 U. C. Q. B. 451—544.
 Sherman v. Wells, 28 Barb. (N. Y.) 403—36, 398, 404.
 Sheridan v. Brooklyn, etc., R. Co., 36 N. Y. 39—643, 644, 659, 822, 826, 828, 861.
 Sheridan v. New Quay Co., 4 C. B. N. S. 618—157, 229, 363.
 Sherley v. Billings, 8 Bush (Ky.), 147—617, 626, 642, 653, 812, 890.
 Sherlock v. Alling, 44 Ind. 184—778.
 Sherwood v. Railroad Co. (Mich.), 46 N. W. 776—671.
 Snewalter v. Missouri Pac. Ry. Co., 84 Mo. App. 589—430, 469.
 Shiff v. New York Cent., etc., R. Co., 16 Hun (N. Y.), 278—301, 494.
 Shinkle, etc., R. Co. v. Louisville, etc., R. Co., 75 Fed. 1007—907.
 Ship Howard v. Wissman, 18 How. (U. S.) 231—247.
 Shipton v. Thornton, 9 Ad. & El. 314—187.
 Shoemaker v. Kingsbury, 12 Wall. (U. S.) 369—39, 236.
 Short v. Northern Pac. R. Co., 1 N. Dak. 164—810.
 Shriver v. Sioux City, etc., R. Co., 24 Minn. 506—316, 380, 382, 390, 394, 491.
 Shuart v. Consol. Tract. Co., 15 Pa. Super. Ct. 26—676.
 Shubrick v. Salmond, 3 Bur. 1637—243.
 Shuler v. Chesapeake, etc., R. Co., 81 Va. 188—855.
 Shuler v. St. Louis, etc., R. Co., 92 Mo. 339—732.
 Sias v. Rochester R. Co., 169 N. Y. 118—598.
 Sickles v. Missouri, etc., R. Co., 13 Tex. Civ. App. 434—868.
 Sidekum v. Wabash, etc., R. Co., 93 Mo. 400—803.
 Siebrecht v. Pennsylvania R. Co., 21 Misc. Rep. (N. Y.) 615—223.
 Siegrist v. Arnot, 86 Mo. 200—540, 820.
 Silver v. Hale, 2 Mo. App. 557—253.
 Silverman v. St. Louis, etc., R. Co. 51 La. Ann. 1785—217, 235.
 Simkins v. Steamboat Co., 11 Cush. (Mass.) 102—104.
 Simms v. Great Western R. Co., 18 C. B. 805—757.
 Simms v. South Carolina R. Co., 27 S. C. 268—652.
 Simmons v. Law, 3 Keyes (N. Y.) 220—209.
 Simmons v. Oregon R. & Nav. Co., 41 Or. 151—582, 587.
 Simmons v. New Bedford, etc., Steamboat Co., 97 Mass. 361—617, 642.
 Simons v. Great Western R. Co., 2 C. B. N. S. 620—297, 302.
 Simons v. Great Western R. Co., 18 C. B. 805—325, 335, 759, 765.
 Simon v. Dunlap's Express Co., 38 Misc. Rep. (N. Y.) 775—348.
 Simon v. The Fung Shuey, 21 La. Ann. 363—104.
 Simonin v. New York, etc., R. Co., 36 Hun (N. Y.) 214—631, 632, 908.
 Simpson v. Dufour, 126 Ind. 322—34, 230.
 Simpson v. Hand, 6 Whart. (Pa.) 311—24.
 Simpson v. London, etc., R. Co., 1 Q. B. Div. 274—427.
 Sims v. Metropolitan St. Ry. Co., 65 App. Div. (N. Y.) 270—662, 863.
 Singer Mfg. Co. v. London, etc., R. Co., 1 Q. B. 833—711.
 Singleton v. Hilliard, 1 Stroh. L. (S. C.) 203—755.
 Sinsheimer v. New York, etc., R. Co., 21 Misc. Rep. (N. Y.) 45—180.
 Sioux City, etc., R. Co. v. First Nat. Bank of Fremont, 10 Neb. 556—165, 173.
 Sirs v. Marion St. R. Co., 39 N. E. (Ind.) 421—759.
 Sira v. Wabash R. Co., 115 Mo. 127—644, 667, 686.
 Sisson v. Cleveland, etc., R. Co., 14 Mich. 489—316, 400, 401, 411, 456, 515, 529.
 Siner v. Great Western R. Co., L. R. 4 Exch. 117—846.
 Skellie v. Central, etc., R. Co., 81 Ga. 56—245.
 Skilling v. Bollman, 73 Mo. 665, 6 Mo. App. 676—176.
 Skinner v. Chicago, etc., R. Co., 12 Iowa, 191—209.
 Skinner v. Hall, 60 Me. 477—459.
 Skinner v. London, etc., R. Co., 5 Exch. 787—548.
 Skinner v. Upshaw, 2 Ld. Raym. 752—429, 441.
 Skottowe v. Oregon Short Line, etc., R. Co., 22 Or. 430—805, 824.
 Slater v. Northern Pac. R. Co., 2 Int. Com. Rep. 243—920, 938.
 Slater v. South Carolina R. Co., 29 S. C. 96—395.
 Sleade v. Payne, 14 La. Ann. 457—192, 195.
 Sleeper v. Pennsylvania R. Co., 100 Pa. St. 259—549.
 Sleat v. Fagg, 5 B. & Ald. 342—360.
 Slim v. Great Northern R. Co., 14 C. B. 647—324, 371, 516, 765.
 Smilner v. Merry, 23 Iowa, 91—53, 540.
 Sloan v. St. Louis, etc., R. Co., 58 Mo. 220—377.
 Sloane v. Southern California R. Co., 111 Cal. 668—744, 880, 884, 889.
 Sloman v. Great Western R. Co., 67 N. Y. 208—707, 709, 717.
 Sloop v. Wabash R. Co., 93 Mo. App. 665—520, 528.
 Slossen v. Burlington, etc., R. Co., 55 Iowa, 294—796.
 Sly v. Union Depot R. Co., 134 Mo. 681—824, 841.
 Smallman v. Whilter, 87 Ill. 545—563, 622, 740.
 Smedley v. Hesterville, etc., R. Co., 184 Pa. St. 620—655, 776.
 Smeed v. Ford, 1 El. & Bl. 602—422.
 Smitson v. Southern Pac. R. Co. (Or.), 60 Pac. 910—665.
 Smith v. Alabama, 124 U. S. 465—669.
 Smith v. American Express Co., 108 Mich. 572—316, 549, 550, 481.
 Smith v. Boston, etc., R. Co., 41 Miss. 671—710.
 Smith v. Boston, etc., R. Co., 44 N. H. 325—708, 709.
 Smith v. Boston & M. R. Co., 120 Mass. 940—831.

TABLE OF CASES.

cvii

(The references are to the pages.)

- Smith v. British, etc., Steam Packet Co., 86 N. Y. 408—616, 693, 700, 782.
 Smith v. Britain S. S. Co. (U. S. D. C. N. Y.), 123 Fed. 176—152.
 Smith v. Canadian Pac. R. Co. (Can.), 34 N. S. 22—60.
 Smith v. Chamberlain (S. C.), 17 S. E. 371—623.
 Smith v. Chicago, etc., R. Co., 108 Mo. 242—654, 660.
 Smith v. Chicago, etc., R. Co., 4 S. Dak. 80—798.
 Smith v. Chicago, etc., R. Co., 55 Iowa, 33—873.
 Smith v. Cincinnati, etc., R. Co., 3 Ohio Dec. 192—705.
 Smith v. City, etc., R. Co., 29 Or. 539—554, 557.
 Smith v. Cleveland, etc., R. Co., 92 Ga. 533—239.
 Smith v. Eastern R. Co., 35 N. H. 356—798.
 Smith v. Findley, 34 Kan. 316—300.
 Smith v. Georgia, etc., R. Co., 88 Ala. 538—665, 671, 847.
 Smith v. Griffith, 3 Hill (N. Y.), 333—400, 407.
 Smith v. Horne, 8 Taunt, 144—294, 323.
 Smith v. Louisville, etc., R. Co., 95 Ky. 11—748.
 Smitha v. Louisville, etc., R. Co., 86 Tenn. 198, 124 Ind. 394—339, 525, 584.
 Smith v. Manhattan Ry. Co., 45 St. Rep. (N. Y.) 856—592, 631, 636.
 Smith v. Manhattan R. Co., 138 N. Y. 623—748.
 Smith v. Metropolitan St. R. Co., 59 App. Div. (N. Y.) 60—605.
 Smith v. Michigan Cent. R. Co., 100 Mich. 148—497, 506.
 Smith v. Missouri Pac. R. Co., 74 Mo. App. 48—173, 488.
 Smith v. Nashua, etc., R. Co., 27 N. H. 86—147, 179, 263, 284.
 Smith v. New Haven, etc., R. Co., 94 Mass. 531—29, 408, 411, 499.
 Smith v. New York, etc., R. Co. 19 N. Y. 127—597, 604, 609.
 Smith v. New York, etc., R. Co., 6 Duer (N. Y.), 231—601.
 Smith v. New York Cent. R. Co., 24 N. Y. 222—6, 272, 326, 579, 752, 762, 763, 765, 768.
 Smith v. New York Cent. R. Co., 43 Barb. (N. Y.) 225, 41 N. Y. 620—886, 465, 466, 467, 468, 491.
 Smith v. New York, etc., R. Co., 46 N. J. L. 7—555.
 Smith v. Pierce, 1 La. 349—46, 49, 65.
 Smith v. Pullman Palace Car Co. (Can.), 60 Alb. L. J. 188—56.
 Smith v. Seward, 3 Pa. St. 342—52.
 Smith v. Southern Express Co., 104 Ala. 387—201, 312.
 Smith v. Western Union Tel. Co., 83 Ky. 104—74, 77.
 Smith v. Whitman, 13 Mo. 352—104, 413.
 Smith v. Norfolk, etc., R. Co. (W. Va.), 35 S. E. 834—633.
 Smith v. Norfolk & S. R. Co., 114 N. C. 728—828.
 Smith v. North Carolina R. Co., 64 N. C. 235—293, 317, 393, 395, 717, 755, 756.
 Smith v. Northern Pac. R. Co., 1 Int. Com. Rep. 611—938.
 Smith v. Pittsburgh, etc., R. Co., 23 Ohio St. 11—888, 889.
 Smith v. Richmond, etc., R. Co., 99 N. C. 241—854.
 Smith v. Savannah, etc., R. Co., 100 Ga. 96—748.
 Smith v. St. Louis, etc., R. Co., 69 Mo. 32—654.
 Smith v. St. Paul City R. Co., 32 Minn. 1—388, 546, 547, 549, 595, 599, 778.
 Smith v. St. Paul, etc., R. Co., 30 Minn. 169—881.
 Smith v. Western R. Co., 91 Ala. 455—221.
 Smotherman v. St. Louis, etc., R. Co., 29 Mo. App. 265—856.
 Smyth v. Ames, 169 U. S. 466—124, 908, 909, 923, 908.
 Smryl v. Niolon, 2 Bailey L. (S. C.) 421—25.
 Snediker v. Nassau Elec. R. Co., 41 App. Div. (N. Y.) 628—612.
 Snelling v. Yetter, 25 App. Div. (N. Y.) 590—70.
 Snider v. Adams Express Co., 63 Mo. 376—290, 294, 295, 317, 472.
 Snow v. Carruth, 1 Spr. (U. S.) 324—126, 447.
 Snow v. Indiana, etc., R. Co., 109 Ind. 422, 425—338, 438, 455, 469.
 Snowden v. Boston, etc., R. Co., 151 Mass. 220—869.
 Snowden v. Davis, 1 Taunt, 359—128.
 Snyder v. Hannibal, etc., R. Co., 60 Mo. 413—550.
 Snyder v. Natchez, etc., R. Co., 42 La. Ann. 302—545.
 Sodowsky v. McFarland, 3 Dana (Ky.), 205—5.
 Solan v. Chicago, etc., R. Co. (Iowa), 63 N. W. 692—753.
 Solarz v. Manhattan R. Co., 29 N. Y. Supp. 1123—784.
 Solomon v. Central Park, etc., R. Co., 1 Sweeny (N. Y.) 298—823, 861.
 Solomon v. Manhattan R. Co., 103 N. Y. 437—836, 847.
 Solomon v. Philadelphia, etc., Steamboat Co., 2 Daly (N. Y.), 104—264, 271, 275.
 Somes v. British Empire Shipping Co., 8 H. L. Cas. 338—443.
 Sommerfield v. St. Louis Transit Co., 108 Mo. App. 713—732.
 Sonia Cotton Oil Co. v. The Red River, 106 La. 42—237.
 Sonier v. Boston, etc., R. Co., 141 Mass. 10—679.
 Sonn v. Smith, 57 App. Div. (N. Y.) 372—179.
 Sornes v. British Empire Shipping Co., 8 H. L. Cas. 338—431.
 Southcotes Case, 4 Coke 84—294.
 South Carolina R. Co. v. Bradford, 10 Rich. L. (S. C.) 307—466, 467.
 South Covington, etc., Ry. Co. v. Smith (Ky.), 86 S. W. 970—603.
 South Covington, etc., Ry. Co. v. Ware, 84 Ky. 267—819.
 South Chicago City R. Co. v. Dufresne, 102 Ill. App. 493—838.
 South, etc., Alabama R. Co. v. Schaufier, 75 Ala. 142—817, 851.
 South, etc., Alabama R. Co. v. Henlein, 56 Ala. 368—342, 350, 356, 498, 510, 759.
 South, etc., Alabama R. Co. v. Jones, 56 Ala. 507—406.
 South, etc., Alabama R. Co. v. Wilson, 78 Ala. 587—319.
 South, etc., Alabama R. Co. v. Wood, 66 Ala. 167, 72 Ala. 451—21, 147, 180, 193, 264, 279, 340, 388, 401.
 South, etc., Alabama R. Co. v. Wood, 72 Ala. 451—184, 399, 401.
 South, etc., R. Co. v. Henlein, 52 Ala. 606—30, 287, 505, 759.
 South Eastern R. Co. v. Railway Com'rs, 41 L. T. N. S. 760, 5 Q. B. Div. 217—113, 121.

TABLE OF CASES.

(The references are to the pages.)

- Southeastern R. Co. v. Southworth, 135 Ill. 250-803.
 South Florida R. Co. v. Rhodes, 25 Fla. 40-589, 750.
 Southard v. Minneapolis, etc., R. Co., 60 Minn. 382-303, 305, 396, 439.
 Souther v. San Diego Flume Co., 121 Fed. 347-89.
 Southern, etc., Ass'n v. Lawson, 97 Tenn. 367-85.
 Southern Express Co. v. Armstead, 50 Ala. 350-194, 292.
 Southern Express Co. v. Ashford, 126 Ala. 591-210.
 Southern Express Co. v. Barnes, 36 Ga. 532-287, 298.
 Southern Express Co. v. Caldwell, 21 Wall (U. S.) 264-33, 74, 76, 334, 759.
 Southern Express Co. v. Caperton, 44 Ala. 101-292, 332, 759.
 Southern Express Co. v. Crook, 44 Ala. 468-35, 287, 292, 359, 360, 754, 756, 759.
 Southern Express Co. v. Dickson, 94 U. S. 549-155, 189.
 Southern Express Co. v. Everett, 37 Ga. 688-153.
 Southern Express Co. v. Glenn, 16 Lea. (Tenn.) 472-35, 227, 334.
 Southern Express Co. v. Holland, 109 Ala. 362-264, 269.
 Southern Express Co. v. Hunnicutt, 54 Miss. 566-334.
 Southern Pacific R. Co. v. Johnson (Tex. App.), 15 S. W. 121-255.
 Southern Express Co. v. Kaufman, 59 Tenn. 161, 12 Heisk. (Tenn.) 165-33, 148, 182, 263, 381.
 Southern Express Co. v. McVeigh, 20 Gratt. (Va.) 264-35, 36, 133.
 Southern Express Co. v. Moon, 39 Miss. 322-24, 37, 92, 94, 495, 316, 345, 753.
 Southern Express Co. v. Newby, 36 Ga. 635-35, 140, 290, 298, 754.
 Southern Express Co. v. Oskamp, 14 Ohio C. C. 176-182.
 Southern Express Co. v. Palmer, 48 Ga. 85-485.
 Southern Express Co. v. Seide, 67 Miss. 613-345, 394.
 Southern Express Co. v. Shea, 38 Ga. 519-462.
 Southern Express Co. v. St. Louis, etc., R. Co., 5 Myers Fed. Dec. sec. 1611-18.
 Southern Express Co. v. Thornton, 41 Miss. 216-37.
 Southern Express Co. v. Tupelo Bank, 108 Ala. 517-335.
 Southern Express Co. v. Williams, 99 Ga. 482-183.
 Southern Express Co. v. Womack, 1 Heisk. (Tenn.) 256-35, 227, 318.
 Southern Indiana Express Co. v. United States Express Co., 88 Fed. 659-931.
 Southern Indiana Express Co. v. United States Express Co., 92 Fed. 1022-911.
 Southern Kansas R. Co. v. Clark, 52 Kan. 398-706.
 Southern Kansas R. Co. v. Crump (Tex. Civ. App.), 74 S. W. 335-520.
 Southern Kansas R. Co. v. Duncan, 40 Kan. 503-450, 469, 495.
 Southern Kansas R. Co. v. Hinsdale, 38 Kan. 507-591, 627, 637, 747, 895.
 Southern Kansas R. Co. v. Pavay, 48 Kan. 452-847.
 Southern Kansas R. Co. v. Rice, 38 Kan. 598-626, 642.
 Southern Kansas R. Co. v. Walsh, 46 Kan. 653-597, 656, 779, 891, 893.
 Southern Pac. R. Co. v. Anderson (Tex. Civ. App.), 63 S. W. 1023-311, 346, 405.
 Southern Pac. R. Co. v. Booth (Tex. Civ. App.), 39 S. W. 585-212, 470.
 Southern Pac. R. Co. v. Colorado Fuel & Iron Co., 101 Fed. 779-907, 939.
 Southern Pac. R. Co. v. Hamilton, 54 Fed. 463-639.
 Southern Pac. R. Co. v. Arnett (Utah), 126 Fed. 75-513, 520.
 Southern Pac. Co. v. D'Arcalis (Tex. Civ. App.), 64 S. W. 813-346, 399.
 Southern Pac. R. Co. v. Maddox, 75 Tex. 300-313, 350, 402.
 Southern Pac. R. Co. v. Rauh, 49 Fed. 696-893, 903.
 Southern R. Co. v. Felder, 46 Ga. 433-261.
 Southern R. Co. v. Hunter, 74 Miss. 444-748.
 Southern R. Co. v. Kendrick, 40 Miss. 374-654, 675, 687, 789, 862, 899, 902.
 Southern R. Co. v. Kinchen, 103 Ga. 186-181, 202.
 Southern R. Co. v. Lanning (Miss.), 35 So. 417-886.
 Southern R. Co. v. McElveen, 109 Ga. 249-461.
 Southern R. Co. v. O'Bryan, 115 Ga. 659-664.
 Southern R. Co. v. Roebuck (Ala.), 31 So. 611-817.
 Southern R. Co. v. Vandergriff (Tenn.), 64 S. W. 481-661.
 Southern R. Co. v. Watson, 110 Ga. 681-564, 760.
 Southern R. Co. v. White (Miss.), 33 So. 970-886.
 Southern R. Co. v. Williams (Miss.), 36 So. 394-833.
 Southern Ry. Co. v. Adams, 115 Ga. 705-525.
 Southern Ry. Co. v. Allison, 115 Ga. 635-143.
 Southern Ry. Co. v. Anniston Foundry Mach. Co., 135 Ala. 315-128.
 Southern Ry. Co. v. Bandy, 120 Ga. 463-818.
 Southern Ry. Co. v. Barlow, 104 Ga. 213-219.
 Southern Ry. Co. v. Bunnell, 138 Ala. 247-731.
 Southern Ry. Co. v. Deakins, 107 Tenn. 522-414.
 Southern Ry. Co. v. De Saussure, 116 Ga. 53-731.
 Southern Ry. Co. v. Jones (Ala.), 31 So. 501-529.
 Southern Ry. Co. v. Lockwood Mfg. Co. (Ala.), 37 So. 667-442.
 Southern Railway Co. v. Marshall, 23 Ky. L. Rep. 813-885.
 Southern Ry. Co. v. Railey Bros., 26 Ky. 53-513.
 Southern Ry. Co. v. Smith, 86 Fed. 293-562.
 Southern Ry. Co. v. Wideman, 119 Ala. 565-637.
 Southern Ry. Co. v. Wilcox, 99 Va. 394-110, 117, 118.
 Southwestern R. Co. v. Bently, 51 Ga. 311-712.
 Southwestern R. Co. v. Paulk, 24 Ga. 366-820.
 Southwestern R. Co. v. Singleton, 66 Ga. 252, 67 Ga. 306-563, 575, 769, 852.
 Southwestern R. Co. v. Webb, 48 Ala. 686-37.
 Spade v. Hudson River R. Co., 16 Barb. (N. Y.) 888-137.

TABLE OF CASES.

cix

(The references are to the pages.)

- Spade v. Lynn, etc., R. Co.**, 172 Mass. 488—488.
Spaids v. New York, etc., Steamship Co., 3 Daly (N. Y.), 139—226.
Spann v. Erie Boatman's Transp. Co., 11 Misc. Rep. (N. Y.) 680—115, 254, 418.
Spanbler v. St. Josephs, etc., Ry. Co. (Kan.), 74 Pac. 607—646.
Spannable v. Chicago, etc., R. Co., 31 Ill. App. 460—541, 545, 546, 548, 551, 836.
Spalding v. Chicago, etc., R. Co. (Mo. App.), 73 S. W. 274—513.
Spaulding v. Quincy & B. St. Ry. Co., 148 Mass. 470—852.
Spears v. Hartley, 3 Esp. 81—15.
Spears v. Lake Shore, etc., R. Co., 67 Barb. (N. Y.) 513—8.
Spear v. Philadelphia, etc., R. Co., 119 Pa. St. 61—781.
Spears v. Spartanburg, etc., R. Co., 11 S. C. 158—265, 273.
Spiegel v. Pacific Mail Steamship Co., 26 Misc. Rep. (N. Y.) 414—229, 230.
Spellman v. Lincoln Transit Co., 36 Neb. 890—44, 45, 540, 654, 770, 779, 864.
Spellman v. Richmond, etc., R. Co., 35 S. C. 475—566, 901.
Spense v. Chicago, etc., R. Co. (Iowa), 90 N. W. 346—574.
Spence v. Chodwick, 10 Q. B. 517—109.
Spence v. Mitchell, 9 Ala. 744—364.
Spence v. Norfolk, etc., R. Co., 92 Va. 102—239.
Spencer v. Milwaukee, etc., R. Co., 17 Wis. 487—870.
Spencer v. St. Louis Transit Co., 111 Mo. App. 653—842.
Spettigue v. Great Western R. Co., 15 U. C. C. P. 315—325.
Speyer v. The Mary Bell Roberts, 2 Sawy. (U. S.) 1—393.
Spicer v. Chicago, etc., R. Co., 29 Wis. 580—880, 891, 892, 899.
Spinnetti v. Atlas Steamship Co., 80 N. Y. 71—352.
S. P. Moseley v. Lord, 2 Conn. 389—8, 202.
Spoofford v. Pennsylvania R. Co., 11 Pa. Super. Ct. 97—132, 236.
Spoohn v. Missouri Pac. R. Co., 101 Mo. 417—644.
Spoohn v. Missouri Pac. R. Co., 87 Mo. 74, 116 Mo. 617—641, 895.
Spooner v. Brooklyn City R. Co., 54 N. Y. 230—855.
Spooner v. Hannibal, etc., R. Co., 23 Mo. App. 403—708.
Spooner v. Manchester, 133 Mass. 270—216.
Sprague v. Missouri Pac. R. Co., 34 Kan. 347—334, 525, 759.
Sprague v. New York Cent., etc., R. Co., 52 N. Y. 637—263, 453.
Sprague v. Smith, 29 Vt. 421, 426—41, 42, 43, 460.
Sprague v. Southern R. Co., 63 U. S. App. 711—695.
Spring v. Haskill, 4 Allen (Mass.), 112—406, 411.
Springs v. South Bound R. Co., 46 S. C. 104—267, 312, 318.
Springfield Consol. R. Co. v. Flynn, 55 Ill. App. 600—632, 642.
Springfield Consol. R. Co. v. Hoeffner, 175 Ill. 634—677, 809.
Springfield Consol. Ry. Co. v. Puntenney, 101 Ill. App. 95—811.
Springfield Consol. R. Co. v. Welsh, 155 Ill. 511—810.
Springer v. Ford, 189 Ill. 430—85, 541.
Springer v. Schultz, 205 Ill. 144—85, 770.
Springer Transp. Co. v. Smith, 16 Lea. (Tenn.) 498—629, 633, 901.
Springer v. Westcott, 166 N. Y. 117—291, 370.
Sproat v. Donnell, 26 Me. 185—378.
Sproul v. Hemingway, 14 Pick. (Mass.) 1—51.
Sproul v. Kellar, 4 Stew. & P. (Ala.) 382—66.
Sprurier v. Front St. Cable Co., 29 Pac. (Wash.) 346—798.
Sprulock v. Missouri Pac. R. Co., 93 Mo. 530—119.
Squire v. Central Park, etc., R. Co., 36 N. Y. Super Ct. 432—797, 823.
Squire v. Michigan Cent. R. Co., 4 Int. Com. C. Rep. 611—912, 913.
Squire v. New York Cent. R. Co., 98 Mass. 248, 239—312, 313, 344, 503, 510, 717, 758, 760.
Stadhecker v. Combes, 9 Rich. L. (S. C.) 193—35.
Stager v. Ridge Ave. Pass. R. Co., 119 Pa. St. 70—663, 771, 777, 838, 839.
Stalcup v. Louisville, etc., R. Co., 16 Ind. App. 584—583.
Standard Oil Co. v. Tierney, 92 Ky. 367—333, 384.
Stanchfield v. Narragansett Steamship Co., 111 Mass. 512—639, 739.
Stanley v. Steele (Conn.), 69 L. R. A. 561—657.
Stannard v. Prince, 64 N. Y. 300—68, 69.
Stanton v. Bell, 2 Hawks (N. C.), 145—5.
Stapleton v. Grand Trunk Ry. Co. (Mich.), 94 N. W. 739—130, 132.
Starkey v. Kelly, 50 N. Y. 676—400.
Starksville First Nat. Bank v. Meyer, 43 La. Ann. 1—170.
Starnes v. Louisville, etc., R. Co., 91 Tenn. 516—344, 350, 528.
Stastney v. Second Ave. R. Co., 61 N. Y. Super. Ct. 104—588.
State v. Baltimore, etc., R. Co., 24 Md. 84—560, 611.
State v. Baltimore, etc., R. Co., 58 Md. 221—771.
State v. Boston, etc., R. Co., 58 N. H. 410, 221—6.
State v. Campbell, 32 N. J. L. 309—555, 557, 565, 735.
State v. Carrigan, 39 N. J. L. 35—906.
State v. Chovin, 7 Iowa, 204—589, 590, 619, 734.
State v. Chicago, etc., R. Co., 36 Minn. 492—105.
State v. Cincinnati, etc., R. Co., 47 Ohio St. 130—119, 124, 915.
State v. Clarke, 109 N. C. 739—549.
State v. Concord R. Corp., 62 N. H. 375—492.
State v. Creedon, 78 Iowa, 556—233, 262.
State v. Dayton, etc., R. Co., 56 Ohio St. 436—596.
State Freight Tax Case, 15 Wall. (U. S.) 232—905.
State v. Goold, 53 Me. 279—734.
State v. Goss, 59 Vt. 266—100.
State v. Grand Trunk R. Co., 58 Mo. 176—557, 558, 634, 669, 670.
State v. Harrington, 44 Mo. App. 297—405.
State v. Hartford, etc., R. Co., 29 Conn. 538—95, 97.
State v. Intoxicating Liquors, 73 Me. 278, 83 Me. 158—200, 230.
State v. Maine, etc., R. Co., 76 Me. 357—797.
State v. Missouri Pac. R. Co., 29 Neb. 550—105.

TABLE OF CASES.

(The references are to the pages.)

- State v. Nebraska Teleph. Co., 17 Neb. 128-79.
 State v. New Haven, etc., R. Co., 41 Conn. 134-99.
 State v. Overton, 24 N. J. L. 435-559, 566, 590, 591.
 State v. Ray, 109 N. C. 736-549.
 State v. Republican Valley R. Co., 17 Neb. 647-105, 193.
 State ex rel. Cumberland Teleph. & Tel. Co. v. Texas, etc., R. Co., 52 La. Ann. 1850-117.
 State v. Seagraves (Mo.), 85 S. W. 925-910.
 State v. Tom, 8 Or. 177-346.
 State v. Young (N. J.), 56 Atl. 471-598.
 State v. Western Maryland Ry. Co., 63 Md. 433-569, 570.
 State ex rel. Atwater v. Delaware, etc., R. Co., 48 N. J. L. 55-123.
 State ex rel. Sheets v. Union Depot Co., 71 Ohio St. 379-95, 614.
 Staub v. Kendrick, 121 Ind. 226-64, 706.
 Steamboat Co. v. Atkins, 22 Pa. St. 522-363.
 Steamboat Co. v. Brockett, 121 U. S. 637, 645-543, 592.
 Steamboat Keystone v. Moies, 28 Mo. 243-196, 276.
 Steamboat Lynx v. King, 12 Mo. 272-234.
 Steamboat New World v. King, 16 How. (U. S.) 474-375, 544, 571, 762.
 Steamboat Virginia v. Kraft, 25 Mo. 76-431, 437.
 Steamboat Farmer v. McCraw, 26 Ala. 189-364.
 Steamboat Sultana v. Chapman, 5 Wis. 454-154, 195.
 Steamboat Crystal Palace v. Vanderpool, 16 B. Mon. (Ky.) 302-713, 715.
 Stearns v. Raymond, 26 Wis. 74-204.
 Stearns v. Pullman Car Co., 8 Ont. Rep. 171-58.
 Stedman v. Western Transp. Co., 48 Barb. (N. Y.) 97-94, 238, 239, 328.
 Steel v. Townsend, 37 Ala. 247-292, 314, 351, 377, 393, 753.
 Steele v. Consolidated Tract. Co., 30 Platts. (Pa.) L. J. N. S. 290-776.
 Steele v. Grand Trunk R. Co., 31 U. C. C. P. 260-337.
 Steele v. McTyer, 31 Ala. 667-11, 65, 353.
 Steele v. Southern R. Co., 55 S. C. 389-695.
 Steelman v. Taylor, 3 Ware (U. S.), 52-126.
 Steen v. Niagara Fire Ins. Co., 89 N. Y. 315-332.
 Steers v. Cunard Steamship Co., 57 N. Y. 1-718.
 Steers v. Liverpool, etc., Steamship Co., 57 N. Y. 1-297, 347, 387, 392, 708, 721, 758.
 Steeg v. St. Paul City R. Co. (Minn.), 52 Am. & Eng. R. Cas. 650-676.
 Steinman v. Wilkins, 7 W. & S. (Pa.) 466-15, 20, 23, 62, 442.
 Steinweg v. Erie R. Co., 43 N. Y. 123-320, 327, 602, 603.
 Stephenson v. Hart, 4 Bing. 476-148, 158.
 Stephenson v. Little, 10 Mich. 433-204.
 Stephens v. Smith, 29 Vt. 160-620, 734, 751.
 Stern v. Westchester Elec. R. Co., 89 App. Div. (N. Y.) 491-650.
 Stetler v. Chicago, etc., R. Co., 49 Wis. 609-188, 190.
 Stevenot v. Eastern R. Co., 61 Minn. 104-232.
 Stevens v. Atchison, etc., R. Co., 1 Mo. App. Rep. 247-741.
 Stevens v. Boston Elev. Ry. Co., 184 Mass. 476-592.
 Stevens v. Boston, etc., R. Corp. 8 Gray (Mass.), 262, 1 Gray, 277-272, 434, 437.
 Stevens v. European, etc., R. Co., 66 Me. 74, 64-779, 787.
 Stevens v. Great Western R. Co., 52 L. T. 324-319.
 Stevens v. Missouri Pac. R. Co., 67 Mo. App. 356-799.
 Stevens v. Sayward, 3 Gray (Mass.), 108-446.
 Stevens v. Lake Shore, etc., R. Co., 20 Ohio C. C. 41, 11 O. C. D. 168-476, 481.
 Stewart v. Terre Haute, etc., R. Co., 3 Fed. 768-458, 474.
 Stevenson v. Pullman Palace Car Co. (Tex. Civ. App.), 26 S. W. 112-59.
 Stevenson v. Second Ave. R. Co., 35 App. Div. (N. Y.) 474-779.
 Stevenson v. West Seattle, etc., Co. (Wash.), 60 Pac. 51-621.
 Stewart v. Baltimore & O. R. Co., 88 N. Y. Supp. 377-835.
 Stewart v. Boston, etc., R. Co., 146 Mass. 605-663, 681, 869.
 Stewart v. Brooklyn, etc., R. Co., 90 N. Y. 588-543, 610, 616, 626, 631, 632, 633, 638.
 Stewart v. Comer, 100 Ga. 754-236.
 Stewart v. Erie, etc., Transp. Co., 17 Minn. 372-472, 492.
 Stewart v. Everts, 76 Wis. 35-303.
 Stewart v. Gracy, 93 Tenn. 314-135, 283.
 Stewart v. London, etc., R. Co., 3 H. & C. 135-324.
 Stewart v. Merchants Despatch Transp. Co., 47 Iowa, 229-47.
 Stierle v. Union Ry. Co., 156 N. Y. 70, 74-594, 605, 657, 660.
 Stiles v. Atlanta, etc., R. Co., 65 Ga. 370-585.
 Stiles v. Davis, 1 Black (U. S.), 101-214, 229, 230, 232.
 Stiles v. Western Union Tel Co. (Ariz.), 15 Pac. 712-76.
 Stillwell v. Staples, 19 N. Y. 401-373.
 Stimson v. Connecticut River Co., 98 Mass. 83-706, 708.
 Stimson v. Jackson, 58 N. H. 138-279, 381.
 Stimson v. Milwaukee, etc., R. Co., 15 Wis. 381-771, 772.
 Stiner v. Metropolitan St. Ry. Co., 84 N. Y. Supp. 285-652.
 Stinson v. New York Cent. R. Co., 32 N. Y. 333-752, 757, 763, 765, 768.
 St. Clair v. Chicago, etc., R. Co., 80 Iowa, 304-94, 241, 247, 249, 250, 388.
 St. Clair St. Ry. Co. v. Eadie, 43 Ohio St. 91-823, 825.
 St. John v. Southern Express Co., 1 Woods (U. S.), 612, 615-356, 480.
 St. Joseph, etc., R. Co. v. Palmer, 38 Neb. 463-317.
 St. Joseph, etc., R. Co. v. Wheeler, 35 Kan. 185-574, 582.
 St. Louis Drayage Co. v. Louisville, etc., R. Co., 65 Fed. 39-450, 930, 931.
 St. Louis Drayage Co. v. Louisville & N. R. Co., 5 Inters. Com. Rep. 137-615.
 St. Louis Coal R. Co. v. Moore, 14 Ill. App. 510-597, 607.
 St. Louis Ins. Co. v. St. Louis, etc., R. Co., 104 U. S. 146-458, 477, 492, 493.

TABLE OF CASES.

cxii

(The references are to the pages.)

- St. Louis S. W. R. Co. v. Berger, 64 Ark. 613—636.
 St. Louis S. W. R. Co. v. Berry, 60 Ark. 433—704, 708, 709.
 St. Louis S. R. Co. v. Cates (Tex. Civ. App.), 38 S. W. 448—454.
 St. Louis S. R. Co. v. Dolan (Tex. Civ. App.), 84 S. W. 393—405.
 St. Louis S. W. Co. v. Ferguson (Tex.), 54 S. W. 797—855.
 St. Louis S. W. Ry. Co. v. Hunt (Tex. Civ. App.), 81 S. W. 322—521.
 St. Louis S. W. R. Co. v. Griffith (Tex. Civ. App.), 35 S. W. 741—560.
 St. Louis S. W. R. Co. v. Musick (Tex. Civ. App.), 80 S. W. 673—521.
 St. Louis S. W. R. Co. v. Pruitt (Tex.), 80 S. W. 72—551.
 St. Louis S. W. R. Co. v. Ray (Tex.), 35 S. W. 951—716.
 St. Louis S. W. R. Co. v. Williams (Tex. Civ. App.), 32 S. W. 225—401.
 St. Louis, etc., Packet Co. v. Missouri Pac. R. Co., 35 Mo. App. 272—471.
 St. Louis, etc., R. Co. v. Adams, 4 Kan. App. 305—173.
 St. Louis, etc., R. Co. v. Adcox, 52 Ark. 406—657.
 St. Louis, etc., R. Co. v. Atchison, 47 Ark. 74—666.
 St. Louis, etc., R. Co. v. Berry, 4 Tex. App. Civ. Cas. sec. 166—886.
 St. Louis, etc., R. Co. v. Berryhill, 3 Tex. App. Civ. Cas. sec. 319—667.
 St. Louis, etc., R. Co. v. Bland (Tex. Civ. App.), 34 S. W. 675—251, 456.
 St. Louis, etc., R. Co. v. Bone, 52 Ark. 26—282, 328.
 St. Louis, etc., R. Co. v. Brown (Tex. Civ. App.), 69 S. W. 1910—374.
 St. Louis, etc., R. Co. v. Branch, 45 Ark. 524—750.
 St. Louis, etc., R. Co. v. Burns (Tex. Civ. App.), 80 S. W. 104—520, 521.
 St. Louis, etc., R. Co. v. Cantrell, 37 Ark. 519—671, 680, 687, 817, 891, 849.
 St. Louis, etc., R. Co. v. Carlisle (Tex. Civ. App.), 78 S. W. 553—535, 574.
 St. Louis, etc., R. Co. v. Carroll, 13 Ill. App. 585—555.
 St. Louis, etc., R. Co. v. Clark, 48 Kan. 321—301, 510.
 St. Louis, etc., R. Co. v. Cleary, 77 Mo. 634—300, 316, 510, 525.
 St. Louis, etc., R. Co. v. Commercial U. Ins. Co., 139 U. S. 223—118, 134, 142, 174.
 St. Louis etc., R. Co. v. Coolidge (Ark.), 83 S. W. 333—455.
 St. Louis, etc., R. Co. v. Coulson, 8 Kan. App. 4—873.
 St. Louis, etc., R. Co. v. Crawford (Tex. Civ. App.), 35 S. W. 748—153.
 St. Louis, etc., R. Co. v. Dalby, 19 Ill. 363, 358—627, 632, 734, 748.
 St. Louis, etc., R. Co. v. Dodd, 59 Ark. 317—264, 282, 283.
 St. Louis, etc., R. Co. v. Dorman, 72 Ill. 504—499, 510.
 St. Louis, etc., R. Co. v. Duck (Tex. Civ. App.), 72 S. W. 445—602.
 St. Louis, etc., R. Co. v. Edwards, 78 Fed. 745—454.
 St. Louis, etc., R. Co. v. Elgin Condensed Milk Co., 175 Ill. 557—365, 372.
 St. Louis, etc., R. Co. v. Fairbairn (Mo.), 4 S. W. 50—613.
 St. Louis, etc., R. Co. v. Fairbairn, 48 Ark. 491—562, 613.
 St. Louis, etc., R. Co. v. Farr, 70 Ark. 264—846.
 St. Louis, etc., R. Co. v. Finley, 79 Tex. 85—554, 655, 659, 825.
 St. Louis, etc., R. Co. v. Flannagan, 23 Ill. App. 489—103.
 St. Louis S. W. Ry. Co. v. Furguson (Tex. Civ. App.), 64 S. W. 797—826.
 St. Louis, etc., R. Co. v. Hanks, 78 Tex. 300—705.
 St. Louis, etc., R. Co. v. Hardway, 17 Ill. App. 321—705, 724, 726.
 St. Louis, etc., R. Co. v. Harper, 69 Ark. 186—750.
 St. Louis, etc., R. Co. v. Hawkins, 39 Ill. App. 406—722, 730.
 St. Louis, etc., R. Co. v. Hays, 13 Tex. Civ. App. 577—338.
 St. Louis, etc., R. Co. v. Heath, 41 Ark. 477, 476—94, 238, 241, 423.
 St. Louis, etc., R. Co. v. Henderson, 57 Ark. 402—114, 467, 499, 504.
 St. Louis, etc., R. Co. v. Henry (Tex. Civ. App.), 81 S. W. 334—414.
 St. Louis, etc., R. Co. v. Hindsman, 1 Tex. App. Civ. Cas. sec. 204—407, 426.
 St. Louis, etc., R. Co. v. Honea (Tex. Civ. App.), 84 S. W. 267—521.
 St. Louis, etc., R. Co. v. Hopkins (Ark.), 15 S. W. 610—221.
 St. Louis, etc., R. Co. v. Huffman (Tex. Civ. App.), 32 S. W. 30—748.
 St. Louis, etc., R. Co. v. Hurst, 67 Ark. 407—332, 333, 335.
 St. Louis, etc., R. Co. v. Jacobs, 70 Ark. 401—525.
 St. Louis, etc., R. Co. v. Johnson, 59 Ark. 122—217, 375.
 St. Louis, etc., R. Co. v. Johnson (Tex.), 68 S. W. 58—633.
 St. Louis, etc., R. Co. v. Johnson, 53 Ark. 282—206.
 St. Louis, etc., R. Co. v. Jones (Tex. Civ. App.), 29 S. W. 695—251, 513.
 St. Louis, etc., R. Co. v. Keitt (Tex. Civ. App.), 76 S. W. 311—602.
 St. Louis, etc., R. Co. v. Knight, 122 U. S. 79—70, 131, 134, 143, 174, 259.
 St. Louis, etc., R. Co. v. Larned, 103 Ill. 293—164, 165, 173, 214, 472.
 St. Louis, etc., R. Co. v. Lear, 54 Ark. 399—467, 495.
 St. Louis, etc., R. Co. v. Lee, 69 Ark. 584—93, 99.
 St. Louis, etc., R. Co. v. Leftwich, 117 Fed. 127—854.
 St. Louis, etc., R. Co. v. Leigh, 45 Ark. 368—695.
 St. Louis, etc., R. Co. v. Lesser, 46 Ark. 236—314, 342, 351, 485.
 St. Louis, etc., R. Co. v. Mackie, 71 Tex. 491—566, 626, 647, 744.
 St. Louis, etc., R. Co. v. Maddry, 57 Ark. 306—819, 826.
 St. Louis, etc., R. Co. v. McKee, 4 Tex. App. Civ. Cas. sec. 7—205, 206.
 St. Louis, etc., R. Co. v. Marrs (Ark.), 31 S. W. 42—451.
 St. Louis, etc., R. Co. v. Martin (Tex. Civ. App.), 37 S. W. 234, 35 S. W. 28—133, 144, 388, 394.
 St. Louis, etc., R. Co. v. Meyer, 40 U. S. App. 554, 77 Fed. 150—633, 644.
 St. Louis, etc., R. Co. v. Mitchell, 57 Ark. 418—595, 606, 787.
 St. Louis, etc., R. Co. v. Montgomery, 39 Ill. 335—70, 131, 259.
 St. Louis, etc., R. Co. v. Mudford, 44 Ark. 439, 48 Ark. 502—405, 413, 416, 424.

TABLE OF CASES.

(The references are to the pages.)

- St. Louis, etc., R. Co. v. Murphy, 60 Ark. 333—131.
 St. Louis, etc., h. Co. v. Murray, 55 Ark. 248—819.
 St. Louis, etc., R. Co. v. Neel, 56 Ark. 279—94, 119, 141, 142, 248, 387, 417, 418, 493.
 St. Louis, etc., R. Co. v. Osborn, 67 Ark. 399—749.
 St. Louis, etc., R. Co. v. Parks (Tex.), 76 S. W. 740—602.
 St. Louis, etc., R. Co. v. Parmar (Tex. Civ. App.), 30 S. W. 1109—388.
 St. Louis, etc., R. Co. v. Person, 49 Ark. 182—817, 849, 851.
 St. Louis, etc., R. Co. v. Phelps, 46 Ark. 485—405, 411.
 St. Louis, etc., R. Co. v. Philadelphia Fire Assoc., 55 Ark. 163—381.
 St. Louis, etc., R. Co. v. Piper, 13 Kan. 505, 510—479, 481, 510, 534.
 St. Louis, etc., R. Co. v. Reagan, 52 Ill. App. 488—748.
 St. Louis, etc., R. Co. v. Rexroad, 59 Ark. 180—692.
 St. Louis, etc., R. Co. v. Robbins, 4 Tex. App. Civ. Cas. sec. 43—350.
 St. Louis, etc., R. Co. v. Rose, 20 Ill. App. 670—179, 211.
 St. Louis, etc., R. Co. v. Rosenberry, 45 Ark. 256—666, 680, 820.
 St. Louis, etc., R. Co. v. Smuck, 49 Ind. 302—299, 315, 721, 760.
 St. Louis, etc., R. Co. v. Spann, 57 Ark. 127—304.
 St. Louis, etc., R. Co. v. South, 43 Ill. 176—734.
 St. Louis, etc., R. Co. v. Sweet, 57 Ark. 287—652.
 St. Louis, etc., R. Co. v. Trimble, 54 Ark. 354—888, 890.
 St. Louis, etc., R. Co. v. Turner, 1 Tex. Civ. App. 625—337, 339, 531.
 St. Louis, etc., R. Co. v. Turner (Tex. Civ. App.), 77 S. W. 255—675.
 St. Louis, etc., R. Co. v. Tyler Coffin Co. (Tex. Civ. App.), 81 S. W. 826—208, 216.
 St. Louis, etc., R. Co. v. Vallrius, 56 Ind. 511—604.
 St. Louis, etc., R. Co. v. Waggoner, 90 Ill. App. 556—657.
 St. Louis, etc., R. Co. v. Weakly, 50 Ark. 397—295, 342, 458, 484, 485, 523, 532, 536, 754, 758, 760.
 St. Louis, etc., R. Co. v. White (Tex. Civ. App.), 34 S. W. 1049—583.
 St. Louis, etc., R. Co. v. Williams (Tex. Civ. App.), 32 S. W. 225, 37 S. W. 992—333, 518, 737.
 Stock Yards Co. v. Louisville, etc., R. Co., 67 Fed. Rep. 35—105.
 Stockton v. Frey, 4 Gill (Md.), 406—617, 653, 776, 788.
 Stoddard v. Long Island R. Co., 5 Sandf. (N. Y.) 180—319, 763.
 Stoddard v. St. Louis, etc., R. Co. (Mo. App.), 80 S. W. 33—675, 834.
 Stoddard v. New York, etc., R. Co., 181 Mass. 422—651.
 Stoddard v. New York, etc., R. Co., 50 Hun (N. Y.), 221—597, 609.
 Stoner v. St. Louis, etc., R. Co., 91 Mo. 509—803.
 Stokes v. Eastern Counties R. Co., 2 F. & F. 691—607.
 Stokes v. Saltonstall, 13 Peters (U. S.) 191—21, 543, 617, 652, 695, 776, 801.
 Stollwerck v. Thacher, 115 Mass. 24—165.
 Stone v. Chicago, etc., R. Co., 47 Iowa, 82—558, 735, 736.
 Stone v. Dry Dock, etc., R. Co., 115 N. Y. 104—823.
 Stone v. Detroit, etc., R. Co., 3 Int. Com. Rep. 60—920, 932.
 Stone v. Farmers L. & T. Co., 116 U. S. 308—669.
 Stone v. Rice, 58 Ala. 95—195.
 Stone v. Waitt, 31 Me. 409—147, 208.
 Stoner v. Chicago, etc., R. Co., 109 Iowa, 551—244, 369.
 Stoner v. Pennsylvania Co., 98 Ind. 384—843.
 Stoneman v. Erie R. Co., 52 N. Y. 429—707, 708.
 Storer v. Gowen, 18 Me. 177—6.
 Storey v. Hershey, 19 Pa. Super. Ct. 485—161.
 Story v. Norfolk, etc., R. Co., 133 N. C. 59—896.
 Storr v. Crowley, 1 McClel. & Y. 129—193, 201.
 Storr's v. Los Angeles Tract. Co., 134 Cal. 91—891.
 Stowe v. New York, etc., R. Co., 113 Mass. 521—261, 269, 283.
 Strahorn v. Union Stock Yard, etc., Co., 43 Ill. 424—160, 187.
 Strand v. Chicago, etc., R. Co., 67 Mich. 380—659, 829.
 Strange v. Missouri Pac. R. Co., 61 Mo. App. 586—637.
 Stratton v. Central City Horse R. Co., 95 Ill. 525—794.
 Straiton v. New York, etc., R. Co., 2 E. D. Sm. (N. Y.) 184—493.
 Straus v. Kansas City, etc., R. Co., 75 Mo. 185, 86 Mo. 421—675, 678, 850.
 Straus v. Kansas City, etc., R. Co., 72 Mo. 414—815.
 Strauss v. St. Louis Transit Co., 102 Mo. App. 644—632.
 Street v. Grand Trunk R. Co., 178 N. Y. 553—586.
 Street v. Morrison, 10 New Bruns. 296—140.
 Stricker v. Leathers, 68 Miss. 803—184.
 Strickland v. Barrett, 20 Pick. (Mass.), 415—46.
 Stringer v. Alabama R. Co., 99 Ala. 397—6, 375, 762.
 Strohn v. Detroit, etc., R. Co., 21 Wis. 564, 23 Wis. 126—25, 295, 302, 307.
 Strohm v. New York, etc., R. Co., 96 N. Y. 305—893, 894.
 Strong v. Adams, 30 Vt. 221—364.
 Strong v. Campbell, 11 Barb. (N. Y.) 135—72.
 Strong v. Long Island R. Co., 91 App. Div. (N. Y.) 442—335.
 Strong v. Natally, 1 B. & P. N. R. 16—194.
 Strouss v. Wabash, etc., R. Co., 17 Fed. 209—707, 708, 713.
 Stuart v. Crawley, 2 Stark, 323—82, 537.
 Sturgeon v. St. Louis, etc., R. Co., 68 Mo. 569—317, 399, 412, 416, 507, 515.
 Sturgess v. Bissell, 46 N. Y. 462—398.
 Stutsky v. Brooklyn Height R. Co., 88 N. Y. Supp. 358—645.
 Stutz v. Chicago, etc., R. Co., 73 Wis. 147—887, 892, 893, 895, 904.
 Sunderland v. Westcott, 40 How. Pr. (N. Y.) 468—209, 281, 756.
 Sullivan v. Bark, 33 Me. 438—446.
 Sullivan v. India Mfg. Co., 113 Mass. 396—586.
 Sullivan v. Jefferson Ave. R. Co., 133 Mo. 1—643.

TABLE OF CASES.

cxiii

(The references are to the pages.)

- Sullivan v. Kuykendall, 82 Ky. 483—79.
 Sullivan v. Metropolitan St. Ry. Co., 54 App. Div. (N. Y.) 632—904.
 Sullivan v. Old Colony R. Co., 148 Mass. 488—648.
 Sullivan v. Oregon R., etc., Co., 12 Or. 392—617, 807, 889, 900.
 Sullivan v. Philadelphia, etc., R. Co., 30 Pa. St. 234—600, 617, 689, 778, 788.
 Sullivan v. Thompson, 99 Mass. 259—194, 481.
 Sullivan v. Union Ry. Co., 81 App. Div. (N. Y.) 596—824.
 Sullivan v. Vicksburg, etc., R. Co., 39 La. Ann. 800—679.
 Sumner v. Charlotte, etc., R. Co., 78 N. C. 289—253, 371.
 Summers v. Crescent City R. Co., 34 La. Ann. 139—679, 8/1.
 Sumner v. Southern R. Assoc., 7 Baxt. (Tenn.) 346—439, 463.
 Sumner v. Walker, 30 Fed. 261—458.
 Summers v. Wabash R. Co. (Mo. App.), 79 S. W. 481—523.
 Summitt v. State, 8 Lea (Tenn.), 413—614, 622, 740.
 Susong v. Florida Cent. R. Co., 115 Ga. 361—535.
 Sutherland v. Peoria Second Nat. Bank, 75 Ky. 250—160, 187, 188, 231, 233.
 Sutro v. Fargo, 41 N. Y. Super. Ct. 231—393, 395.
 Sutton v. Chicago, etc., R. Co. (S. D.), 84 N. W. 396—368, 488.
 Sutton v. Wauwatosa, 29 Wis. 21—831.
 Swan v. Manchester, etc., R. Co., 132 Mass. 116—734.
 Swarthout v. New Jersey Steamboat Co., 48 N. Y. 209—615.
 Swetland v. Boston, etc., R. Co., 102 Mass. 276—108, 223, 247, 375, 467, 491.
 Sweetland v. Illinois, etc., Tel. Co., 27 Iowa, 458—73, 76.
 Sweet v. Barney, 23 N. Y. 335, 337—36, 152, 154, 166, 188, 209.
 Sweeney v. Colter, 22 Ky. L. Rep. 885—571.
 Sweeney v. Kansas City Cable R. Co., 150 Mo. 385—637, 864.
 Sweeney v. Railroad Co., 10 Allen (Mass.), 368—846.
 Swift v. Pacific Mail Steamship Co., 106 N. Y. 206—307, 313, 473, 491, 492.
 Swift v. Staten Island R. T. Co., 123 N. Y. 645—822, 823, 824.
 Swift v. Tyson, 16 Pet. (U. S.) 1—311.
 Swigert v. Hannibal, etc., R. Co., 75 Mo. 475—675, 837.
 Swindler v. Hilliard, 2 Rich. (S. C.) 286—66, 318, 394, 717.
 Sword v. Young, 89 Tenn. 126—158, 178, 179, 180.
 Swisher v. Williams, Wright (Ohio), 754—831.
 Switzerland and Marine Ins. Co. v. Louisville, etc., R. Co., 131 U. S. 440—706.
 Sycamore Marsh, etc., Mfg. Co. v. Sturm, 13 Neb. 211—422.
 Symonds v. Pain, 6 Hurl. & N. 709—51.
 Syracuse First Nat. Bank v. New York Cent., etc., R. Co., 85 Hun (N. Y.), 160, 163.

 T.
 Taber v. Delaware, etc., R. Co., 71 N. Y. 489, 493—652, 665, 671, 681, 847.
 Taber v. Hannibal, etc., R. Co., 93 Mo. 79—850.
 Taff v. Oregon R. Co. (Or.), 67 Pac. 1015, 68 Pac. 732—481.
 Taff Vale R. Co. v. Giles, 2 El. & Bl. 822—194, 504.
 Taillon v. Mears, 29 Mont. 161—627, 654.
 Talbott v. Merchants Despatch Co., 41 Iowa, 247—220, 309.
 Talcott v. Wabash R. Co., 159 N. Y. 461—367, 707, 709, 717, 729.
 Talcott v. Wabash R. Co., 66 Hun (N. Y.), 456—706, 728.
 Tallassee Falls Mfg. Co. v. Western Ry. of Ala. (Ala.), 29 So. 203—150, 352.
 Talley v. Great Western R. Co., L. R. 6 C. P. 44—714.
 Tanner v. Oll Creek R. Co., 53 Pa. St. 411—263, 274, 412.
 Tanner v. Buffalo Ry. Co., 72 Hun (N. Y.), 465—861, 865.
 Tanner v. Louisiana, etc., R. Co., 60 Ala. 621—618, 689.
 Tanner v. New York Cent., etc., R. Co., 108 N. Y. 623—376.
 Tanger v. South West Mo. El. Ry. Co., 85 Mo. App. 28—632.
 Tarbell v. Central Pac. R. Co., 34 Cal. 616—553, 619.
 Tarbell v. Northern Cent. R. Co., 24 Hun (N. Y.), 51—559, 741, 743.
 Tarbell v. Royal Exchange Shipping Co., 110 N. Y. 170—263, 268, 270, 274.
 Tardos v. Chicago, etc., R. Co., 35 La. Ann. 15—410, 444.
 Tardos v. Toulon, 14 La. Ann. 429—388.
 Tate v. Illinois Cent. R. Co., 26 Ky. Law Rep. 309—647.
 Tate v. Yazoo, etc., R. Co., 78 Miss. 842—134.
 Tattan v. Great Western R. Co., 2 El. & El. 844—542.
 Taylor, etc., R. Co. v. Montgomery, 4 Tex. App. Civ. Cas. sec. 238—350, 504.
 Taylor, etc., R. Co. v. Sublett (Tex. App.), 16 S. W. 182—350.
 Taylor, etc., R. Co. v. Taylor, 79 Tex. 104—803.
 Taylor v. Great Northern R. Co., L. R. 1 C. P. 385—107, 240, 250.
 Taylor v. Grand Trunk R. Co., 24 U. C. C. P. 582—159.
 Taylor v. Grand Trunk R. Co., 48 N. H. 304—597, 604, 605, 654, 898, 900, 901.
 Taylor v. Little Rock, etc., R. Co., 32 Ark. 393—287, 481.
 Taylor v. Carew Mfg. Co., 143 Mass. 470—795.
 Taylor v. Chicago, etc., R. Co., 74 Ill. 86—473.
 Taylor v. Little Rock, etc., R. Co., 32 Ark. 398, 39 Ark. 448—485, 758, 760.
 Taylor v. Liverpool, etc., Steam Co., L. R. 9 Q. B. 546—352.
 Taylor v. Maine Central R. Co., 87 Me. 299—475.
 Taylor v. Missouri Pac. R. Co., 26 Mo. App. 336—850.
 Taylor v. Monnot, 4 Duer (N. Y.), 116—704.
 Taylor v. Pennsylvania R. Co., 8 N. J. L. J. 149—288, 317.
 Taylor v. Pennsylvania Co., 50 Fed. 755—595, 614.
 Taylor v. Railroad Co., 45 Mich. 74—600.
 Taylor v. Smith, 87 App. Div. (N. Y.) 78—432, 433.
 Taylor v. Star Coal Co. (Iowa), 81 N. W. 249—831.
 Taylor v. Wells, 3 Watts. (Pa.) 65—202.
 Teague v. Southern R. Co., 45 S. C. 27—419.
 Teall v. Felton, 1 N. Y. 537—72.
 Teall v. Sears, 9 Barb. (N. Y.) 317—60, 68.

TABLE OF CASES.

(The references are to the pages.)

- Telfer v. Northern R. Co., 30 N. J. L. 188—700.
 Ten Eyck v. Harris, 47 Ill. 268—180.
 Tennery v. Pippinger, 1 Phila. (Pa.) 543—776.
 Tennessee R. Co. v. Walker, 11 Heisk. (Tenn.) 383—786.
 Tennis v. Interstate, etc., R. Co., 45 Kan. 503—812.
 Terre Haute, etc., R. Co. v. Buck, 96 Ind. 346—653, 670, 675, 847.
 Terre Haute, etc., R. Co. v. Chicago, etc., R. Co., 150 Ill. 592—46.
 Terre Haute, etc. R. Co. v. Clem, 123 Ind. 15—284.
 Terre Haute, etc., R. Co. v. Crews, 53 Ill. App. 50—114.
 Terre Haute, etc., R. Co. v. Fitzgerald, 47 Ind. 79—553, 564.
 Terre Haute Elec. R. Co. v. Kiely (Ind. App.), 72 N. E. 658—601, 603.
 Terre Haute, etc., R. Co. v. Jackson, 81 Ind. 19—632, 692.
 Terre Haute, etc., R. Co. v. Sherwood, 132 Ind. 129—315, 389, 390, 394, 524, 534, 760.
 Terre Haute, etc., R. Co. v. Vanatta, 21 Ill. 188—732, 890.
 Terry v. Flushing, etc., R. Co., 13 Hun (N. Y.), 359—558, 565, 591.
 Terry v. Gulf, etc., R. Co., 14 Tex. Civ. App. 451—409.
 Terry v. Jewett, 78 N. Y. 338—875.
 Tewes v. North German Lloyd S. S. Co., 42 Misc. Rep. (N. Y.) 148—721.
 Texarkana St. R. Co. v. Hart (Tex. Civ. App.), 26 S. W. 435—321.
 Texas & New Orleans Ry. Co. v. Crowder, 63 Tex. 502—797.
 Texas & P. Ry. Co. v. Byers Bros. (Tex. Civ. App.), 84 S. W. 1087—523.
 Texas & P. R. Co. v. Centry, 160 U. S. 353—790.
 Texas & P. Ry. Co. v. Edins (Tex. Civ. App.), 83 S. W. 253—519, 524.
 Texas & P. R. Co. v. Gardner (Tex.), 114 Fed. 186—776.
 Texas & P. R. Co. v. Hassell (Tex. Civ. App.), 58 S. W. 54—415, 456.
 Texas & P. R. Co. v. Reid (Tex. Civ. App.), 74 S. W. 99—826.
 Texas & P. Ry. Co. v. Smith & White (Tex. Civ. App.), 79 S. W. 614—498.
 Texas Cent. R. Co. v. Morris, 1 Tex. App. Civ. Cas. sec. 135—389, 525.
 Texas Cent. R. Co. v. O'Laughlin (Tex. Civ. App.), 72 S. W. 610, 84 S. W. 1104—500, 585.
 Texas, etc., R. Co. v. Adams, 78 Tex. 372—335, 482, 491.
 Texas, etc., R. Co. v. Alexander (Tex. Civ. App.), 30 S. W. 113, 1113—61, 688.
 Texas, etc., R. Co. v. Anderson (Tex. Civ. App.), 61 S. W. 424—611.
 Texas, etc., R. Co. v. Andrews (Tex. Civ. App.), 80 S. W. 390—535.
 Texas, etc., R. Co. v. Avery, 19 Tex. Civ. App. 235, 33 S. W. 704—117, 409, 906.
 Texas, etc., R. Co. v. Barber (Tex. Civ. App.), 30 S. W. 500—335.
 Texas, etc., R. Co. v. Barnhart, 5 Tex. Civ. App. 601—491.
 Texas, etc., R. Co. v. Barron, 78 Tex. 421—808.
 Texas, etc., R. Co. v. Berry (Tex. Civ. App.), 71 S. W. 326—728.
 Texas, etc., R. Co. v. Best, 66 Tex. 116—584.
 Texas, etc., R. Co. v. Bingham, 2 Tex. Civ. App. 278—606, 681.
 Texas, etc., R. Co. v. Birchfield (Tex. Civ. App.), 33 S. W. 1022—409.
 Texas, etc., R. Co. v. Black, 87 Tex. 160—563, 583.
 Texas, etc., R. Co. v. Boggs (Tex. Civ. App.), 30 S. W. 1089—242.
 Texas, etc., R. Co. v. Bond, 62 Tex. 42—733, 735.
 Texas, etc., R. Co. v. Brown, 78 Tex. 401—469, 873.
 Texas, etc., R. Co. v. Byers Bros. (Tex. Civ. App.), 73 S. W. 427—505, 535.
 Texas, etc., R. Co. v. Callender, 183 U. S. 632, 98 Fed. 538—353, 452, 480.
 Texas, etc., R. Co. v. Capps, 2 Tex. App. Civ. Cas. sec. 33—706, 707.
 Texas, etc., R. Co. v. Carlton, 60 Tex. 397—96.
 Texas, etc., R. Co. v. Cau, 120 Fed. 15, 645—304.
 Texas, etc., R. Co. v. Cauble (Tex. Civ. App.), 81 S. W. 1022—535.
 Texas, etc., R. Co. v. Clayton, 173 U. S. 348, 51 U. S. App. 676—133, 186, 266.
 Texas, etc., R. Co. v. Cole, 66 Tex. 562—887.
 Texas, etc., R. Co. v. Cook, 2 Tex. App. Civ. Cas. sec. 659—725.
 Texas, etc., R. Co. v. Cushny (Tex. Civ. App.), 64 S. W. 795—535.
 Texas, etc., R. Co. v. Cuteman (Tex. App.), 14 S. W. 1069—142.
 Texas, etc., R. Co. v. Davis, 2 Tex. App. Civ. Cas. sec. 191—318, 355, 404, 524, 531.
 Texas, etc., R. Co. v. Davidson, 3 Tex. Civ. App. 542—655.
 Texas, etc., R. Co. v. Dennis, 4 Tex. Civ. App. 90—744.
 Texas, etc., R. Co. v. Dick (Tex. Civ. App.), 63 S. W. 895—554.
 Texas, etc., R. Co. v. Dishman & Tribble (Tex. Civ. App.), 85 S. W. 319—408, 532.
 Texas, etc., R. Co. v. Edmond (Tex. Civ. App.), 29 S. W. 518—633, 636, 737.
 Texas, etc., R. Co. v. Ferguson, 1 Tex. App. Civ. Cas. sec. 1253—404, 701, 705.
 Texas, etc., R. Co. v. Fort, 1 Tex. App. Civ. Cas. sec. 122—460, 727.
 Texas, etc., R. Co. v. Garcia, 62 Tex. 285—572, 573, 582.
 Texas, etc., R. Co. v. Hamilton, 66 Tex. 92—601, 604, 606.
 Texas, etc., R. Co. v. Hamm, 2 Tex. Civ. App. Cas. sec. 430—112.
 Texas, etc., R. Co. v. Hardin, 62 Tex. 367—597.
 Texas, etc., R. Co. v. Hawkins (Tex. Civ. App.), 30 S. W. 1113—332, 482.
 Texas, etc., R. Co. v. Hayden, 6 Tex. Civ. App. 745—550.
 Texas, etc., R. Co. v. Humphries, 20 Tex. Civ. App. 28—637.
 Texas, etc., R. Co. v. Interstate Commerce Co., 162 U. S. 197—906, 910, 911, 912, 915, 918, 920, 921, 922, 923, 924, 925, 928, 932, 933.
 Texas, etc., R. Co. v. Jackson, 3 Tex. App. Civ. Cas. sec. 41—339.
 Texas, etc., R. Co. v. James, 82 Tex. 306—688.
 Texas, etc., R. Co. v. Kelly (Tex. Civ. App.), 74 S. W. 343—453.
 Texas, etc., R. Co. v. Klepper (Tex. Civ. App.), 24 S. W. 587—332, 408, 556.
 Texas, etc., R. Co. v. Lester, 75 Tex. 56—804.
 Texas, etc., R. Co. v. Levie, 59 Tex. 674—410.
 Texas, etc., R. Co. v. Logan, 3 Tex. Civ. App. Cas. secs. 185, 186—198, 409, 484.
 Texas, etc., R. Co. v. Ludlam, 57 Fed. 481—666.

TABLE OF CASES.

CXV

(The references are to the pages.)

- Texas, etc., R. Co. v. Lynch (Tex. Civ. App.), 73 S. W. 65—472, 732, 883.
 Texas, etc., R. Co. v. Lyons (Tex. Civ. App.), 50 S. W. 161—749.
 Texas, etc., R. Co. v. Mansell (Tex. Civ. App.), 23 S. W. 549—588.
 Texas, etc., R. Co. v. Mayes (Tex. App.), 15 S. W. 43—881.
 Texas, etc., R. Co. v. Martin, 2 Tex. Civ. App. Cas. sec. 341—198, 404.
 Texas, etc., R. Co. v. McCarty (Tex. Civ. App.), 69 S. W. 229—525.
 Texas, etc., R. Co. v. McDonald, 2 Tex. Civ. App. Cas. sec. 163—565, 689.
 Texas, etc., R. Co. v. McLean (Tex.), 32 S. W. 776—599.
 Texas, etc., R. Co. v. Miller, 79 Tex. 78—554, 670, 683.
 Texas, etc., R. Co. v. Morse, 1 Tex. Civ. App. Cas. sec. 411—25.
 Texas, etc., R. Co. v. Murtishaw (Tex. Civ. App.), 78 S. W. 953—405, 520.
 Texas, etc., R. Co. v. Orr, 46 Ark. 194—656, 798.
 Texas, etc., R. Co. v. Overalls, 82 Tex. 247—782, 866.
 Texas, etc., R. Co. v. Payne, 15 Tex. Civ. App. 58—396, 419.
 Texas, etc., R. Co. v. Pollard, 2 Tex. Civ. App. Cas. sec. 481—672, 880, 891, 893.
 Texas, etc., R. Co. v. Powell (Tex. Civ. App.), 73 S. W. 86—522.
 Texas, etc., R. Co. v. Pandle, 18 Tex. Civ. App. 531—535.
 Texas, etc., R. Co. v. Rea (Tex. Civ. App.) 65 S. W. 1115—882.
 Texas, etc., R. Co. v. Reiss, 183 U. S. 621, 99 Fed. 1006—185, 266, 480.
 Texas, etc., R. Co. v. Richmond (Tex. Civ. App.), 63 S. W. 619—310.
 Texas, etc., R. Co. v. Rogers (Tenn.), 3 S. W. 660—318.
 Texas, etc., R. Co. v. Scrivener, 2 Tex. Civ. App. Cas. sec. 328—403, 482.
 Texas, etc., R. Co. v. Sims (Tex. Civ. App.), 26 S. W. 624—400.
 Texas, etc., R. Co. v. Smissen (Tex. Civ. App.), 73 S. W. 42—405.
 Texas, etc., R. Co. v. Smith, 67 Fed. 524—587.
 Texas, etc., R. Co. v. Smith & White (Tex. Civ. App.), 79 S. W. 614—535.
 Texas, etc., R. Co. v. Strirling (Tex. Civ. App.), 34 S. W. 1002—506.
 Texas, etc., R. Co. v. Suggs, 62 Tex. 323—605, 772, 779.
 Texas, etc., R. Co. v. Talley, 2 Tex. App. Civ. Cas. sec. 765—424.
 Texas, etc., R. Co. v. Tankersley, 63 Tex. 57—399.
 Texas, etc., R. Co. v. Tarkington (Tex. Civ. App.), 66 S. W. 137—636.
 Texas, etc., R. Co. v. Tott, 20 Tex. Civ. App. 335—629.
 Texas, etc., R. Co. v. Wever, 3 Tex. App. Civ. Cas. sec. 60—285.
 Texas, etc., R. Co. v. Wheat, 2 Tex. Civ. App. Cas. sec. 64—142.
 Texas, etc., R. Co. v. White, 4 Tex. App. Civ. Cas. sec. 259, 451—549, 589.
 Texas Exp. Co. v. Scott, 16 Am. & Eng. R. Cas. 11—21, 25, 360.
 Texas, etc., R. Co. v. White, 101 Fed. 928—882.
 Texas, etc., R. Co. v. Williams, 62 Fed. 440—635, 636.
 Texas, etc., R. Co. v. Woods, 15 Tex. Civ. App. 612—670.
 Texas, etc., R. Co. v. Wright, 2 Tex. App. Civ. Cas. sec. 339—404.
 Texas Mexican R. Co. v. Willis, 3 Tex. App. Civ. Cas. sec. 71—718.
 Texas Mexican Ry. Co. v. Gallagher (Tex. Civ. App.), 64 S. W. 809—535.
 Texas Fac. R. Co. v. Bucklewe, 3 Tex. Civ. App. 272—655, 771, 780.
 Tex. Pac. R. Co. v. Nicholson, 61 Tex. 491—112, 116, 142, 243, 399.
 Texas Trunk R. Co. v. Johnson, 75 Tex. 158—399, 900.
 Thane v. Scranton Tract. Co., 191 Pa. 249—860.
 Thatcher v. Delaware, etc., Canal Co., 1 Int. Com. C. Rep. 152—908, 932.
 Thatcher v. Fitchburg R. Co., 1 Int. Com. Rep. 356—908.
 Thatcher v. Great Western R. Co., 4 U. C. C. P. 543—787.
 Thayer v. Burchard, 99 Mass. 508—106, 108.
 Thayer v. St. Louis, etc., R. Co., 22 Ind. 26—294, 653, 692, 753, 762.
 The Aterfoyle, 1 Blatchf. (U. S.) 360—540.
 The Accomac, 15 Prob. Div. 208—354.
 The Aline, 25 Fed. 562—350.
 The Argentina, L. R. 1 Adm. & Eccl. 370—173.
 The Augusta, 29 Fed. 334—203.
 The Bark Edwin, 1 Sprague (U. S.), 477—144.
 The Bark Gentleman, 1 Ole. Adm. 110—32.
 The Beaconsfield, 158 U. S. 303—363.
 The Bermuda, 29 Fed. 399—358.
 The Bernia, 12 Prob. Div. 58—699.
 The Bird of Paradise, 5 Wall. (U. S.) 545—443, 445.
 The Bitterne, 35 Fed. 927—378.
 The Bobolink, 6 Sawy. (U. S.) 146—187.
 The Boskenna Bay, 40 Fed. 93—274.
 The Brantford City, 29 Fed. 373—31, 311, 353, 499.
 The Brig Collenberg, 1 Black (U. S.), 170—126, 247.
 The Brig May Queen, 1 Newb. Adm. 465—292.
 The Caledonia, 43 Fed. Rep. 681—114.
 The Caledonia, 157 U. S. 124, 50 Fed. 567—413, 515.
 The Carib Prince, 63 Fed. 266—309.
 The Carlos F. Roses, 177 U. S. 655—177.
 The Carron Park, 15 Prob. Div. 203—354.
 The Chasca, 23 Fed. 356—379.
 The City of Lincoln 25 Fed. 835—265.
 The Commander-in-Chief, 1 Wall. (U. S.) 51—46.
 The Cuba, 3 Warc (U. S.) 260—126.
 The Dan (D. C. S. D. N. Y.), 40 Fed. 691—66.
 The Daniel Burns, 52 Fed. 159—48.
 The David & Caroline, 5 Blatchf. (U. S.) 266—101.
 The Davis, 10 Wall. (U. S.) 15—433.
 The Delaware, 14 Wall. (U. S.) 579—378.
 The Denmark, 27 Fed. 141—358.
 The Drew, 15 Fed. 826—157.
 The D. R. Martin, 11 Blatchf. 233—614, 622, 740.
 The Duero, 22 L. T. N. S. 37—324.
 The Eddy, 5 Wall. (U. S.) 481—195, 435, 436, 441, 443.
 The Emilien Marie, 32 L. T. N. S. 435—173.
 The Duripides, 52 Fed. 161—379.
 The Ferryboat S. S. Gregory, 2 Ben. (U. S.) 226—409, 881.
 The Freeman, 18 How. (U. S.) 182—174.
 The Gazelle, 128 U. S. 474—187.
 The Gentleman, 1 Blatchf. (U. S.) 196—32.
 The Glamorganshire, 50 Fed. 840—378.
 The Gold Hunter, 1 B. & H. Adm. 300—405.

TABLE OF CASES.

(The references are to the pages.)

- The Grafton, 1 Blatchf. (U. S.) 173—192.
 The Guiding Star, 33 Fed. 936—339.
 The Guildhall, 58 Fed. 796—282, 296, 311,
 314.
 The Harriman, 9 Wall. (U. S.) 161—243.
 The Hattie Palmer, 63 Fed. 1015—217.
 The Hugo, 57 Fed. 403, 61 Fed. 360—311,
 319, 407.
 The Humboldt, 97 Fed. 656—713.
 The Huntress, 12 Fed. Cas. No. 6, 914—38.
 The Huntress, Davies (U. S.), 82—381.
 The Idaho, 93 U. S. 575—156, 229 363.
 The Invincible, 1 Lowell (U. S.) 225—279.
 The Ionic, 5 Blatchf. (U. S.) 538—356, 702,
 703, 708.
 The Isaac Reed, 82 Fed. 566—396.
 The Iowa, 50 Fed. 561—314, 759.
 The Jefferson, 31 Fed. 489—393.
 The J. P. Donaldson, 167 U. S. 603—50.
 The Julia, 14 Moore P. C. 210—51.
 The Kensington, 88 Fed. 331—396.
 The Kimbal, 3 Wall. (U. S.) 37—443, 445.
 The Lady Franklin, 8 Wall. (U. S.) 325—
 143, 174.
 The Lady Pike, 21 Wall. (U. S.) 14—65.
 The L. P. Dayton, 120 U. S. 337—50.
 The Lydia Monarch, 23 Fed. 298—350.
 The Lyon, 1 Brown's Adm. (U. S.) 59—50.
 The Maggie Hammond, 9 Wall. (U. S.)
 435—65, 236.
 The Maggie M., 30 Fed. 692—378.
 The Majestic, 56 Fed. 244—352, 717.
 The Majestic, 60 Fed. 624—718, 754, 756, 758.
 The Mangalore, 9 Sawy. (U. S.) 71—408.
 The Margaret, 94 U. S. 494—50.
 The Martha, 35 Fei. 313—187.
 The Mary Ann Guest, 1 Blatchf. (U. S.)
 358—230.
 The Mary Washington, 1 Abb. (U. S.) 125
 —265, 274.
 The Merrimac, 2 Sawy. (U. S.) 586—50.
 The Minnehaha, 1 Lush. 335—51.
 The Mill Boy, 4 McCrary (U. S.), 383—
 196.
 The M. M. Chase, 37 Fed. 708—229, 230.
 The Neafie, 1 Abb. U. S. Rep. 465—18, 50.
 The New England, 110 Fed. 415—718.
 The New Orleans, 26 Fed. 44—393.
 The New World v. King, 16 How. (U. S.)
 469—554.
 The Niagara v. Cordes, 21 How. (U. S.)
 7—65, 66.
 The Nith, 36 Fed. 86—405.
 The Normannia (D. C. S. D. N. Y.), 62
 Fed. 469—650.
 The Nutmeg State, 103 Fed. 797—289.
 Theobald v. Railway Pass. Assur. Co., 10
 Exch. 45—556.
 The Oconto, 5 Biss. (U. S.) 460—50.
 The Olympia, 61 Fed. 120—509.
 The Oregon, Deady (U. S.), 179—144.
 The Oriflamme, 3 Sawy. (U. S.) 397—652,
 692, 891, 893, 902.
 The Pacific, Deady (U. S.), 17—292, 540.
 The Portuence, 33 Fed. 670—379.
 The Princeton, 3 Blatchf. (U. S.) 54—50.
 The Priscilla, 106 Fed. 739—727.
 The Propeller Burlington, 137 U. S. 386—
 50.
 The Propeller Commerce, 1 Black (U. S.),
 582—66.
 The Propeller Mohawk, 8 Wall. (U. S.)
 153—209.
 The Propeller Niagara v. Cordes, 21 How.
 (U. S.) 7, 22—19, 22, 32.
 The Quickstep, 9 Wall. (U. S.) 665—50.
 The R. E. Lee, 2 Abb. (U. S.) 50—715.
 The Reliance, 4 Woods (U. S.), 420—781.
 The Samuel E. Spring, 29 Fed. 397—388.
 The Saratoga, 20 Fed. 869—759.
 The Saugerties, 44 Fed. 625—174.
 The Schooner Anne, 1 Mason (U. S.), 512
 —438.
 The Schooner Volunteer, 1 Sumn. (U. S.)
 551—445.
 The Severne, 113 Fed. 578—610.
 The Siren, 7 Wall. (U. S.) 152—433.
 The St. Hubert, 102 Fed. 362—340.
 The Steamboat Angelina Corning, 1 Ben.
 (U. S.) 109—50.
 The Steamboat F. X. Aubury, 28 Ill. 412
 —627.
 The Steamboat Lynx v. King, 12 Mo. 272
 —32.
 The Steamboat New World v. King, 16
 How. (U. S.) 474, 469—6, 569, 781.
 The Steamboat Sultana v. Chapman, 5
 Wis. 454—154, 319.
 The Steamer New Philadelphia, 1 Black,
 (U. S.), 62—50, 695.
 The Steamer Webb, 14 Wall. (U. S.) 406
 —50.
 The Steamship American, 8 Ben. (U. S.)
 491—32.
 The Stranger, 1 Brown's Adm. (U. S.)
 281—30.
 The Strathairly, 124 U. S. 558—624.
 The Success, 7 Blatchf. (U. S.) 551—126.
 The Sue, 22 Fed. 843—623.
 The Thames, 14 Wall. (U. S.) 98—163, 187.
 The Thomas Newton, 41 Fed. 106—222.
 The Titania, 124 Fed. 975, 131 Fed. 229—
 147, 209.
 The Vaughan, 14 Wall. (U. S.) 258—411.
 The Warren Adams, 38 U. S. App. 336—769.
 The Wasco, 53 Fed. 546—548, 549, 552, 553.
 The Washington, 9 Wall. (U. S.) 513—893.
 The William Crane, 50 Fed. 444—373.
 The Zenobia, 1 Abb. Adm. 48—546, 884.
 Thirteenth, etc., St. Pass. R. Co. v.
 Boudrou, 92 Pa. St. 475—814, 858, 861.
 Thomas, etc., Mfg. Co. v. Wabash, etc.,
 R. Co., 62 Wis. 642—198, 405, 409, 425.
 Thomas v. Boston, etc., R. Corp., 10 Metc.
 (Mass.) 478—37, 149, 261, 485, 752.
 Thomas v. Charlotte, etc., R. Co., 38 S.
 C. 485—686.
 Thomas v. Chicago, etc., R. Co., 72
 Mich. 355—583, 746, 747.
 Thomas v. Citizens Pass. Ry. Co., 132
 Pa. St. 504—783.
 Thomas v. Day, 4 Esp. N. P. 262—144.
 Thomas v. Frankfort, etc., R. Co., 25 Ky.
 L. Rep. 1051—428 429, 438, 459.
 Thomas v. Great Western R. Co., 14 U.
 C. Q. B. 389—702.
 Thomas v. Lancaster Mills, 19 C. C. A.
 88, 71 Fed. 481—94, 225, 248, 283, 314, 351.
 Thomas v. Northern Pac. Exp. Co., 73
 Minn. 185—156, 214.
 Thomas v. North Staffordshire R. Co., 3
 Ry. & C. T. Cas. 1—92, 99, 184.
 Thomas v. Pacific Express Co., 30 Mo.
 App. 86—181.
 Thomas v. Philadelphia, etc., R. Co., 148
 Pa. 180—770, 772.
 Thomas v. Southern R. Co., 122 N. C.
 1005—668.
 Thomas v. Wabash, etc., R. Co., 63 Fed.
 Rep. 200—94, 106, 283, 305, 309.
 Thomas v. Winchester, 6 N. Y. 397—334.
 Thompson v. Belfast, etc., R. Co., 5 Ir.
 R. C. L. 517—683.
 Thompson v. Duncan, 76 Ala. 334—798, 866.
 Thompson v. Fargo, 49 N. Y. 188—188.
 Thompson v. Hamilton, 12 Pick. (Mass.)
 425—66.
 Thompson-Houston Elec. Co. v. Simon, 20
 Or. 60—21, 37, 39, 44, 45.
 Thompson v. Manhattan R. Co., 75 Hun
 (N. Y.), 548—648.

TABLE OF CASES.

cxvii

(The references are to the pages.)

- Thompson v. Midland R. Co., 122 Ala. 378
—244, 415.
- Thompson v. New Orleans, etc., R. Co.,
60 Miss. 315—672, 627.
- Thompson v. Smal., 1 C. B. 328—187.
- Thompson v. Trail, 2 C. & P. 334—160.
- Thompson v. Western Union Tel. Co., 64
Wis. 531—77.
- Thompson v. Yazoo, etc., R. Co., 47 La.
Ann. 1107—550, 570.
- Thompson v. Yazoo, etc., R. Co., 72 Miss.
715—748.
- Thorpe v. Deas, 4 Johns. (N. Y.) 84—6.
- Thorogood v. Bryan, 8 C. B. 131—699.
- Thorpe v. Concord R. Co., 61 Vt. 378—574.
- Thorpe v. Hammond, 12 Wall. (U. S.) 408
—754.
- Thorpe v. New York Cent., etc., R. Co.,
76 N. Y. 402—60, 541, 631, 696.
- Three Hundred, etc., Tons of Coal, 14
Blatchf. (U. S.) 453—94.
- Thurber v. Harlem Bridge, etc., R. Co.,
60 N. Y. 326—822, 823, 867.
- Thurber v. New York Cent., etc., R. Co.,
3 Int. Com. Rep. 742—912, 919.
- Thurman v. Well, 18 Barb. (N. Y.) 500
—27.
- Thurston v. Union Pac. R. Co., 4 Dill.
(U. S.) 321—620, 621, 739.
- Thweatt v. Houston, etc., R. Co. (Tex.
Civ. App.), 71 S. W. 976—646.
- Thyll v. New York, etc., R. Co., 92 App.
Div. (N. Y.) 513—321, 386, 480, 487, 489.
- Tibbitts v. Rock Island, etc., R. Co., 49
Ill. App. 567—354.
- Tibbe v. Cleveland, etc., R. Co., 20 Ind.
App. 192—153.
- Tibby v. Missouri Pac. R. Co., 82 Mo.
292—571, 572, 758.
- Tierney v. New York Cent., etc., R. Co.,
76 N. Y. 305—101, 107, 223, 246, 247, 275.
- Tiffany v. St. John 65 N. Y. 314—444.
- Tift v. Southern R. Co., 123 Fed. 789—
119, 911, 939.
- Tillery v. Bond, 38 Fed. 825—688.
- Tilley v. Cook County, 103 U. S. 155—110.
- Tillman v. St. Louis Transit Co., 102 Mo.
App. 553—654.
- Timpson v. Manhattan R. Co., 52 Hun
(N. Y.), 483—554, 613, 805.
- Timmons v. Old Co'ny St. Ry. Co. (Mass.),
1 St. Ry. Rep. 301—683.
- Tindall v. Taylor, 4 El. & Bl. 219—435.
- Tinney v. New Jersey Steamboat Co., 5
Lans. (N. Y.) 507—904.
- Tirell v. Gage, t Allen (Mass.), 251—243.
- Toledo, etc., R. Co. v. Ambach, 10 Ohio
C. C. 490—709, 713.
- Toledo, etc., R. Co. v. Apperson, 49 Ill.
480—597, 605.
- Toledo, etc., R. Co. v. Baddeley, 54 Ill.
19—575, 677, 683, 892, 893.
- Toledo, etc., R. Co. v. Berry, 31 Ind. App.
556—513.
- Toledo, etc., R. Co. v. Beggs, 85 Ill. 80—
568, F70, 571, 601, 607, 753, 764, 766, 781, 787.
- Toledo, etc., R. Co. v. Brooks, 81 Ill. 245
—551, 560, 561, 570, 584.
- Toledo etc., R. Co. v. Conroy, 68 Ill. 560
—596.
- Toledo, etc., R. Co. v. Durkin, 76 Ill.
395—533.
- Toledo, etc., R. Co. v. Elliott, 76 Ill. 67—
371.
- Toledo, etc., R. Co. v. Gilvin, 81 Ill. 511
—141.
- Toledo, etc., R. Co. v. Grable, 88 Ill. 441
—822.
- Toledo, etc., R. Co. v. Hamilton, 76 Ill.
393—504, 507.
- Toledo, etc., R. Co. v. Hammond, 33 Ind.
379—701, 702, 704, 725.
- Toledo, etc., R. Co. v. Kid, 29 Ill. App.
353—588.
- Toledo, etc., R. Co. v. Kickler, 51 Ill. 157
—402.
- Toledo, etc., R. Co. v. Levy, 127 Ind. 168
—302.
- Toledo, etc., R. Co. v. Lockhart, 71 Ill.
627—123, 463.
- Toledo, etc., Co. v. McDonough, 53 Md.
289—744, 889.
- Toledo, etc., R. Co. v. Merriman, 52 Ill.
123—474.
- Toledo, etc., R. Co. v. Patterson, 63 Ill.
304—747, 750, 890.
- Toledo, etc., R. Co. v. Pennsylvania Co.,
54 Fed. 730—453.
- Toledo, etc., R. Co. v. Roberts, 71 Ill.
540—110, 417.
- Toledo, etc., R. Co. v. Tapp, 6 Ind. App.
304—713, 722.
- Toledo, etc., R. Co., v. Thompson, 71 Ill.
434—504, 507, 511.
- Toledo, etc., R. Co. v. Wingate (Ind.),
37 N. E. 274—850, 851.
- Toledo, etc., R. Co. v. Wright, 68 Ind.
586—659, 732, 749, 750.
- Toledo Produce Exch. v. Lake Shore, etc.
R. Co. 3 Int. Cm. Rep. 830—922.
- Tobin v. Omnibus Cable Co., (Cal.), 34
Pac. 124—815.
- Todd v. Old Colony etc., R. Co., 3 Allen
(Mass.), 18, 21—569, 570, 571, 782, 860.
- Todd v. Old Colony, etc., R. Co., 7 Allen
(Mass.), 207—569, 870.
- Tolano v. National Steam Nav. Co., 5
Robt. (N. Y.) 318—713.
- Tolman v. Abbot, 78 Wis. 192—463, 482.
- Tolman v. Syracuse, etc., R. Co., 98 N.
Y. 198—796.
- Tomlinson v. Wilmington, etc., R. Co.,
107 N. C. 327—577.
- Tompkins v. Clay St. R. Co., 66 Cal. 163
—698.
- Tompkins v. Saltmarsh, 14 S. & R. (Pa.)
275—5, 10.
- Tooker v. Gorman, 2 Hilt. (N. Y.) 71—88,
199, 201.
- Toomey v. Delaware, etc., R. Co., 2 Misc.
Rep. (N. Y.) 82—63s.
- Topeka City R. Co. v. Higgs, 38 Kan.
375, 389—44, 617, 655, 660, 859, 862, 864.
- Topliff v. Lake Shore, etc., R. Co., 7 Ohio
N. P. 297—431.
- Topy v. United Rys. & Elec. Co., 99 Md.
630—353.
- Torpey v. Grand Trunk R. Co., 20 U. C.
Q. B. 446—544.
- Torpey v. William, 3 Daly (N. Y.), 162—
703, 704, 724, 728.
- Torrey v. Boston, etc., R. Co., 147 Mass.
412—856, 860.
- Tousev v. Roberts, 114 N. Y. 312—83.
- Tower v. Utica, etc., R. Co., 7 Hill (N.
Y.), 47—714.
- Town of South Ottawa v. Perkins, 94 U.
S. 260—266.
- Townsend v. Binghamton R. Co., 57 App.
Div. (N. Y.) 234—F42, 858.
- Townsend v. New York Cent., etc., Co.,
56 N. Y. 295—743.
- Township of Elmwood v. Marcy, 92 U. S.
289—366.
- Tozer v. United States, 52 Fed. 917—925,
933.

TABLE OF CASES.

(The references are to the pages.)

- Trabing v. California Nav., etc., Co., 121 Cal. 137-641.
 Trace v. Pennsylvania R. Co., 26 Pa. Super. Ct. 466-498, 53.
 Tracy v. New York, etc., R. Co., 9 Bosw. (N. Y.) 396-589.
 Tracy v. Pullman Palace Car Co., 67 How. Pr. (N. Y.) 154-56, 58.
 Tracy v. Troy, etc. R. Co. 38 N. Y. 433-600.
 Tracy v. Wood, 3 Mason (U. S.), 132-5.
 Trammell v. Clyde Steamship Co., 4 Int. Com. Rep. 120, 5 Int. Com. C. Rep. 324-910, 933.
 Transportation Lire v. Hope, 95 U. S. 297-50.
 Travers v. Kansas Pac. R. Co., 63 Mo. 421-327, 749.
 Treadwell v. Whittier, 80 Cal. 574-85, 603, 609, 652.
 Treat v. Boston, etc., R. Co., 131 Mass. 371-387.
 Trelevan v. Northern Pac. R. Co., 89 Wis. 598-384.
 Trent v. Cartersville Bridge Co., 11 Leigh (Va.), 544-53.
 Trevor v. U. & S R. Co., 7 Hill (N. Y.), 47-132.
 Trice v. Chesapeake, etc., R. Co., 40 W. Va. 271-745.
 Trice v. Railroad Co., 49 Mo. 438-600.
 Trigg v. St. Louis, etc., R. Co., 74 Mo. 147-588, 880, 881, 888, 887, 895.
 Trimble v. New York Cent., etc., R. Co., 162 N. Y. 84-367, 389, 707, 716, 722.
 Trinity Val. R. Co. v. Stewart (Tex. Civ. App.), 62 S. W. 185-544.
 Troilan v. New York Cent., etc., R. Co., 31 App. Div. (N. Y.) 320-767.
 Trottlinger v. East Tennessee, etc., R. Co., 11 Lea (Tenn.), 553-551, 591, 669.
 Trottler v. Red River Transp. Co., T. Wood (Manitoba), 255-437.
 Trowbridge v. Chapin, 23 Conn. 595-138, 139.
 Troy v. Vermont, etc., R. Co., 24 U. S. 487-874.
 Truax v. Erie R. Co. 4 Lans. (N. Y.) 198-539, 697.
 Truax v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 233-31, 33, 106, 108, 110, 133, 137, 139, 186, 249, 250, 314, 380, 458.
 True v. International Tel. Co., 60 Me. 9-76.
 Trumbull v. Erickson, 97 Fed. (Colo.) 891-829, 866.
 Tucker v. Buffalo Ry. Co., 53 App. Div. (N. Y.) 571-871.
 Tucker v. Housatonic R. Co., 39 Conn. 447-217.
 Tucker v. New York Cent., etc., R. Co., 124 N. Y. 308-823.
 Tucker v. Pacific R. Co., 50 Mo. 385-515.
 Tucker v. Pennsylvania R. Co., 11 Misc. Rep. (N. Y.) 366-115, 223.
 Tuckerman v. Brown, 17 Barb. (N. Y.) 191-65, 66.
 Tugle v. St. Louis, etc., R. Co., 62 Mo. 425-335.
 Tuley v. Chicago, etc., R. Co., 41 Mo. App. 432-782, 854.
 Tunney v. Midland R. Co., L. R. 1 C. P. 291-586.
 Tuller v. Talbot, 23 Ill. 357-617.
 Turner v. London, etc., R. Co., L. R. 17 Eq. 561-667.
 Turner v. North Carolina R. Co., 63 N. C. 522-832.
 Turner v. St. Louis, etc., R. Co., 20 Mo. App. 632-367.
 Turney v. Wilson, 7 Verg. (Tenn.) 340-22, 25, 63, 388.
 Turnpike Co. v. Philadelphia, etc., R. Co., 54 Pa. St. 345-
 Turrentine v. Wilmington, etc., R. Co., 100 N. C. 375-262, 382.
 Tuthill v. Long Island R. Co., 81 Hun (N. Y.), 616-893.
 Tuttle v. Chicago, etc., R. Co., 48 Iowa 236-778.
 Twomley v. Central Park, etc., R. Co., 69 N. Y. 158-812, 819.
 Tyler v. Western Union Tel. Co., 60 Ill. 421-73, 77.
 Tyler v. Texas, etc., R. Co. (Tex. Civ. App.), 79 S. W. 94-654.
 Tyndale v. Taylor 4 El. & Bl. 219-169.
- U.
- Udell v. Illinois Cent. R. Co., 13 Mo. App. 254-115, 376.
 Uggla v. West End St. R. Co., 160 Mass. 351-784.
 Ullman v. Chicago, etc., R. Co., 112 Wis. 168-289, 303, 306, 313, 346.
 Ulrich v. New York Cent., etc., R. Co., 108 N. Y. 80-60, 752, 766.
 Unger v. Forty-second St. R. Co., 51 N. Y. 497-595, 613, 656.
 Union Express Co. v. Graham, 26 Ohio St. 595-100, 317, 351, 394, 396.
 Union Express Co. v. Obleman, 92 Pa. St. 323-262.
 Union Express Co. v. Shoop, 85 Pa. St. 325-427.
 Union Ins. Co. v. Smith, 174 U. S. 424-810.
 Union Mut. int. Co. v. Indianapolis, etc., R. Co., 1 Disney (Ohio), 480-293, 394.
 Union Packet Co. v. Clough, 20 Wall. (U. S.) 528-533.
 Union Pac. R. Co. v. Evans, 52 Neb. 50-874.
 Union Pac. R. Co. v. Hall, 91 U. S. 343-97.
 Union Pac. R. Co. v. Hand, 7 Kan. 380-597, 503, 904.
 Union Pac. R. Co. v. Harwood, 31 Kan. 388-601.
 Union Pac. R. Co. v. Hause, 1 Wy. 27-880, 899, 900.
 Union Pac. R. Co. v. Hepner, 3 Colo. App. 313-145, 386.
 Union Pac. R. Co. v. Johnston, 45 Neb. 57-162.
 Union Pac. R. Co. v. Marston, 30 Neb. 241-297.
 Union Pac. R. Co. v. Mitchell, 56 Kan. 324-748.
 Union Pac. R. Co. v. Moyer, 40 Kan. 184-272.
 Union Pac. R. Co. v. Nichols, 8 Kans. 505-549, 580.
 Union Pac. R. Co. v. Rainey (Colo.), 19 Col. 225-38, 242, 314, 499, 503, 510.
 Union Pac. R. Co. v. Roeser (Neb.), 95 N. W. 68-870.
 Union Pac. R. Co. v. Sue, 25 Neb. 772-674.
 Union Pac. R. Co. v. United States, 2 Wy. 170-433.
 Union Pac. R. Co. v. United States, 117 U. S. 355-920.
 Union Pac. R. Co. v. Williams, 3 Colo. App. 52-401.
 Union R., etc., Co. v. Riegel, 73 Pa. St. 72-200, 301.
 Union R., etc., Co. v. Shacklett, 19 Ill. App. 145-572

TABLE OF CASES.

cxix

(The references are to the pages.)

- Union R., etc., Co. v. Traube, 59 Mo. 355—389.
 Union Steamboat Co. v. Knapp, 73 Ill. 506—515.
 Union Stock Yards Co. v. Westcott, 47 Neb. 300—171.
 United Ry., etc., Co. v. State (Md.), 49 Atl. 925—643.
 United Rys., etc., R. Co. v. Beidelman (Md.) 52 Atl. 913—75.
 United Rys. & Elec. Co. v. Hertel (Md.), 55 Atl. 428—592.
 United Rys. & Electric Co. v. Woodbridge (Md.), 55 Atl. 444—629.
 United States v. ArCyston Pipe & Steel Co., 85 Fed. 271—935.
 United States v. Boston, etc., R. Co., 15 Fed. 209—508.
 United States v. Chicago, etc., R. Co., 127 Fed. 785—922.
 United States v. Delaware, etc., R. Co., 40 Fed. 101—515, 917, 922, 927, 929.
 United States v. East Tennessee, etc., R. Co., 13 Fed. 642—509.
 United States v. Egan, 47 Fed. 112—915.
 United States Express Co. v. Backman, 28 Ohio St. 141—21, 36, 345, 394, 395, 396, 759, 761.
 United States Exp. Co. v. Burke, 94 Ill. App. 29—323.
 United States Express Co. v. Council, 84 Ill. App. 19—315.
 United States Express Co. v. Haines, 67 Ill. 187—297, 462, 481.
 United States Express Co. v. Harris, 51 Ind. 129, 127—334, 486.
 United States Express Co. v. Joyce (Ind. App.), 69 N. E. 396, 72 N. E. 865—529, 532.
 United States Express Co. v. Keefer, 59 Ind. 283—200.
 United States Exp. Co. v. Koerner, 65 Minn. 540—366, 357, 470.
 United States Express Co. v. Kountze, 8 Wall. (U. S.) 342—455.
 United States Express Co. v. Rush, 24 Ind. 433—159, 481.
 United States Mail Line Co. v. Mfg. Co., 101 Ky. 658—461.
 United States Tel. Co. v. Gildersleeve, 29 Md. 232—78.
 United States v. Howell, 56 Fed. 21—935, 936.
 United States v. Joint Traffic Assoc., 171 U. S. 505—905, 935.
 United States v. Louisville, etc., R. Co., 18 Fed. 480—509.
 United States v. Michigan Cent. R. Co., 43 Fed. 26—336.
 United States v. Michigan Cent. R. Co., 122 Fed. 544—939.
 United States v. Mellon, 53 Fed. 229—933, 936.
 United States v. Missouri Pac. R. Co., 65 Fed. 905—906.
 United States v. McRasman, 42 Fed. 448—909, 911.
 United States v. Norfolk, etc., R. Co., 109 Fed. 831—927.
 United States v. Power, 6 Mont. 271—12, 14, 82.
 United States v. Tozer, 2 Int. Com. Rep. 597—919.
 United States v. Tozer, 39 Fed. 369—917, 920, 924.
 United States v. Trans-Missouri Freight Assoc. 166 U. S. 290—935.
 United States v. West Virginia Northern R. Co., 125 Fed. 252—927.
 United States v. Wilder, 3 Sumn. (U. S.) 308—433.
 Upham v. Detroit Citizens R. Co., 85 Mich. 12—857.
 Uptridge v. Central R. Co., 16 Misc. Rep. (N. Y.) 14—140, 470.
 Uransky v. Dry Dock, etc., R. Co., 44 Hun (N. Y.), 119—808.
- V.
- Vail v. Broadway R. Co., 147 N. Y. 377—865.
 Vail v. Pacific R. Co., 63 Mo. 230—30, 222.
 Valentine v. Middlesex R. Co., 137 Mass. 28—599.
 Valle v. Cerre, 36 Mo. 576—178.
 Van Akin v. Erie R. Co., 92 App. Div. (N. Y.) 23—395.
 Vanatta v. Central R. Co., 154 Pa. St. 262—489.
 Van Bokkelin v. Ingersoll, 5 Wend. (N. Y.) 315—127, 441.
 Van Buskirk v. Purington, 2 Hall. (N. Y.) 561—434.
 Van Buskirk v. Roberts, 31 N. Y. 661, 663—243, 690, 806.
 Vandegrift v. West Jersey & S. R. Co. (71 N. J. L.), 60 Atl. 184—549.
 Vanderbilt v. Richmond Turnp. Co., 2 N. Y. 479—640.
 Vanderbilt v. Schreyer, 91 N. Y. 392—767.
 Van Dusan v. Railway Co., 97 Mich. 439—743.
 Van Gilder v. Chicago, etc., R. Co., 44 Iowa 548—723.
 Van Horn v. Kermit, 4 E. D. Sm. (N. Y.) 453—703, 705, 712, 725.
 Van Horn v. Taylor, 2 La. Ann. 587—24, 381, 382.
 Van Kirk v. Pennsylvania R. Co., 76 Pa. St. 66—559.
 Van Natta v. Mutual Security Ins. Co., 2 Sandf. (N. Y.) 490—373.
 Van Ostran v. New York Cent., etc., R. Co., 35 Hun (N. Y.), 590—613, 670, 814, 815.
 Van Santvoord v. St. John, 6 Hill (N. Y.), 157—21, 186, 194, 458, 474, 488, 729.
 Van Schaack v. Northern Transp. Co., 3 Biss. (U. S.) 394—312, 393.
 Van Toll v. South Eastern R. Co., 12 C. B. N. S. 75—278.
 Van Winkle v. Adams Express Co., 3 Rob. (N. Y.) 59—281, 359.
 Van Winkle v. South Carolina R. Co., 33 Ga. 32—392.
 Van Winkle v. U. S. Mail Steamship Co., 37 Barb. (N. Y.) 122—229.
 Varble v. Bigley, 14 Bush. (Ky.) 698—51.
 Vaughan v. Providence, etc., R. Co., 13 R. I. 578—434, 437, 438, 458.
 Vaughan v. Watt, 6 M. & W. 492—214.
 Vaughn v. New York, etc., R. Co. (R. I.), 61 Atl. 695—147.
 Vaughn v. Wabash R. Co., 62 Mo. App. 461—316.
 Vedder v. Fellows, 20 N. Y. 126—588, 711.
 Vermont, etc., R. Co. v. Fitchburg R. Co., 14 Allen (Mass.), 462—45, 95.
 Verner v. Sweitzer, 32 Pa. St. 208—18, 35, 89, 293, 539, 755.
 Verrall v. Robinson, 5 Tyr. 1069—229.
 Vick v. New York Cent., etc., R. Co., 95 N. Y. 267—586.
 Vickers v. Atlanta, etc., R. Co., 64 Ga. 306—786.
 Vicksburg, etc., R. Co. v. O'Brien, 119 U. S. 99—810, 811.
 Vicksburg, etc., R. Co. v. Patton, 31 Miss. 156—801.

TABLE OF CASES.

(The references are to the pages.)

- Vicksburg, etc., R. Co. v. Phillips, 64 Miss. 693—770, 786.
 Vicksburg, etc., R. Co. v. Putnam, 118 U. S. 545—597, 803, 804.
 Vicksburg, etc., R. Co. v. Ragsdale, 46 Miss. 458—106, 240, 251, 253, 399, 412, 422, 423, 425, 426, 477.
 Vicksburg, etc., R. Co. v. Scanlan, 63 Miss. 413—896, 898.
 Village of Carterville v. Cook, 129 Ill. 159—41.
 Vimont v. Chicago, etc., R. Co., 71 Iowa, 58—852.
 Vincent v. Chicago, etc., R. Co., 49 Ill. 33—189, 190, 262, 281.
 Vineberg v. Grand Trunk R. Co., 13 Ont. App. 93—724, 725.
 Viner v. New York, etc., Steamship Co., 50 N. Y. 25—153, 180, 282.
 Vinton v. Baldwin, 95 Ind. 433—445.
 Vinton v. Middlesex R. Co., 11 Allen (Mass.), 304—621, 648, 737, 739.
 Violett v. Stettinius, 5 Cranch. (C. C.) 559—187.
 Virginia Cent. R. Co. v. Sanger, 15 Gratt. (Va.) 250, 290—596, 599.
 Virginia Coal & Iron Co. v. Louisville, etc., R. Co., 98 Va. 776—128.
 Virginia, etc., R. Co. v. Sayers, 26 Gratt. (Va.) 328—318, 328, 510, 530, 754.
 Virginia Midland, etc., R. Co. v. Roach, 83 Va. 375—576, 816, 855.
 Voak v. Northern Cent. R. Co., 75 N. Y. 320—818.
 Volkmar v. Manhattan R. Co., 134 N. Y. 418—605, 773.
 Voorhees v. Chicago, etc., R. Co., 71 Iowa, 734—369, 402.
 Voorhees v. Kings County El. R. Co., 3 Misc. Rep. (N. Y.) 18—871.
 Vorinus v. Tennessee, etc., R. Co., 97 Ala. 326—548.
 Voss v. Wagner Palace Car Co., 16 Ind. App. 271—57.
 Vrooman v. Houston, etc., R. Co., 7 Misc. Rep. (N. Y.) 234—865.
- W.
- Wabash, etc., R. Co. v. Black, 11 Ill. App. 465—498.
 Wabash R. Co. v. Brown, 51 Ill. App. 656—529.
 Wabash, etc., R. Co. v. Brown, 152 Ill. 484—322, 335.
 Wabash R. Co. v. Harris, 55 Ill. App. 159—302, 462, 472, 481, 483.
 Wabash, etc., R. Co. v. Jaggerman, 115 Ill. 407—462, 481, 762.
 Wabash R. Co. v. Kingsley, 177 Ill. 558—748.
 Wabash, etc., R. Co. v. Lynch, 12 Ill. App. 365—401, 410, 422, 424.
 Wabash, etc., R. Co. v. McCasland, 11 Ill. App. 491—239, 515.
 Wabash R. Co. v. Pearce, 192 U. S. 179—429.
 Wabash, etc., R. Co. v. Peyton, 106 Ill. 354, 534—287, 322.
 Wabash, etc., R. Co. v. Pratt, 15 Ill. App. 177—506.
 Wabash, etc., R. Co. v. Rector, 104 Ill. 296—545, 548, 628, 666, 675.
 Wabash R. Co. v. Savage, 110 Ind. 156—627, 638.
 Wabash, etc., R. Co. v. Shacklet, 105 Ill. 364—698.
 Wade v. Hamilton, 30 Ga. 450—159.
 Wade v. Leroy, 20 How. (U. S.) 34—903.
 Wade v. Lutcher, etc., Cypress Lumber Co., 74 Fed. 517—73.
 Wade v. Missouri Pac. R. Co., 78 Mo. 362—405.
 Wade v. Wheeler, 3 Lans. (N. Y.) 201, 47 N. Y. 658—68, 70, 131, 259.
 Wadsworth v. Boston El. R. Co., 60 N. E. 421—772.
 Wagner v. Brooklyn H. R. Co., 95 App. Div. (N. Y.) 219—595, 672, 842.
 Wagner v. Brooklyn Heights R. Co., 174 N. Y. 520—571.
 Wagner v. Missouri Pac. R. Co., 97 Mo. 512—563, 575, 625.
 Wahl v. Holt, 26 Wis. 703—474, 478.
 Wait v. Gilbert, 10 Cush. (Mass.) 177—419.
 Wait v. Omaha, etc., R. Co., 165 Mo. 612—661.
 Waite v. Albany, etc., R. Co., 5 Lans. (N. Y.) 475—473.
 Waite v. New York Cent., etc., R. Co., 110 N. Y. 635—94, 238, 241, 456.
 Wakefield v. South Boston R. Co., 117 Mass. 544—566.
 Wald v. Louisville, etc., R. Co., 92 Ky. 645—264, 282, 724, 725, 726.
 Wald v. Pittsburg, etc., R. Co., 60 Ill. App. 460, 162 Ill. 545—309, 611.
 Waldele v. New York Cent. etc., R. Co., 95 N. Y. 274—807, 809.
 Waldron v. Canadian Pac. R. Co., 22 Wash. 253—371.
 Waldron v. Chicago, etc., R. Co., 1 Dak. 336—139, 154, 179, 619, 708, 709, 726.
 Walker v. Cassaway, 4 La. Ann. 19—435.
 Walker v. Chicago, etc., R. Co., 71 Iowa, 658, 30 Am. & Eng. R. Cas. 173—379.
 Walker v. Detroit, etc., R. Co., 49 Mich. 446—230, 232.
 Walker v. Erie R. Co., 63 Barb. (N. Y.) 260, 360—692, 774, 786, 892, 893, 902, 903.
 Walker v. Great Western R. Co., 8 U. C. C. P. 161—562.
 Walker v. Jackson, 10 M. & W. 161—53, 358.
 Walker v. Keenan, 73 Fed. 755—502.
 Walker v. Louisville, etc., R. Co., 111 Ala. 233—363.
 Walker v. Platt, 34 Misc. Rep. 799—291.
 Walker v. Price (Kan. App.), 59 Pac. 1102—564.
 Walker v. Skipwith, Meigs (Tenn.), 502—55, 63, 293.
 Walker v. Vicksburg, etc., R. Co., 41 La. Ann. 795—848.
 Walker v. Wabash, etc., R. Co., 15 Mo. App. 333—558, 568.
 Walker v. Walker, 5 Heisk. (Tenn.) 425—201.
 Walker v. Western Transp. Co., 3 Wall. (U. S.) 104—754.
 Walker v. York, etc., R. Co., 2 El. & El. 750—370, 757, 758.
 Wall v. Cameron, 6 Colo. 275—880, 891, 893.
 Wall v. Helena St. R. Co., 12 Mont. 44—617.
 Wall v. Livezay, 6 Colo. 465—776.
 Wallacc v. Dublin, etc., R. Co., 8 Ir. R. C. L. 341—250.
 Wallace v. Great Southern, etc., R. Co., 17 W. R. 464—105.
 Wallace v. Jackson, 10 M. & W. 168—360.
 Wallace v. Lake Shore, etc., Ry. Co., 10 Detroit Leg. N. 331—527, 531.
 Wallace v. Matthews, 89 Ga. 617—229, 302.
 Wallace v. Sanders, 42 Ga. 486—226, 298.

TABLE OF CASES.

cxxi

(The references are to the pages.)

- Wallace v. Third Ave. R. Co., 36 App. Div. (N. Y.) 57-547.
 Wallace v. Western North Carolina R. Co., 104 N. C. 442, 101 N. C. 454-866, 880, 891, 903.
 Wallace v. Western, etc., R. Co., 98 N. C. 494-694.
 Wallace v. Wilmington, etc., R. Co., 8 Houst. (Del.) 529-556, 604, 880, 884, 891.
 Wallace v. Woodgate Ry. & N. 193-443.
 Waller v. Hannibal, etc., R. Co., 83 Mo. 608-654.
 Waller v. Midland Great Western R. Co., L. R. 4 Ir. 376-400, 418.
 Wallingford v. Columbia, etc., R. Co., 26 S. C. 258-307, 318, 394, 396, 460, 467, 487, 503, 504, 533, 755, 781.
 Wallingford v. Columbia, etc., R. Co., 28 S. C. 258-115, 318, 399.
 Walling v. Railway Co., 12 Phila. (Pa.) 309-362.
 Walsh v. Chicago, etc., R. Co., 42 Wis. 23-620, 621, 886.
 Walsh v. Pittsburgh, etc., R. Co., 10 Ohio St. 75-764.
 Walton v. Myers, 5 Jones L. (N. C.) 172-655.
 Walter v. Chicago, etc., R. Co., 39 Iowa, 33-628.
 Walters v. Chicago, etc., R. Co. (Wis.), 89 N. W. 140-848.
 Walters v. Western, etc., R. Co., 63 Fed. 391, 66 Fed. 862-167, 172, 373.
 Walther v. Chicago, etc., R. Co., 72 Ill. 354-833, 836.
 Walton v. Philadelphia Tract. Co., 161 Pa. St. 36-839.
 Wamsley v. Atlas Steamship Co., 168 N. Y. 533-216, 217.
 Wandell v. Corbin, 38 Hun (N. Y.), 391-558, 876.
 Wann v. Western Union Tel Co., 37 Mo. 472-73, 78.
 Wanzer v. Chippewa Val. Elec. R. Co., 108 Wis. 319, 329-656, 821.
 Warburton v. Midland R. Co., 21 L. T. N. S. 825-866.
 Ward v. Central Park, etc., R. Co., 11 Abb. Pr. N. S. (N. Y.) 411-861, 863.
 Ward v. Chicago, etc., R. Co., 55 N. W. (Wis.) 771-829.
 Ward v. Metropolitan St. Ry. Co., 99 App. Div. (N. Y.) 126-842.
 Ward v. Missouri Pac. R. Co., 158 Mo. 226-304, 334.
 Ward v. New York Cent. R. Co., 47 N. Y. 29-248, 411.
 Ward v. Railroad Co. (Ill. App.), 46 N. E. 365-605.
 Ward v. Railway Co., 102 Wis. 215-782.
 Ward v. Vanderbilt, 1 Keyes (N. Y.), 70-690.
 Wardell v. City R. Co., 35 La. Ann. 202-683.
 Warden v. Greer, 6 Watts (Pa.), 424-31, 66, 247.
 Warden v. Missouri Pac. R. Co., 35 Mo. App. 631-672, 682, 688.
 Wardlaw v. South Carolina R. Co., 11 Rich. L. (S. C.) 337-388, 396.
 Wardrobe v. California Stage Co., 7 Cal. 119, 118-896, 900.
 Wards' Cent. Lake Co. v. Elkins, 34 Mich. 439-411, 418.
 Wardwell v. Chicago, etc., R. Co., 46 Minn. 514-736, 741.
 Ware v. Gray, 11 Pick. (Mass.) 106-617, 781, 788.
 Wareham Bank v. Burt, 5 Allen (Mass.), 113-242.
 Warehouse & B. Supply Co. v. Galvin (Wis.), 71 N. W. 804-430.
 Ware River R. Co. v. Vibbard, 114 Mass. 447-442.
 Warfield v. Louisville, etc., R. Co. (Tenn.), 55 S. W. 304-732.
 Waring v. Indemnity Fire Ins. Co., 45 N. Y. 606-373.
 Warner v. Baltimore & C. R. Co., 168 U. S. 339-576.
 Warner v. Burlington, etc., R. Co., 22 Iowa, 166-710, 716.
 Warner v. New York, etc., R. Co., 3 Int. Com. Rep. 74-912, 916.
 Warner v. New York Cent. R. Co., 44 N. Y. 465-789, 795.
 Warner v. Western Transp. Co., 5 Robt. (N. Y.) 490-356.
 Warren v. Fitchburg R. Co., 8 Allen (Mass.), 227-546, 549, 552, 604.
 Warren v. Southern Kansas R. Co., 37 Kan. 408-837.
 Washburn-Crosby Co. v. Boston, etc., R. Co., 180 Mass. 252-452.
 Washburn-Crosby Co. v. William Johnston & Co., 125 Fed. 273-352.
 Washburn, etc., Mfg. Co. v. Providence, etc., R. Co., 113 Mass. 490-459, 475.
 Washburn v. Nashville, etc., R. Co., 3 Head. (Tenn.) 638-551, 569, 817, 855.
 Washington & G. Ry. Co. v. Gladmon, 15 Wall. (U. S.) 401-797, 799, 800, 825.
 Washington & G. R. Co. v. Hickey (D. C.), 23 Wash. L. Rep. 177-822.
 Washington & G. R. Co. v. Patterson, 9 App. D. C. 423-902.
 Washington & G. R. Co. v. Tobriner, 147 U. S. 571-677.
 Washington, etc., R. Co. v. Harmon, 147 U. S. 571-674, 630, 892.
 Washington, etc., Tel. Co. v. Hobson, 15 Gratt. (Va.) 122-74.
 Washington, etc., R. Co. v. McLane, 11 App. D. C. 220-808.
 Washington v. Raleigh, etc., R. Co., 101 N. C. 239-492, 493.
 Washington, etc., R. Co. v. Yarnell, 98 U. S. 479-652.
 Water Valley Bank v. Southern Express Co., 71 Miss. 741-240.
 Waters v. Cox, 2 Bradwell (Ill. App.) 129-267.
 Waters v. Richmond & D. R. Co., 110 N. C. 338-118, 376.
 Waterbury v. Chicago, etc., R. Co., 104 Iowa, 32-874.
 Waterbury v. New York Cent., etc., R. Co., 17 Fed. 671-544, 545, 569, 576, 571, 584.
 Waterman v. Chicago, etc., R. Co., 52 N. W. (Wis.) 247-798.
 Watkins v. El. Co. (Ala.), 24 So. 392-864.
 Watkins v. Morley, 2 Tex. App. Civ. Cas. sec. 727-369.
 Watkins v. New York Cent., etc., R. Co., 3 N. Y. Supp. 946-725.
 Watkins v. Pennsylvania R. Co. (D. C.), 52 Am. & Eng. R. Cas. 159-589.
 Watkins v. Raleigh, etc., R. Co., 116 N. C. 961-680.
 Watkins v. Terre Haute, etc., R. Co., 8 Mo. App. 570-493.
 Watkins v. Union Tract. Co., 194 Pa. St. 564-792.
 Watkinson v. Laughton, 8 Johns. (N. Y.) 213-398, 404.
 Watts v. Boston, etc., R. Corp. 106 Mass. 467-71, 259.

TABLE OF CASES.

(The references are to the pages.)

- Watts v. Savannah, etc., Canal Co., 64 Ga. 88-88.
 Watson v. Ambergate, etc., R. Co., 15 Jur. 448-427, 463.
 Watson v. Camden, etc., R. Co., 55 N. J. L. 125-844.
 Watson v. Georgia Pac. R. Co., 81 Ga. 476-850.
 Watson v. Memphis, etc., R. Co., 9 Heisk. (Tenn.) 255-25.
 Watson v. North British R. Co., 3 Ry. & C. T. Cas. 17-11, 80.
 Watson v. Oswego St. Ry. Co., 7 Misc. Rep. (N. Y.) 356-738, 827.
 Watson v. Portland, etc., R. Co., 91 Me. 584-857, 859.
 Watson v. St. Paul City R. Co., 42 Minn. 46-540.
 Way v. Chicago, etc., R. Co., 64 Iowa, 48, 73 Iowa, 463-561, 568, 694.
 Weaver v. Baltimore, etc., R. Co., 22 Wash. L. Rep. (D. C.) 393-578, 782.
 Weaver v. Washington & G. R. R. Co., 3 App. D. C. 436-663.
 Webb v. Great Western R. Co., 26 W. R. 111-323.
 Webber v. Great Western R. Co., 3 H. & C. 771-474.
 Webber v. St. Paul City R. Co., 67 Minn. 155-807.
 Weber v. Brooklyn, etc., R. Co., 45 App. Div. (N. Y.) 306-634, 635.
 Weber Co. v. Chicago, etc., R. Co. (Iowa), 60 N. W. 637-608, 706, 718.
 Weber v. Kansas City Cable R. Co., 100 Mo. 194-675, 683, 844.
 Weber v. New York Cent. R. Co., 58 N. Y. 451-595.
 Weber v. New Orleans, etc., R. Co., 104 La. 367-772.
 Webster v. Elmira, etc., R. Co., 85 Hun (N. Y.), 167-779.
 Webster v. Fitchburg R. Co., 161 Mass. 298-545, 562.
 Webster v. Hudson River R. Co., 38 N. Y. 260-698.
 Webster v. Rome, etc., R. Co., 115 N. Y. 112-855.
 Wedekind v. Southern River R. Co., 38 N. Y. 260-893.
 Weed v. Barney, 45 N. Y. 344-201, 276, 333.
 Weed v. Panama R. Co., 17 N. Y. 362-255, 543, 626, 631, 690, 748, 881.
 Weed v. Saratoga R. Co., 19 Wend. (N. Y.) 534-37, 704, 706, 728, 471.
 Weeks v. Goods, 6 C. B. N. S. 367-444.
 Weeks v. New Orleans, etc., R. Co., 32 La. Ann. 615-738, 875.
 Weeks v. New York, etc., R. Co., 72 N. Y. 50-701, 704, 714.
 Wehle v. Haviland, 69 N. Y. 448, 42 How. Pr. (N. Y.) 399-400, 404.
 Wehmann v. Minneapolis, etc., R. Co., 58 Minn. 22-303, 493.
 Weightman v. Louisville, etc., R. Co., 70 Miss. 563-688.
 Weiler v. Manhattan R. Co., 53 Hun (N. Y.), 372-595, 680.
 Weiller v. Pennsylvania R. Co., 134 Pa. St. 310-317, 345.
 Weinberg v. Albermarle, etc., R. Co., 91 N. C. 31-459, 481, 483, 493.
 Weir v. Adams Express Co., 5 Phila. (Pa.) 355-334.
 Weiss v. Metropolitan St. Ry. Co., 29 Misc. Rep. (N. Y.) 332-876.
 Weiser v. Broadway, etc., R. Co., 10 Ohio C. C. 14-809.
 Weitner v. Delaware & Hudson Canal Co., 4 Rob. (N. Y.) 234-67.
 Weitzman v. Nassau Electric R. Co., 33 App. Div. (N. Y.) 585-823.
 Welch v. Boston, etc., R. Co., 41 Conn. 333-237, 354, 529.
 Welch v. Concord R. Co., 68 N. H. 206-263.
 Welch v. Jugenheimer, 56 Iowa, 11-794.
 Welch v. Pullman Palace Car Co., 1 Sheild. (N. Y.) 457-56, 58, 540.
 Welfare v. London, etc., R. Co., L. R. 4 Q. B. 693-772.
 Weller v. London, etc., R. Co., 9 C. P. 126-665, 673.
 Wellington v. Downer Kerosene Oil Co., 104 Mass. 64-284.
 Wells, etc., Express Co. v. Fuller, 13 Tex. Civ. App. 610-241, 413, 421, 422, 455.
 Wells, Fargo Express Co. v. Williams (Tex. Civ. App.), 71 S. W. 314-129, 408.
 Wells, Fargo & Co. v. Windham, 1 Tex. Civ. App. 267-207.
 Wells v. Alabama, etc., R. Co., 67 Miss. 24-667, 668, 687.
 Wells v. American Express Co., 55 Wis. 23, 44 Wis. 342-156, 201, 230, 363.
 Wells v. Battle, 5 Tex. Civ. App. 532-421.
 Wells v. Maine S. S. Co., 1 Cliff. (U. S.) 232-233.
 Wells v. New York Cent. R. Co., 24 N. Y. 181-320, 327, 719, 752, 763, 766.
 Wells v. New York Cent., etc., R. Co., 25 App. Div. (N. Y.) 365-626.
 Wells v. Oregon, etc., R. Co., 32 Fed. 51-162, 170, 172, 420.
 Wells v. Steam Navigation Co., 2 N. Y. 204-13, 50.
 Wells v. Steam Navigation Co., 8 N. Y. 380-321, 348.
 Wells v. Steinway R. Co., 18 App. Div. (N. Y.) 180-613.
 Wells v. Thomas, 27 Mo. 17-169, 437, 439, 494.
 Wells v. Wilmington, etc., R. Co., 6 Jones L. (N. C.) 47-137.
 Wells v. Pittsburgh, etc., R. Co., 10 Ohio St. 65-24, 317, 503, 510, 525.
 Welsh v. West Jersey, etc., R. Co., 62 N. J. L. 655-748.
 Welton v. Missouri, 91 U. S. 280-905.
 Welty v. Indianapolis, etc., R. Co., 105 Ind. 55-829.
 Wentworth v. Eastern R. Co., 143 Mass. 248-306.
 Wentz v. Erie R. Co., 3 Hun (N. Y.), 241-564, 566.
 Werle v. Long Island R. Co., 98 N. Y. 650-856, 857, 861.
 Wernwag v. Philadelphia, etc., R. Co., 117 Pa. St. 46-179, 182.
 Wertheimer v. Pennsylvania R. Co., 17 Blatchf. (U. S.) 421-228, 393.
 Werte v. Western Union Tel. Co., 7 Utah. 446-77.
 West v. The Berlin, 3 Iowa, 552-222.
 West v. First Nat. Bank, 20 Hun (N. Y.), 411-305.
 West v. London, etc., R. Co., L. R. 5 C. P. 622-123.
 West Philadelphia Pass. R. Co. v. Gallagher, 108 Pa. St. 524-861.
 West v. Ward (Iowa), 42 N. W. 309-697.
 West Jersey R. Co. v. Railway Co., 52 N. J. Eq. 31-698.
 West Memphis Packet Co. v. White, 99 Tenn. 256-633.
 Westchester, etc., R. Co. v. McElwee, 67 Pa. St. 211-149.

TABLE OF CASES.

cxxiii

(The references are to the pages.)

- West Chester, etc., R. Co. v. Miles, 55 Pa. St. 209—589, 590, 628, 739.
 West Chicago St. R. Co. v. Buckley, 102 Ill. App. 314—613.
 West Chicago St. R. Co. v. Carr, 170 Ill. 478—809.
 West Chicago St. R. Co. v. Johnson, 108 Ill. 285—655.
 West Chicago St. R. Co. v. Kennelly, 170 Ill. 508, 66 Ill. App. 244—770, 809.
 West Chicago St. R. Co. v. Kromskinsky, 185 Ill. 92—655.
 West Chicago St. R. Co. v. Lyons, 57 Ill. App. 536—820.
 West Chicago St. R. Co. v. Manning, 170 Ill. 417—658, 677, 832.
 West Chicago St. R. Co. v. Marks, 82 Ill. App. 185—857, 864.
 West Chicago St. R. Co. v. Martin, 47 Ill. App. 610—653, 698.
 West Chicago St. R. Co. v. Nash, 64 Ill. App. 548—655.
 West Chicago St. R. Co. v. Shiplett, 85 Ill. App. 683—547.
 West Chicago St. R. Co. v. Stiver, 69 Ill. App. 625—677, 864.
 West Chicago St. Ry. Co. v. Torpe, 187 Ill. 610—842.
 West Chicago St. R. Co. v. Walsh, 78 Ill. App. 595—554, 557.
 West Chicago St. R. Co. v. Waniata, 68 Ill. App. 481—676.
 West Chicago St. R. Co. v. Winters, 107 Ill. App. 221—656.
 Westcott v. Fargo, 63 Barb. (N. Y.) 354, 61 N. Y. 543—308, 320, 321, 336, 338, 339, 347, 351, 387.
 Westfield v. Great Western R. Co., 52 L. J. Q. B. Div. 276—431, 432.
 Weston v. Grand Trunk R. Co., 54 Me. 376—411.
 Weston v. New York El. R. Co., 73 N. Y. 595—613, 876.
 Western & O. R. Co. v. Ohio Valley Blg. & T. Co., 107 Ga. 512—164, 171.
 West End, etc., St. R. Co. v. Mozely, 79 Ga. 463—849.
 Western, etc., R. Co. v. Camp, 53 Ga. 596—261, 384.
 Western, etc., R. Co. v. Exposition Cotton Mills, 81 Ga. 522—309, 376, 377, 449, 760.
 Western, etc., R. Co. v. Harwell, 91 Ala. 340—343, 394, 533.
 Western, etc., R. Co. v. King, 70 Ga. 261—595.
 Western, etc., R. Co. v. Ledbetter (Ga.), 25 S. E. 663—733.
 Western, etc., R. Co. v. McElwee, 6 Heisk. (Tenn.), 208, 253—300, 463.
 Western, etc., R. Co. v. State, 95 Md. 637—601.
 Western, etc., R. Co. v. Turner, 72 Ga. 292—582, 624.
 Western, etc., R. Co. v. Trust Co., 107 Ga. 512—214.
 Western, etc., R. Co. v. Vaughan, 113 Ga. 354—374.
 Western, etc., R. Co. v. Young, 51 Ga. 489—668, 852.
 Western, etc., R. Co. v. Young, 83 N. Y. 512—822.
 Westernfield v. Lewis, 43 La. Ann. 63—823, 825.
 Western Maryland R. Co. v. Herold, 74 Md. 510—816, 820.
 Western Maryland R. Co. v. Schann (Md.), 55 Atl. 701—743.
 Western Maryland R. Co. v. Stanley, 61 Md. 266—822.
 Western Maryland R. Co. v. State, 95 Md. 637—781, 820.
 Western Maryland R. Co. v. Stocksdale, 83 Md. 245—743.
 Western Mfg. Co. v. The Guiding Star, 37 Fed. 641—388, 405, 408, 410.
 Western R. Co. v. Harwell, 91 Ala. 340, 341—466, 486, 499, 503, 505, 510.
 Western R. Co. v. Little, 86 Ala. 159—26, 240.
 Western R. Co. v. Harwell, 97 Ala. 341—240, 296, 482, 485, 526, 758.
 Western R. Co. v. Thornton, 60 Ga. 300—231.
 Western Ry. Co. v. Wagner, 65 Ill. 197—177.
 Western Sash & Door Co. v. Chicago, etc., R. Co., 177 Mo. 641—484.
 Western Transp. Co. v. Barber, 56 N. Y. 544—156, 229, 363, 436, 443.
 Western Transp. Co. v. Downer, 11 Wall. (U. S.) 129—393, 395.
 Western Transp. Co. v. Hoyt, 69 N. Y. 230—363, 438, 495.
 Western Transp. Co. v. Newhall, 24 Ill. 466—24, 33, 290, 292, 341, 394, 753, 756, 757.
 Western Union Tel. Co. v. Adams, 87 Ind. 598—76.
 Western Union Tel. Co. v. Blanchard, 68 Ga. 299—76.
 Western Union Tel. Co. v. Broesche, 72 Tex. 654—77.
 Western Union Tel. Co. v. Brown, 84 Tex. 54—332.
 Western Union Tel. Co. v. Carew, 15 Mich. 525—73, 78, 728.
 Western Union Tel. Co. v. Crall, 39 Kan. 580—427.
 Western Union Tel. Co. v. Edsall, 63 Tex. 668—74.
 Western Union Tel. Co. v. Eyser, 2 Colo. 154—798.
 Western Union Tel. Co. v. Fenton, 52 Ind. 1—76.
 Western Union Tel. Co. v. Fontaine, 53 Ga. 433—76.
 Western Union Tel. Co. v. Goodbar (Miss.), 7 So. 214—78.
 Western Union Tel. Co. v. Graham, 1 Colo. 230—76, 77, 237.
 Western Union Tel. Co. v. Griswold, 37 Ohio St. 310—73, 77.
 Western Union Tel. Co. v. Hyer, 22 Fla. 637—73.
 Western Union Tel. Co. v. Meek, 49 Ind. 53—76.
 Western Union Tel. Co. v. Meredith, 95 Ind. 93—76.
 Western Union Tel. Co. v. Neill, 57 Tex. 283—74, 78.
 Western Union Tel. Co. v. Reynolds, 77 Va. 173, 178—74, 711.
 Western Union Tel. Co. v. Short, 53 Ark. 434—76.
 Western Union Tel. Co. v. Tyler, 74 Ill. 168—77.
 Western Union Tel. Co. v. Woods, 88 Ill. App. 375—85.
 Weyand v. Atchison, etc., R. Co., 75 Iowa, 573—158, 164, 177, 178.
 Weymire v. Wolfe, 52 Iowa, 533—689.
 Whelan v. Georgia, etc., R. Co., 184 Ga. 506—847.
 Whalen v. Consol. Tract. Co., 61 N. J. L. 606—781.
 Whalen v. St. Louis, etc., R. Co., 60 Mo. 323—815, 829, 891, 893, 902.
 Whalley v. Wray, 3 Esp. 74—12.
 Whalon v. Aldrich, 8 Minn. 346—411.

TABLE OF CASES.

(The references are to the pages.)

- Wheat v. Platte City, etc., R. Co., 4 Kan. 370—231, 233.
 Wheaton v. North Beach, etc., R. Co., 36 Cal. 590—652.
 Wheeler v. McFarland, 10 Wend. (N. Y.) 318—15.
 Wheeler v. Oceanic Steam Nav. Co., 125 N. Y. 155—347, 720.
 Wheeler v. St. Louis, etc., R. Co., 3 Mo. App. 358—183.
 Wheeler v. San Francisco, etc., R. Co., 31 Cal. 46—119, 619.
 Wheelwright v. Beers, 2 Hall (N. Y.), 391—401.
 Whitbeck v. Holland, 45 N. Y. 13—131, 193, 479.
 Whitbeck v. Schuyler, 31 How. Pr. (N. Y.) 97—723.
 Whicher v. Boston, etc., R. Co., 176 Mass. 278—58.
 White v. Atlantic Consol. R. Co., 92 Ga. 494—545, 840.
 White v. Ashton, 51 N. Y. 280—104.
 White v. Bartlett, 9 Bing. 382—156.
 White v. Bascom, 28 Vt. 268—12, 363.
 White v. Boston, etc., R. Co., 144 Mass. 404—773, 776.
 White v. Canadian Pac. R. Co., 6 Man. L. R. 169—218, 234.
 White v. Cincinnati, etc., R. Co., 89 Ky. 478—114.
 White v. Colorado Cent. R. Co., 3 McCrary (U. S.), 559—282, 283, 379.
 White v. Conly, 14 Lea (Tenn.), 51—257.
 White v. Fitchburg R. Co., 136 Mass. 321—658.
 White v. Goodrich Transp. Co., 46 Wis. 493—131, 259, 313.
 White v. Great Western R. Co., 2 C. B. N. S. 7—256, 325.
 White v. Humphrey, 11 Q. B. 43—148, 284.
 White v. Miller, 78 N. Y. 393—404.
 White v. Missouri Pac. R. Co., 19 Mo. App. 400—110, 227, 255, 367, 498.
 White v. Norfolk, etc., R. Co., 115 N. C. 631—626.
 White v. Postal Telegraph & Cable Co., 33 Wash. L. Rep. 295—88.
 Whiteside v. Thurlkill, 12 Smed. & M. (Miss.) 599—24.
 White v. The Mary Ann, 6 Cal. 462—49, 65.
 White v. Twenty-third St. R. Co., 42 Hun (N. Y.) 587—639.
 White v. Vann, 6 Humph. (Tenn.) 70—437.
 White v. Western Union Tel. Co., 14 Fed. Rep. 710—76.
 White v. Winnisimmet Co., 7 Cush. (Mass.) 155—52, 131.
 White Water R. Co. v. Butler, 112 Ind. 598—687.
 Whitehead v. St. Louis, etc., R. Co., 99 Mo. 263—550, 583, 625, 816.
 Whitehead v. Vaughan, 6 East. 523—431.
 Whitehead v. Wilmington, etc., R. Co., 87 N. C. 255—245.
 Whitfield v. LeDesprurer, Comp. K. B. 754—72.
 Whiting v. New York Cent., etc., R. Co., 97 App. Div. (N. Y.) 11—693.
 Whitlock v. Comer, 57 Fed. 565—818, 852.
 Whitman v. Western Counties R. Co., 17 Nova Scotia, 405—144.
 Whitmore v. Bowman, 4 G. Gr. (Iowa), 148—53, 540.
 Whitmore v. Steamer Caroline, 20 Mo. 513—8, 701, 704.
 Whitney v. Beckford, 105 Mass. 287—438.
 Whitney v. Chicago, etc., R. Co., 27 Wis. 327—282, 400.
 Whitney v. Clifford, 57 Wis. 156—794.
 Whitney Mfg. Co. v. Richmond, etc., R. Co., 38 S. C. 365—150, 151.
 Whitney v. New York, etc., R. Co., 102 Fed. 850—587.
 Whitney v. Pullman Palace Car Co., 113 Mass. 243—58.
 Whittaker v. Eight Ave. R. Co., 51 N. Y. 295—811.
 Whittaker v. Manchester, etc., R. Co., L. R. C. P. 464—665, 671.
 Whittier v. Smith, 11 Mass. 210—363.
 Whitwam v. Wisconsin, etc., R. Co., 58 Wis. 408—602.
 Whitworth v. Erie R. Co., 87 N. Y. 413—47, 250, 320, 392, 395, 484, 728.
 Wibert v. New York, etc., R. Co., 12 N. Y. 245—33, 105, 108, 228, 239, 249, 252, 411.
 Wichita, etc., R. Co. v. Koch, 47 Kan. 753—335, 525.
 Wichita Savings Bank v. Atchison, etc., R. Co., 20 Kan. 519—173.
 Wichita Valley R. Co. v. Swenson (Tex. Civ. App.), 25 S. W. 47—460.
 Wiedmer v. New York Elec. R. Co., 41 Hun (N. Y.), 284—772.
 Wiegand v. Central R. Co., 75 Fed. 370—718, 725.
 Wier v. St. Paul, etc., R. Co., 18 Minn. 155—95.
 Wiggin v. Boston, etc., R. Co., 120 Mass. 201—207.
 Wiggins Ferry Co. v. Chicago, etc., R. Co., 73 Mo. 389—472, 473.
 Wiggins v. Hathaway, 6 Barb. (N. Y.) 632—71.
 Wiggins v. King, 91 Hun (N. Y.), 340—745.
 Wright v. United States, 167 U. S. 512—918, 920, 935, 936.
 Wightman v. Chicago, etc., R. Co., 73 Wis. 190—566.
 Wilburn v. St. Louis, etc., R. Co., 48 Mo. App. 224, 36 Mo. App. 203—681, 682.
 Wilby v. Midland R. Co., 35 L. T. N. S. 244—562.
 Wilby v. West Cornwall R. Co., 2 H. & N. 703—463, 471.
 Wilcox v. Chicago, etc., R. Co., 24 Minn. 269—154.
 Wilcox v. Parmalee, 3 Sandf. (N. Y.) 610—458.
 Wilcock v. Pennsylvania R. Co., 166 Pa. St. 184—24, 317.
 Wilde v. Lynn & B. R. Co., 163 Mass. 533—859.
 Wilde v. Merchants Despatch Transp. Co., 47 Iowa, 247, 272—47, 307, 376, 483.
 Wilder v. Metropolitan St. R. Co., 10 App. Div. (N. Y.) 364—771.
 Wilder v. St. Johnsbury, etc., R. Co., 66 Vt. 636—117.
 Wilds v. Hudson River R. Co., 24 N. Y. 230—799.
 Wilkerson v. Corrigan Consol. St. R. Co., 26 Mo. App. 144—778.
 Wilkie v. Bolster, 3 E. D. Sm. (N. Y.) 327—751, 787.
 Wilkinson v. First Nat. Fire Ins. Co., 72 N. Y. 499—332.
 Will v. Postal Tel. Cable Co., 3 App. Div. (N. Y.) 22—78.
 Willard v. Dorr, 3 Mason (U. S.), 172—447.

TABLE OF CASES.

CXXV

(The references are to the pages.)

- Willets v. Buffalo, etc., R. Co., 14 Barb. (N. Y.) 585—659, 826.
 Wm. H. Blessing & Co. v. Houston, etc., R. Co. (Tex. Clv. App.), 80 S. W. 639—372.
 Williams v. Carr, 80 N. C. 294—267.
 Williams v. Central R. Co. of N. J., 93 App. Div. (N. Y.) 582—711, 719, 726.
 Williams v. Central of Ga. R. Co., 117 Ga. 830—534.
 Williams v. Citizens Elec. St. Ry. Co., 184 Mass. 473—602.
 Williams v. Cranston, 2 Stark. 82—140.
 Williams v. Delaware, etc., Canal Co., 53 Hum (N. Y.), 635—272.
 Williams v. East India Co., 3 East. 192—100.
 Williams v. Electric Co., 43 La. Ann. 300—606.
 Williams v. Grant, 1 Conn. 487—24, 65, 257.
 Williams v. Great Northern R. Co., 68 Minn. 55—809.
 Williams v. Great Western R. Co., 10 Exch. 15—712.
 Williams v. Holland, 22 How. Pr. (N. Y.) 137—154, 196, 276, 283.
 Williams v. Keokuk, etc., Packet Co., 3 Cent. L. J. (Mo.) 400—713.
 Williams v. Missouri Pac. R. Co., 109 Mo. 475—802.
 Williams v. Morgan, 32 La. Ann. 163—376.
 Williams v. New York, etc., R. Co., 97 App. Div. (N. Y.) 133—650.
 Williams v. Pullman Palace Car Co., 40 La. Ann. 417—56, 60, 627, 632.
 Williams v. Railroad Co., 18 Utah, 210—761.
 Williams v. Taylor, 4 Porter (Ala.), 234—28.
 Williams v. Vanderbilt, 28 N. Y. 211, 217—690, 881, 885, 891.
 Williams v. Webb, 27 Misc. Rep. (N. Y.) 508, 22 Misc. 513—56, 57, 58.
 Williams v. Wilmington, etc., R. Co., 93 N. C. 42—175.
 Williamson v. Cambridge R. Co., 144 Mass. 148—811, 812.
 Williamson v. New York, etc., R. Co., 56 N. Y. Super. Ct. 508—285.
 Willis v. Atlantic, etc., R. Co., 122 N. C. 905—577.
 Willis v. Grand Trunk R. Co., 62 Me. 488—287.
 Willis v. Long Island R. Co., 34 N. Y. 670—696, 782, 856, 861, 867.
 Willis v. Lynn, etc., R. Co., 129 Mass. 351—861.
 Willis v. Metropolitan St. Ry. Co., 63 App. Div. (N. Y.) 332, 76 App. Div. (N. Y.) 340—632, 633, 664.
 Willis v. Second Ave. Tract. Co., 189 Pa. St. 430—603.
 Willmott v. Corrigan Consol. St. R. Co., 106 Mo. 535, 534—653, 858.
 Willock v. Pennsylvania R. Co., 166 Pa. St. 184—373.
 Willoughby v. Chicago, etc., R. Co., 37 Iowa, 432—793.
 Willoughby v. Chicago Junction R., etc., Co., 50 N. J. Eq. 656—920.
 Willoughby v. Horridge, 12 C. B. 742—53, 380, 537.
 Wilman v. People Ry. Co. (Del.), 55 Atl. 332—596.
 Wilmington, etc., R. Co. v. Greenville, etc., R. Co., 9 S. C. 225—451.
 Wilmington, etc., R. Co. v. Kitchin, 91 N. C. 39—164.
 Wise v. Brooklyn Heights R. Co., 46 App. Div. (N. Y.) 246—878.
 Wilsey v. Louisville, etc., R. Co., 83 Ky. 511—559.
 Wilson v. Adams Express Co., 27 Mo. App. 360, 43 Mo. App. 659—158, 181.
 Wilson v. Anderton, 1 B. & Ad. 450—229.
 Wilson v. Atlanta, etc., R. Co., 82 Ga. 386—133, 137.
 Wilson v. Atlantic, etc., R. Co., 129 Fed. 774—80, 329.
 Wilson v. Baltimore, etc., R. Co., 32 Mo. App. 682—60.
 Wilson v. Brett, 11 M. & W. 113—6.
 Wilson v. California Cent. R. Co., 94 Cal. 166—264, 269, 273, 388.
 Wilson v. Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654—288, 710, 715, 717, 720, 721, 729.
 Wilson v. City of Troy, 135 N. Y. 96—404.
 Wilson v. Elliott, 57 N. H. 316—208.
 Wilson v. Grand Trunk R. Co., 56 Me. 60, 57 Me. 138—620, 710, 722, 723.
 Wilson v. Hamilton, 4 Ohio St. 722—32, 53, 65.
 Wilson v. Lancashire, etc., R. Co., 9 C. B. N. S. 632—412, 424.
 Wilson v. Missouri Pac. R. Co., 2 Mo. App. Rep. 1366—412.
 Wilson v. New Castle, etc., R. Co., 18 E. B. & E. 557—412.
 Wilson v. Northern Pac. R. Co., 26 Minn. 278—780, 820.
 Wilson v. Northern Pac. R. Co., 5 Wash. 621—888.
 Wilson v. New York Cent., etc., R. Co., 97 N. Y. 87—320, 524, 525, 763.
 Wilson v. New Orleans, etc., R. Co., 68 Miss. 9—688, 846.
 Wilson v. Platt, 84 N. Y. Supp. 143—349.
 Wilson Sewing Machine Co. v. Louisville, etc., R. Co., 71 Mo. 203—147, 155, 180.
 Wilson v. Southern Pac. R. Co., 62 Cal. 164—395, 397.
 Wilson v. Wabash, etc., R. Co., 23 Mo. App. 50—179, 336.
 Wilson v. York, etc., R. Co., 17 L. T. 223—139.
 Wilson v. Atlantic, etc., Nav. Co., 10 C. B. N. S.—324.
 Wilts v. Barnes, 46 Iowa, 210—203.
 Wiltsire Iron Co. v. Great Western R. Co., L. R. 6 Q. B. 101—431.
 Wilton v. Middlesex R. Co., 107 Mass. 108—544, 550, 569, 582, 862.
 Winchell v. National Express Co., 64 Vt. 15—82, 293.
 Winheim v. Field, 107 Ill. App. 145—653.
 Winkfield v. Packington, 2 C. & P. 599—139.
 Wing v. New York, etc., R. Co., 1 Hilt. (U. S.) 235—220, 223, 256, 376, 386, 466.
 Wingard v. Banning, 39 Cal. 543—364, 441, 443.
 Wingate v. Smith, 20 Me. 287—204.
 Winkler v. Missouri, etc., R. Co., 21 Mo. App. 99—902.
 Winkler v. St. Louis, etc., R. Co., 21 Mo. App. 99—673, 690, 887, 895.
 Winne v. Illinois Cent. R. Co., 31 Iowa, 583—388, 403, 410.
 Winnegar v. Central Pass. R. Co., 85 Ky. 547—619, 626, 641.
 Winona, etc., R. Co. v. Blake, 94 U. S. 180—37, 95.
 Winship v. Enfield, 42 N. H. 197—800.
 Winslow v. Vermont, etc., R. Co., 42 Vt. 700—158, 179, 180, 265.
 Winter v. Central I. R. Co., 74 Iowa, 448—808.
 Winter v. Pacific R. Co., 41 Mo. 503—709.
 Winter v. Southern Kan. R. Co., 56 Mo. App. 282—481.

TABLE OF CASES.

(The references are to the pages.)

- Winterfield v. Second Ave. R. Co., 20 N. Y. Supp. 801—796.
 Winters v. Hannibal, etc., R. Co., 39 Mo. 468—871.
 Wisconsin Cent. R. Co. v. Ross, 142 Ill. 9—609.
 Wise v. Covington, etc., St. R. Co., 91 Ky. 537—635.
 Wise v. Great Western R. Co., 1 H. & N. 63—194.
 Wise v. South Covington, etc., R. Co., 17 Ky. L. Rep. 1359—635.
 Witbeck v. Holland, 55 Barb. (N. Y.) 443—479.
 Witbeck v. Schuyler, 44 Barb. (N. Y.) 469—139, 140.
 Withers v. North Kent R. Co., 3 H. & N. 969—222, 597, 611.
 Witsell v. West Asheville, etc., R. Co., 120 N. C. 557—604.
 Witt v. East Tennessee, etc., R. Co., 99 Tenn. 442—212.
 Witting v. St. Louis, etc., R. Co., 101 Mo. 631, 28 Mo. App. 103—316, 376, 393.
 Wirowski v. Lake Shore, etc., R. Co., 124 N. Y. 424—678.
 Wolf v. American Express Co., 43 Mo. 421—223, 257, 317, 395.
 Wolf v. Hough, 22 Kan. 659—439.
 Wolf v. Summers, 2 Campb. 631—711.
 Wolf v. Western Union Tel. Co., 62 Pa. St. 83—332.
 Wolfe v. Lehigh Valley R. Co., 9 Kulp. (Pa.) 401—367.
 Wolfe v. Missouri Pac. R. Co., 97 Mo. 473—155, 156.
 Wolff v. Central R. Co., 68 Ga. 653—468, 727, 728.
 Wolverhampton, etc., R. Co. v. London, etc., R. Co., 1 L. R. 16 Eq. 483—454.
 Womack v. Western Union Tel. Co., 58 Tex. 176—78.
 Woo Dan v. Seattle El. R. & P. Co., 5 Wash. 466—839.
 Wood v. Chicago, etc., R. Co., 68 Iowa, 491—243, 247, 369, 371.
 Wood v. Crocker, 18 Wis. 345—25, 27, 196, 265, 268, 271, 490.
 Wood v. Lake Shore, etc., R. Co., 49 Mich. 370—660, 675, 815.
 Wood v. Maine Cent. R. Co., 98 Me. 98—716.
 Wood v. Metropolitan St. Ry. Co., 181 Mo. 433—595.
 Wood v. Milwaukee, etc., R. Co., 27 Wis. 541—265, 268, 275, 489.
 Wood v. New York Cent., etc., R. Co., 83 App. Div. (N. Y.) 604—894.
 Wood v. Railroad Company, 101 Ky. 703—646.
 Wood v. Southern Express Co., 95 Ga. 412—343.
 Wood v. Southern Pac. R. Co., 9 Utah, 146—857.
 Wood v. Southern R. Co., 118 N. C. 1056—334, 335.
 Woodburn v. Cincinnati, etc., R. Co., 40 Fed. 731—300, 314.
 Wooden v. Austin, 51 Barb. (N. Y.) 9—50.
 Woodger v. Great Western R. Co., 1 L. R. 2 C. P. 318—416.
 Woodman v. Nottingham, 49 N. H. 387—364.
 Woodroffe v. Roxborough, etc., Ry. Co., 201 Pa. 521—860.
 Woodruff v. Sherrard, 9 Hun (N. Y.), 322—720.
 Woodruff Sleeping, etc., Coach Co. v. Diehl, 84 Ind. 474—56.
- Woods v. Devin, 13 Ill. 746—701.
 Woods v. Railway Co., 48 Mo. App. 125—742.
 Woodward v. Illinois Cent. R. Co., 1 Biss. (U. S.) 403, 447—236, 314, 388, 398, 405, 413, 471, 485.
 Woodward v. Illinois Cent. R. Co., 33 Ill. App. 433—270, 271.
 Wooley v. Louisville, etc., R. Co., 107 Ind. 381—850.
 Woolsey v. Chicago, etc., R. Co., 39 Neb. 798—550, 576.
 Worcester v. Western R. Corp., 4 Metc. (Mass.) 564—95.
 Worcester Excursion Car Co. v. Pennsylvania R. Co., 2 Int. Com. Rep. 792—931.
 Worden v. Canadian Pac. R. Co., 13 Ont. Rep. 652—187, 207, 400.
 Wormsdorf v. Detroit City R. Co., 75 Mich. 472—804, 811.
 Worth v. Chicago, etc., R. Co., 51 Fed. 171—788.
 Worth, etc., R. Co. v. I. B. Rosenthal Millinery Co. (Tex. Civ. App.), 29 S. W. 196—707.
 Worthington v. Central Vermont R. Co., 64 Vt. 107—782, 818, 856, 857.
 Wren v. Eastern Counties R. Co., 1 L. T. N. S. 5—241.
 Wright v. Boughton, 22 Barb. (N. Y.) 561—474, 477, 478.
 Wright v. Caldwell, 3 Mich. 51—138, 723.
 Wright v. California Cent. R. Co., 78 Cal. 360—591, 883.
 Wright v. Chicago, etc., R. Co., 4 Colo. App. 102—618, 632, 644.
 Wright v. Detroit, etc., R. Co., 77 Mich. 123—822.
 Wright v. Gaff, 6 Ind. 416—815.
 Wright v. Great Northern R. Co., L. R. 8 Ir. 257—875.
 Wright v. Howe (Tex. Civ. App.), 24 S. W. 314—206.
 Wright v. London R. Co., 33 L. T. N. S. 830—588.
 Wright v. Malden, etc., R. Co., 4 Allen (Mass.), 283—822.
 Wright v. Northern Cent. R. Co., 8 Phila. (Pa.) 19—155, 382.
 Wright v. Northampton, etc., R. Co., 12 N. C. 552—586, 587.
 Wright v. Pennsylvania R. Co., 3 Pittsb. (Pa.) 116—600, 699.
 Wright v. Snell, 5 B. & Ald. 350—323, 431, 432.
 Wrightman v. Chicago, etc., R. Co., 73 Wis. 169—590.
 Wunsch v. Northern Pac. R. Co., 62 Fed. 878—703, 708, 709.
 Wyatt v. Citizens R. Co., 55 Mo. 485, 62 Mo. 408—538, 849, 850, 852.
 Wyatt v. Larimer & W. Irrig. Co., 1 Colo. App. 480—88.
 Wyckoff v. Queens County Ferry Co., 53 N. Y. 35—52, 58, 131.
 Wyld v. Pickford, 8 M. & W. 443—6, 102.
 Wyld v. Northern R. Co., 53 N. Y. 155—492, 698, 775, 867.
 Wyman v. Chicago, etc., R. Co., 4 Mo. App. 35, 39—492, 493.
 Wyman v. Lancaster, 32 Fed. 720—429.
 Wyman v. Northern R. Co., 34 Minn. 210—555, 558, 689, 749, 751.
 Wynantskill Knitting Co. v. Murray, 90 Hun (N. Y.), 554—270.
 Wynn v. Central Park, etc., R. Co., 133 N. Y. 575—604.

TABLE OF CASES.

cxxvii

(The references are to the pages.)

Y.

- Yarnell v. Kansas City, etc., R. Co., 113 Mo. 570—282, 585, 682.
 Yates v. New York Cent. R. Co., 67 N. Y. 100—898.
 Yazoo, etc., R. Co. v. Baldwin (Tenn.), 81 S. W. 599—701.
 Yazoo, etc., R. Co. v. Faust (Miss.), 32 So. 9—886.
 Yazoo, etc., R. Co. v. Georgia Home Ins. Co. (Miss.), 37 So. 500—702.
 Yazoo, etc., R. Co. v. Humphrey, 83 Miss. 721—711.
 Yazoo, etc., R. Co. v. Millsaps, 76 Miss. 855—225, 248.
 Yeomans v. Contra Costa Steam Nav. Co., 44 Cal. 71—544, 563, 580, 781.
 Yerkes v. Keokuk, etc., Packet Co., 7 Mo. App. 265—604, 607, 615, 782.
 Yoakum v. Dunn, 1 Tex. Civ. App. 532, 524—421, 422.
 Yoakum v. Dryden (Tex. Civ. App.), 26 S. W. 312—137.
 Yonge v. Kinney, 28 Ga. 111—779, 787.
 Yonge v. Pacific Mail Steamship Co., 1 Cal. 353—881.
 York v. Grenough, 2 Ld. Raym. 867—434.
 York Co. v. Central Railroad, 3 Wall (U. S.) 107—394, 754.
 York Co. v. Illinois Cent. R. Co., 3 Wall. (U. S.) 107—305, 313, 434, 758.
 York, etc., R. Co. v. Crisp, 14 C. B. 527—324.
 Yorton v. Milwaukee, etc., R. Co., 62 Wis. 367—559, 745.
 Youl v. Harbottle, Peake N. P. 49—179.
 Young v. Missouri Pac. Ry. Co., 93 Mo. App. 267—826.
 Young v. Bradsford, 12 Lea (Tex.), 232—783.

- Young v. Canadian Pac. R. Co., 1 Manitoba L. Rep. 205—139.
 Young v. Citizens St. R. Co., 148 Ind. 54—795.
 Young v. East Alabama Ry. Co., 80 Ala. 100—162, 363.
 Young v. Hannibal, etc., R. Co., 79 Mo. 336—700.
 Young v. Old Colony R. Co., 156 Mass. 178—875.
 Young v. Smith, 3 Dana (Ky.), 92—192, 196, 269.
 Young v. Western Union Tel. Co., 34 N. Y. Super Ct. 390—332.

Z.

- Zackry v. Mobile, etc., R. Co., 75 Miss. 746—621.
 Zeliff v. North Jersey St. Ry. Co. (N. J.), 55 Atl. 95—872.
 Zemp v. Wilmington, etc., R. Co., 9 Rich. L. (S. C.) 84—753, 770, 810, 856, 857, 858.
 Zimmer v. New York, etc., R. Co., 137 N. Y. 460—291, 296, 312, 347, 352, 765.
 Zimmerman v. Denver Consol. Tramway Co. (Colo.), 1 St. Ry. Rep. 21—877.
 Zinn v. New Jersey Steamboat Co., 49 N. Y. 442—194, 196, 201, 248, 263, 276.
 Zollinger v. Steamer Emma, 3 Cent. L. J. 285—202.
 Zouch v. Chesapeake, etc., R. Co., 36 W. Va. 524—294, 344, 356.
 Zumault v. Kansas City, etc., Air Line, 71 Mo. App. 670—872.
 Zunz v. South Eastern R. Co., L. R. 4 Q. B. 539—114.
 Zwack v. New York Cent., etc., R. Co., 160 N. Y. 362—820.

THE LAW OF CARRIERS.

CHAPTER I.

CARRIERS GENERALLY.

- SECTION
- 1. Carrier defined.
 - 2. Classes of carriers.
 - 3. Carriage of goods a bailment.
 - 4. Private carriers.
 - 5. Duties and liabilities of private carriers.
 - 6. Private carriers without hire.
 - 7. When transportation is gratuitous.
 - 8. When compensation is implied.
 - 9. Proof of negligence.
 - 10. Private carriers for hire.
 - 11. Liability of private carriers for hire.
 - 12. Special contracts increasing or diminishing liability.
 - 13. Lien of the private carrier.

§ 1. **Carrier defined.**—A carrier has been defined to be one who undertakes to transport goods from one place to another.¹ But a more accurate and comprehensive definition, perhaps, would be that a carrier is a person or corporation who undertakes to transport or convey goods, or property, or persons, from one place to another, gratuitously or for hire.

§ 2. **Classes of carriers.**—Carriers have been divided into two classes: private or special carriers, and common or public carriers.² Another classification recognizes three classes; carriers without hire, carriers for hire but not common carriers, and common carriers; or carriers without hire or reward, private carriers for hire, and common or public carriers for hire.³ As all carriers without

1. Bouvier's L. Dict. Vol. 1, 242; 2. Bouvr. L. Dict. 242; Story Parsons, Contr., Vol. 1, 642. Bailm. § 495.

3. Hutch. Carr. § 15.

hire may be said to be private carriers, since common carriers when they carry gratuitously become in fact private carriers as to the particular goods or transaction, the classification of carriers into private carriers without hire, private carriers for hire, and common carriers, seems to best express the differences in character and liability which distinguish them. The classification of carriers is important because it enters largely into the determination of the legal responsibility of the carrier. The class among carriers to which a particular carrier is to be assigned depends upon the nature of his business, the character in which he holds himself out to the public, the terms of his contract, and his relations generally to the parties with whom he deals and the public. The above classifications include carriers by land and by water, as well as carriers of goods, carriers of passengers, and carriers of live stock, and the liability of the carrier is also to a considerable extent determined from or affected by whichever of these latter classes he belongs to.

§ 3. Carriage of goods a bailment.—The carriage of goods or the baggage of a passenger is a bailment, the goods or baggage being delivered to the carrier on a condition, express or implied, for the purpose of carriage to their destination and delivery according to the directions of the consignor or owner. The carriage of goods or baggage, when it is gratuitous or without compensation to the carrier, belongs to that class of bailments known as mandates, a species of bailment where the bailee receives goods, and without reward undertakes to do some act about them, or simply to carry them from place to place.⁴ The carriage of goods or baggage, where the carrier is paid for the service, is of that class of bailments known as a hiring, which is a bailment of goods always for a reward, and among which bailments is the hire of carriage.⁵ Private carriers, whether without hire or for hire, are strictly bailees and assume simply the duties and liabilities of bailees. Their responsibility does not necessarily arise from an undertaking to carry and is determined by the rules governing the responsibility of bailees. The foundation of the bailee's liability, except in the case of common carriers of goods and innkeepers, is negligence, and negligence in some degree must be shown to make

4. See § 6, *post*; Edwards, *Bailm.* 5. See § 10, *post*; Edwards, § 3. *Bailm.* § 3.

the bailee liable. But the liability of the common carrier of goods, like that of the innkeeper, is extraordinary and exceptional, and is based upon reasons of public policy, and not upon the contract of bailment, although the liability cannot exist without the bailment. The common carrier of goods is an insurer of the safety of the goods and the question of negligence, as will be hereafter seen, ordinarily does not enter into the determination of his liability.⁶ But the question of negligence does arise when he seeks to avail himself of any of the exceptions which the law allows, or his contract makes, to his general liability as an insurer, and it is charged that but for his negligence the loss would not have occurred. And the liability of a common carrier of passengers for an injury to a passenger generally depends exclusively upon the question of negligence.⁷ The law as to the liability of bailees in general for negligence, adverted to in a subsequent section, thus frequently furnishes the rule by which the common carrier as well as other bailees are held responsible for negligence. But while the liability of all those carriers whose liability depends entirely upon negligence is determined by the general law of bailments, that law, not admitting the responsibility of the bailee when loss or injury has occurred without negligence, has generally but little application to the liability of common carriers of goods, who are held to be insurers against all accidents not attributable directly to the acts of God or of the public enemy.

§ 4. Private carriers.—A private carrier is one who agrees, by special agreement or contract, to transport persons or property from one place to another, either gratuitously or for hire; one who undertakes for the transportation in a particular instance only, not making it a vocation, nor holding himself out to the public ready to act for all who desire his services.⁸ Common carriers, however, hold themselves out to carry for all persons indiscriminately.⁹ Private or special carriers are not subject to the exceptional or extraordinary duties and liabilities of common carriers. They are not bound by virtue of their employment or vocation to receive and carry all persons or the goods of all who apply to them, but

6. See Chap. II, § 1.

7. See Carriers of Passengers.

8. §§ 6, 10, *post*.

9. See Common Carriers.

they may carry for whom they choose and for such compensation and at such times as they may fix or as may be agreed upon. They are not in any sense public servants like common carriers. But they may by special contract assume the duties of common or public carriers and thus make themselves liable as common carriers.

§ 5. Duties and liabilities of private carriers.—Private carriers, whether carriers without hire or carriers for hire, as has been stated, are strictly bailees, in no way distinguishable from ordinary bailees as to their responsibility, and are subject only to the duties and liabilities of bailees, and their liability is determined by the degree of negligence of which they are guilty.¹⁰ The principles of the law as to the liabilities of bailees in general for negligence which form a part of the law of bailments, are applicable in determining the liability of private carriers. These principles or rules may be stated as follows: When the bailment is for the sole benefit of the bailor, the law requires only slight diligence on the part of the bailee, and holds him liable only for gross negligence. When the bailment is for the sole benefit of the bailee, the law requires great diligence on his part, and holds him liable for slight negligence. When the bailment is, or is intended to be, reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and holds him liable for ordinary negligence.¹¹

§ 6. Private carriers without hire.—Carriers who carry goods gratuitously, without any compensation directly or indirectly, are liable as gratuitous bailees or mandataries only.¹² It was formerly held that such carriers were only liable for gross negligence and required to exercise only slight care and diligence.¹³ But all

10. § 3, *ante*; *Allen v. Sackrider*, 37 N. Y. 341; *Fish v. Clark*, 49 N. Y. 122, 2 Lans. (N. Y.) 176.

11. *Angell, Carrs.* (5th ed.) § 11; *Hutch. Carrs.* § 8.

12. *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story (U. S.) 16; *Pender v. Robbins*, 6 Jones L. (N.

C.) 207; *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Smith's L. Cas. 199; *Hutton v. Osborne*, 1 Sel. N. P. 420; *Mobile, etc., R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Robinson v. Threadgill*, 13 Ired. L. (N. C.) 39.

13. *Coggs v. Bernard*, 2 Ld. Raym.

distinctions in the degrees of negligence are now generally regarded by the courts as unimportant and as impracticable in determining liability for negligence.¹⁴ Although a person under-

909, 1 Smith's L. Cas. 199; Hutton v. Osborne, 1 Sel. N. P. 420; Colyar v. Taylor, 1 Coldw. (Tenn.) 372, where T. gratuitously undertook to receive \$1,500 for C. at N., and deliver it to him at W., where they both resided, and, after drawing the money went to a public fair, where he met E., a townsman, who was going home before he was, and, stepping a little aside from the crowd, gave E. the money to carry to C., and, on his way home in a crowded car, E. had his pocket picked of the money, T. was held liable for the loss, as he had violated his trust and was guilty of a conversion of the property, and of gross negligence.

Kirtland v. Montgomery, 1 Swan (Tenn.), 457, wherein it was said: "As a general rule, a mandatary whose engagement is merely gratuitous, is bound to *ordinary* diligence and liable only for gross neglect or breach of good faith. It is, however, a well settled rule that if a mandatary enter upon the execution of business submitted to him, he is bound to use a degree of diligence and attention adequate to the performance of his undertaking; if he do not, and damage ensue, he is liable as a mandatary for his misfeasance."

In Jenkins v. Motlow, 1 Sneed. (Tenn.) 253, 60 Am. Dec. 154, the court, referring to this extract, said: "The word 'ordinary' in this extract is not technical or correct, but the rule as to the liability of a gratuitous bailee is clearly and truly stated."

A mere mandatary is liable only for gross negligence. Stan-

ton v. Bell, 2 Hawks (N. C.), 145; Sodowsky v. McFarland, 3 Dana (Ky.), 205; Tracy v. Wood, 3 Mason (U. S.), 132; Tompkins v. Saltmarsh, 14 S. & R. (Pa.) 275; Bland v. Womack, 2 Murph. (N. C.) 373; Beardslee v. Richardson, 11 Wend. (N. Y.) 25; Anderson v. Foresman, Wright (Ohio), 598.

Gross negligence, in such case, is the omission of that care which bailees without hire, or other mandataries, of common prudence, are accustomed to take of property of the like kind. Money requires more care than common articles of property. Tracy v. Wood, 3 Mason (U. S.), 132; Anderson v. Foresman, Wright (Ohio), 598; Bland v. Womack, 2 Murph. (N. C.) 373.

Carrier not liable. Where gold dust was taken on board the steamer New World to be carried gratuitously from Sacramento to San Francisco, the clerk of the boat having given the owners of the dust actual notice that he would receive gold dust or money only on condition that no charge should be made and no responsibility incurred, and the gold dust was stolen from the boat without any negligence on the part of its officers, the owners of the boat were held not liable for the loss. Fay v. Steamer New World, 1 Cal. 348.

14. Perkins v. New York Cent. R. Co., 24 N. Y. 196, 82 Am. Dec. 282, wherein the court said: "The difficulty of defining gross negligence and the intrinsic uncertainty pertaining to the question as one of law, and the other impracticability of establishing any precise rule on the subject,

taking gratuitously to perform an act with respect to the property of another is not bound by his undertaking,¹⁵ yet if the act is performed he will be held responsible for any injury resulting from a want of due care.¹⁶ What is gross negligence or slight negligence can only be determined by the circumstances of a given case, and gross negligence is not shown where the evidence is that reasonable and proper care was exercised.¹⁷ Negligence is essen-

renders it unsafe to base any legal decision on distinctions of the degrees of negligence." Smith v. New York Cent. R. Co., 24 N. Y. 222; Nellis' St. Rd. Acct. Law, pp. 22, 23.

The same view has been taken in other states:

Ala.—Stringer v. Alabama R. Co., 99 Ala. 397, 13 So. 75.

Colo.—Denver, etc., R. Co. v. Peterson (Colo.), 69 Pac. 578.

Me.—Storer v. Gowen, 18 Me. 177.

Mass.—Lane v. Boston, etc., R. Co., 112 Mass. 455, 22 Am. L. Reg. N. S. 126, note.

Mo.—McPheeters v. Hannibal, etc., R. Co., 45 Mo. 22.

N. H.—State v. Boston, etc., R. Co., 58 N. H. 410.

N. C.—McAdoo v. Richmond, etc., R. Co., 105 N. C. 140.

Tenn.—Mariner v. Smith, 5 Heisk. (Tenn.) 208.

Vt.—Briggs v. Taylor, 28 Vt. 180.

The doctrine has also been criticised in the United States courts and in England.

U. S.—The Steamboat New World v. King, 16 How. (U. S.) 474; Milwaukee, etc., R. Co. v. Arms, 91 U. S. 494; New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357; Holladay v. Kennard, 12 Wall. (U. S.) 254; Purple v. Union Pac. R. Co., 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700, the words "gross" and "reckless," as applied to negligence *per se*, have no legal signifi-

cance which imports other than simple negligence or want of due care, and are not the equivalent of "willful" or "wanton."

Eng.—Hinton v. Dibbin, 2 Ad. & El. N. S. 661, 42 E. C. L. 847, 2 Q. B. 646, 2 G. & D. 36, 6 Jur. 601, "it may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists." Grill v. General Iron Screw Collier Co., L. R. 1 C. P. 612; Beal v. South Devon R. Co., 3 H. & C. 341; Wyld v. Pickford, 8 M. & W. 443; Wilson v. Brett, 11 M. & W. 113; Armistead v. Wilde, 17 Q. B. 261, 71 E. C. L. 261; Austin v. Manchester, etc., R. Co., 10 C. B. 454, 70 E. C. L. 454, 11 Eng. L. & Eq. 512.

Any negligence is gross in one who undertakes a duty and fails to perform it. The term "gross negligence" is applied to the case of a gratuitous bailee, who is not liable unless he fails to exercise the degree of skill which he possesses. Lord v. Midland R. Co., L. R. 2 C. P. 339; Cashill v. Wright, 6 El. & Bl. 891, 88 E. C. L. 891; Giblin v. McMullen, L. R. 2 P. C. 317.

15. Thorne v. Deas, 4 Johns. (N. Y.) 84; McGee v. Bast, 6 J. J. Marsh (Ky.), 455.

16. Melbourne v. Louisville, etc., R. Co., 88 Ala. 443, 6 So. 762.

17. Louisville, etc., R. Co. v. Ger-
son, 102 Ala. 409, 14 So. 873.

tially always a question of fact and its determination depends necessarily upon the particular circumstances in each case. The private carrier without hire is bound to use proper and reasonable care for the safety of the goods committed to his charge, and the test of what is such proper and reasonable care seems to be that which a man of ordinary prudence would have used under the particular circumstances. The test must be applied with reference to the article, the nature of the trust, and the circumstances attending its execution, and thus applied what would be reasonable and proper care in the case of a private carrier without hire may not be the same measure of care required of a private carrier for hire.¹⁸ If a person who has undertaken to carry goods gratuitously takes the same care of the goods intrusted to him as of his own, he is not liable, if loss ensues, but he is responsible for a loss resulting from a want of such care.¹⁹

§ 7. When transportation is gratuitous.—In order to determine the question of negligence it is frequently necessary to determine in the first instance whether or not the transportation was actually gratuitous. Where the carrier received goods for shipment and sale at their place of destination, the proceeds to be returned to the shipper by the carrier, it has been frequently held that the carrier was not acting gratuitously in carrying such proceeds to the shipper, but as a carrier for hire, although he received only the usual or ordinary freight for transportation of the goods, the freight being a consideration for both carriage of the goods and the return of the proceeds.²⁰ So, a person traveling on a train in

Gross negligence. A carrier, without compensation, was held liable on the ground of gross negligence, because he had deposited the goods in a place which was peculiarly unsafe at the time, by reason of an anticipated raid of hostile troops. Adams Exp. Co. v. Cressop, 6 Bush. (Ky.) 572. But, where the transportation was not gratuitous and the goods were deposited under such circumstances as showed the exercise of reasonable care as bailee by the defendant, after the termination of its

liability as a carrier, it was held not liable. Adams Exp. Co. v. Darnell, 31 Ind. 20, 99 Am. Dec. 582; Howard Exp. Co. v. Wile, 64 Pa. St. 201.

18. Philadelphia, etc., R. Co. v. Derby, 14 How. (U. S.) 468; Treleven v. Northern Pac. R. Co., 89 Wis. 598; Coggs v. Bernard, 2 Ld. Raym. 909, 1 Smith's L. Cas. 199.

19. Anderson v. Foresman, Wright (Ohio), 598.

20. Kemp v. Coughtry, 11 Johns. (N. Y.) 107; Harrington v. McShane, 2 Watts (Pa.) 443, 27 Am. Dec.

charge of cattle which are being shipped, is not a gratuitous passenger, but a passenger for hire; the consideration for his passage is the service he renders in taking care of the cattle, or it is found in the charges made for shipping the cattle.²¹ Where officers of steamboats carried packages of money, without compensation other than the probability that the boat would be preferred for the shipment of freight, in case the package was accompanied by an order for goods, the owners of the boats have been held not liable as common carriers for the loss of such packages because there was no certain or fixed standard of remuneration, nor could any pay be recovered for the service, and the custom was not shown to have grown up with the knowledge of the owner, or to be other than a mere accommodation usage.²² A railroad company which contracts for the transportation of the tanks of an oil company, and their return, when emptied, is subject to the liabilities of a common carrier with respect to the return of the empty tanks, though no bill of lading is furnished therefor, nor any additional compensation paid, independently of the freight for the transportation of the oil.²³ Likewise, a carrier which, by contract or usage, carries without extra charge the empty sacks returned to a shipper of grain or other commodity, is held to be a carrier for hire as to such sacks, his compensation lying in the freight charges received for transportation of the grain or other commodity.²⁴

321; *Emery v. Hersey*, 4 Me. 407, 16 Am. Dec. 268; *Moseley v. Lord*, 2 Conn. 389.

21. *Missouri Pac. R. Co. v. Ivey*, 71 Tex. 409, 9 S. W. 346, 1 L. R. A. 500, 10 Am. St. Rep. 758; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Ohio, etc., R. Co. v. Nickless*, 71 Ind. 271.

22. *Cincinnati, etc., Mail Co. v. Boal*, 15 Ind. 345; *Whitemore v. The Steamboat Caroline*, 20 Mo. 513; *Chouteau v. Steamboat St. Anthony*, 16 Mo. 216. See *Rogers v. Head, Cro. Jac.* 262, where it was held when plaintiff had undertaken

with defendant "reasonably to content him for the carriage," the latter was liable as a private carrier for hire, although there was no proof of a specific compensation having been paid him.

23. *Spears v. Lake Shore, etc., R. Co.*, 67 Barb. (N. Y.) 513; *Mallory v. Tioga R. Co.*, 32 How. Pr. (N. Y.) 616, affg. 39 Barb. (N. Y.) 488.

24. *Pierce v. Milwaukee, etc., R. Co.*, 23 Wis. 387; *Aldridge v. Great Western R. Co.*, 15 C. B. N. S. 582, 109 E. C. L. 582. Compare *Jenkins v. Motlow*, 1 Sneed. (Tenn.) 248, cited under § 6, where the deposit of money by a passenger, for the carriage of which no extra charge was

§ 8. When compensation may be implied.—The fact that a carrier did not intend to charge for the transportation of a certain chattel, but meant to carry it gratuitously, if not communicated to the owner, does not render the bailment a gratuitous one so as to exempt him from loss, except for gross negligence. Delivery of property to a common carrier, for transportation, raises an implied obligation to pay freight, and renders the carrier liable accordingly, unless the contrary is agreed upon. No express agreement having been made as to compensation, the carrier is entitled to it if he choose to demand it.²⁵ It is not necessary to constitute one a common carrier that a stipulation should be entered into as to the amount of freight to be paid. But unless a right to compensation exists, the common law liability of a common carrier is not created, though there may be the responsibility of a mandatary incurred.²⁶ Though there be no stipulated price for the service, yet if the usage in such cases implies an agreement to pay the carrier for such service, he will be liable as a common carrier.²⁷

§ 9. Proof of negligence.—A private carrier without hire is a mandatary or bailee without reward and is liable in all cases for gross negligence only, and this must be proved against him. If he fails to deliver the goods according to his undertaking, in order to make him liable for the loss, proof must be made of a demand and refusal, or that the property was lost by the carrier's negligence.²⁸ It then devolves upon the carrier to account for the loss

made, was held to render the carrier liable to plaintiff only as a mandatary or depository, having failed to use *ordinary* diligence under the circumstances. This case would seem to be analogous to those cited in the text and the carrier to be liable as a common carrier as to the money as he is of the passenger's baggage, the price paid for the passage being also the hire for the carriage of whatever the passenger commits to the custody of the carrier.

25. Gray v. Missouri Riv. Packet Co., 64 Mo. 47; Kirtland v. Montgomery, 1 Swan (Tenn.), 452.

26. Knox v. Rives, 14 Ala. 249, 48 Am. Dec. 97. The owner of a private

ferry, although on a road not opened by public authority, or repaired by public labor, may so use it as to subject himself to the liability of a common carrier, if he undertakes, for hire, to convey across the river all persons indifferently, with their carriages and goods; but this is a question for the jury. Littlejohn v. Jones, 2 McMull. (S. C.) 365, 39 Am. Dec. 132.

27. Kirtland v. Montgomery, 1 Swan (Tenn.), 452.

28. Beardslee v. Richardson, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596; Lampley v. Scott, 24 Miss. 528. If the goods be taken from him by one having paramount title, he is dis-

by showing that it occurred under circumstances such as to relieve him from liability.²⁹ The statements made by the carrier at the time of the demand and refusal to deliver the property, in which he gives an account of the loss by accident, or theft, with the attendant circumstances, are part of the *res gestae*, and admissible as evidence in his favor.³⁰

§ 10. Private carriers for hire.—A private carrier for hire is one who, without being engaged in such business as a public employment, and making no public profession to carry for all who apply, undertakes to carry and deliver the goods of others upon particular occasions, for hire or reward, upon such terms as may be agreed upon.³¹ One who is the owner of a vessel, and who

charged. *Edson v. Weston*, 7 Cow. (N. Y.) 278; *Beardslee v. Richardson, supra*.

29. *Beardslee v. Richardson, supra*; *Darling v. Younker*, 37 Ohio St. 493, 41 Am. Rep. 532. A bailor who entrusts his goods, knowing how and where the bailee will keep them, assents to such keeping, and can maintain no action for their loss. *Knowles v. Atlantic, etc., R. Co.*, 38 Me. 55, 61 Am. Dec. 234.

A person who undertakes, without reward, to sell and dispose of the property of another in the same manner as though it was his own, is liable for gross negligence, such as will imply fraud, and is not bound, under such a contract, "to dispose of the same as a prudent man would of his own." *McLean v. Rutherford*, 8 Mo. 109.

A bailee acting gratuitously in carrying money, which is lost, while other money, which is his own, is not lost, is liable for the loss. *Bland v. Womack*, 2 Murph. (N. C.) 373.

A bailee, without reward, who has used money with which he is intrusted, and is afterwards robbed of other money, must bear the loss. An-

derson v. Foresman, Wright (Ohio), 598.

If the bailee "keeps the goods bailed to him, but as he keeps his own, though he keeps his own negligently, yet he is not chargeable for them, for the keeping of them as he keeps his own is an argument of his honesty." *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Smith's L. Cas. 199. Compare *Doorman v. Jenkins*, 2 Ad. & El. 256, 29 E. C. L. 80; *Rooth v. Wilson*, 1 B. & Ald. 59.

30. *Lamplley v. Scott*, 24 Miss. 528; *Tompkins v. Saltmarsh*, 14 S. & R. (Pa.) 275. "That a person robbed instantly states the fact, institutes a search, and prosecutes the offender, are circumstances for the jury. It would be difficult to establish such facts except by the attending circumstances. Such evidence is competent, as it would be for the plaintiff to show that at the time of the alleged robbery the defendant remained silent, neither instituting search or prosecution." *Anderson v. Foresman, Wright (Ohio)*, 598.

31. *Penniwill v. Cullen*, 5 Harr. (Del.) 238; *Self. v. Dunn*, 42 Ga. 328, 5 Am. Rep. 544; *Littlejohn v.*

is especially employed to transport a cargo of grain, is not a common or public carrier, but only a private carrier for hire.³² All persons who carry under a special contract, as the driver of a stagecoach, occasionally taking packages to carry for compensation, are private carriers.³³ One who contracts to cut timber, and transport it to the place where it is to be delivered and used, does not incur the responsibility of a common carrier, but is only liable as a private carrier for the want of ordinary prudence, care and skill.³⁴ If the carrier holds himself out to the public generally as ready and willing to carry any goods that may be shipped, he is liable as a common carrier;³⁵ but if he only proposes to carry the goods of particular persons, he cannot be held liable as a common carrier to a third person, with whom his servant or agent, in violation of his instructions, makes a contract for freight.³⁶ A purchaser of machinery who contracts to remove it from the railroad to his building, where it is to be erected by the vendor, does not become a common carrier and liable for breakage of the machinery by mere accident, without his negligence.³⁷ A railroad acts as a private carrier, instead of as a common carrier, in carrying goods for an express company under a special agreement with such company.³⁸ And where a railroad company undertakes to haul along its line wagons belonging to private traders, it is a private carrier as to such wagons.³⁹ A common carrier may, by special contract, limit its common law liability, and thus become

Jones, 2 McMull. L. (S. C.) 366, 39 Am. Dec. 132; Sheldon v. Robinson, 7 N. H. 157, 26 Am. Dec. 726; Samms v. Stewart, 20 Ohio 69, 55 Am. Dec. 445; Moriarty v. Hadden's Express, 1 Daly (N. Y.) 227; Rogers v. Head, Cro. Jac. 262. One who is employed for hire *pro hac vice* only, and does not make the carriage of goods his constant employment, is not liable as a common carrier. Anon. v. Jackson, 1 Hayw. (N. C.) 14; Satterlee v. Groat, 1 Wend. (N. Y.) 272.

32. Allen v. Sackrider, 37 N. Y. 341.

33. Beckman v. Shouse, 5 Rawle. (Pa.) 179, 28 Am. Dec. 653.

34. Pike v. Nash, 1 Keyes (N. Y.), 335, 3 Abb. App. Dec. (N. Y.) 610.

35. McClure v. Richardson, Rice L. (S. C.) 215, 33 Am. Dec. 105.

36. Steele v. McTyer, 31 Ala. 667, 70 Am. Dec. 516; Jenkins v. Pickett, 9 Yerg. (Tenn.) 481; Satterlee v. Groat, 1 Wend. (N. Y.) 272.

37. Allis v. Voight, 90 Mich. 125, 51 N. W. 190.

38. Louisville, etc., R. Co. v. Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 5 Am. & Eng. Cas. N. S. 26.

39. Watson v. North British R. Co., 3 Sc. Sess. Cas. (4th sess.) 637, 3 Ry. & C. T. Cas. 17.

a private carrier or bailee for hire as to the particular goods carried under the contract, although it cannot by special contract create an exemption from liability for actual negligence of itself or its servants.⁴⁰

§ 11. Liability of private carriers for hire.—The private or special carrier for hire is bound to exercise ordinary prudence, care, and skill in carrying goods and delivering them to the consignee, and is liable for ordinary negligence resulting in loss or injury of the goods. He is not an insurer of the safety of the goods intrusted to him for transportation.⁴¹ Ordinary care has been defined to be “such care and diligence as a reasonably prudent man would exercise in the conduct of his own business or in the preservation of his property.”⁴² A carrier for hire, although not a common carrier, is bound to make good losses arising from the negligence of his own servants, although he would not be liable for losses by thieves, or by any taking by force, if not himself guilty of negligence, or if the owner accompanies the goods to take care of them and is himself guilty of negligence; for it is a rule of law that a party cannot recover if his own negligence was as much

40. New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357.

41. Allen v. Sackrider, 37 N. Y. 341; Fish v. Clark, 49 N. Y. 122, 2 Lans. (N. Y.) 176; Pike v. Nash, 1 Keyes (N. Y.), 335, 3 Abb. Dec. (N. Y.) 610; Beck v. Evans, 16 East, 244; Whalley v. Wray, 3 Esp. 74; Bowman v. Teall, 23 Wend. (N. Y.) 306; Allis v. Voight, 90 Mich. 125, 51 N. W. 190; White v. Bascom, 28 Vt. 268; Nelson v. Mackintosh, 1 Stark. 237, 2 E. C. L. 96.

42. United States v. Power, 6 Mont. 271; Ames v. Belden, 17 Barb. (N. Y.) 515; Samms v. Stewart, 20 Ohio, 73, 55 Am. Dec. 445; Story Bailm. § 399. “It is obvious that a bailee, whatever the character of the bailment may be, when its purpose has been fully satisfied and performed, is bound, upon request, to

redeliver the thing bailed to its lawful owner. This is necessarily implied, in all cases, from the nature of the contract of bailment. The authorities are uniform to the effect that such redelivery may be excused in the case of a bailment, mutually beneficial to the parties, by proof that the deposit has been lost or destroyed without negligence, or want of such care on the part of a bailee as prudent men under similar circumstances, commonly take of their own goods. In the case of gratuitous bailments, however, the bailee is liable only when chargeable with gross neglect.” Ouderkirk v. Central Nat. Bank, 119 N. Y. 263. See Nelson v. Mackintosh, 1 Stark. 237, 2 E. C. L. 96. Compare Pender v. Robbins, 6 Jones L. (N. C.) 207.

the cause of the loss as that of the defendant.⁴³ But, in all such cases, whether there has or has not been a due degree of care on the part of the carrier, whether or not in the exercise of ordinary diligence the loss could have been avoided, must be decided from all the circumstances surrounding the case.⁴⁴ The carrier being liable only for losses resulting from his negligence, the burden of proof is on the owner or consignee of the goods lost to show that the loss resulted from the negligence of the carrier. The question is for the jury to determine where the evidence is conflicting.⁴⁵

§ 12. Special contracts increasing or diminishing liability.— The rule is now well recognized that there is no restriction upon the right of any carrier to limit, by special contract, his common law liability for loss, except such loss as is due to the negligence of himself or servants.⁴⁶ Private or special carriers for hire may contract for a larger or more restricted liability than the law would imply against them in the absence of a special contract. They may become insurers against all possible hazards and assume liabilities coextensive with those of common carriers, or they may contract to answer for nothing but a loss happening through their own fraud or want of good faith. The contracting parties stand on equal terms and can make just such a bargain as they think will answer their purposes.⁴⁷ They are carriers, common or private, exactly according to their contracts, and their liabilities will be measured by the contract; and in actions against them for loss or damage, they must be declared against on the contracts or for a breach of duty, and not as common or private carriers.⁴⁸ Such contracts are strictly construed and an undertaking to carry "safely and securely" will not be presumed to enlarge the common

43. Brind v. Dale, 8 C. & P. 207, 34 E. C. L. 355; Cailiff v. Danvers, 1 Peake N. P. 114.

44. Story Bailm. § 39.

45. Kirtland v. Montgomery, 1 Swan (Tenn.), 453; see Burden of Proof; Carriers of Goods. Chap. 14.

46. New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357; and other cases cited under Limitation of Liability, Carriers of Goods, chap. 10.

47. Wells v. Steam Nav. Co., 2 N. Y. 204; Alexander v. Green, 3 Hill (N. Y.) 9; Fish v. Chapman, 2 Ga. 349; Hand v. Baynes, 4 Whart. (Pa.) 214; Robinson v. Dunmore, 2 Bos. & P. 417; Hadley v. Clark, 8 T. R. 259; Breakneck Canal Nav. Co. v. Pritchard, 6 T. R. 750; Paradise v. Jane, Alleyn. 27.

48. Kimball v. Rutland Railroad, 26 Vt. 247; Robinson v. Dunmore, 2 Bos. & P. 416.

law liability to carry free from ordinary negligence and to make the carrier an insurer of the goods. To do this there must be an express agreement.⁴⁹

§ 13. Lien of the private carrier.—The rule seems to be that the private carrier has no common law lien upon the goods carried by him for his charges for transportation, and has a lien only when he specially reserves it by agreement, or it has been conferred by statute.⁵⁰ Most text writers, reasoning from analogy, find no satisfactory reason why the private carrier should not have the same lien as the warehouseman and wharfinger, who have rendered service in respect to the goods for the owner's benefit, or the tradesman or artisan, who, by his labor and skill and materials furnished, has added to the value of the goods in his charge.⁵¹ This view has been criticised as questionable on the grounds that the artisan is given such a lien on the theory that he has bettered the property; the innkeeper and common carrier are recognized as entitled to it because they are in a measure public servants, and bound to perform services and furnish entertainment for all who apply; the warehouseman deals largely with the public, serving all who apply, although not bound to do so, furnishing facilities at great expense to serve the public whose patronage he seeks; while none of these reasons apply in the case of the private carrier.⁵² It was said by Lord Kenyon, in speaking of the liens of warehousemen and wharfingers, that liens were either by common law, usage or agreement; that a lien from usage was a matter of evidence; that the usage in the case under discussion had been proved so often it should be considered a settled point; and that liens by common law arose where a party was

49. Ames v. Belden, 17 Barb. (N. Y.) 516; Foster v. Essex Bank, 17 Mass. 501, 9 Am. Dec. 168; Oakley v. Portsmouth, etc., Steam Packet Co., 11 Exch. 618; Ross v. Hill, 2 C. B. 877, 3 Dowl. & L. 788; United States v. Power, 6 Mont. 271; Scaife v. Farrant, L. R. 10 Exch. 358.

50. Riddle, Dean & Co. v. New York, etc., R. Co., 1 Int. Com. R. 594, 604, the compensation of a com-

mon carrier is assured to him by a lien upon the goods—a right which is not enjoyed by a private carrier; Jones, Liens, § 276; Fuller v. Bradley, 25 Pa. St. 120; Picquet v. McKay, 2 Blackf. (Ind.) 465.

51. Angell, Carriers (5th ed.), § 66; Hutchinson, Carriers, § 46; Jones, Liens, § 276.

52. Van Zile, Bailments and Carriers, § 404.

obliged to receive the goods.⁵³ The general lien of the wharfinger upon the goods of his customer entrusted to him and in his possession, for his balance in respect of freight and wharfage, was admitted; but the court refused to allow a lien claimed for labor- age, (comprising landing, weighing and delivering) and warehouse rent, because the custom proved was not sufficiently certain and uniform to lay a foundation, upon which an express or implied contract could be found, to act upon it.⁵⁴ A warehouseman has a specific lien, unless it is made general by an express or implied contract, upon goods entrusted to him within his line of business, for his reasonable charges. His lien arose out of the usage of business, repeatedly proved and recognized until it has become an established right.⁵⁵ An artisan or other bailee for hire of labor and services has an interest or special property in the chattels upon which his labor or services are performed, for which he has a specific lien until he is paid for his labor, or parts with the possession pursuant to the terms of his agreement.⁵⁶ The lien of the artisan, therefore, seems to be founded upon his special prop-

53. Holderness v. Collinson, 1 M. & R. 55, 7 B. & C. 712.

54. Holderness v. Collinson, *supra*; Naylor v. Mangles, 1 Esp. 109; Spears v. Hartley, 3 Esp. 81; Rushford v. Hadfield, 6 East, 519; Dresser v. Bosanquet, 4 B. & S. 460, 116 E. C. L. R.

55. Holderness v. Collinson, *supra*; Nayler v. Mangles, *supra*; Spears v. Hartley, *supra*. As against a consignee, knowing the regulation and usage of a railroad company to require certain kinds of goods to be unloaded within twenty-four hours after notice to him of their arrival, the company as warehousemen have a lien on the goods for storage after the twenty-four hours have elapsed. Miller v. Mansfield, 112 Mass. 260.

A warehouseman has a specific, not a general lien; but he may deliver a part, and retain the residue for the price chargeable on all the goods received by him uner

the same bailment, provided the ownership of the whole is in the same person. Steinman v. Wilkins, 7 Watts & S. (Pa.) 466. Where a quantity of merchandise is stored in a warehouse, and portions of it are from time to time delivered out without receiving the storage thereon, the warehouseman has a lien upon the residue for the storage of the whole; it being one transaction, the lien covers the whole of the goods deposited, and may rest upon each part of the entire claim. Morgan v. Congdon, 4 N. Y. 552; Schmidt v. Blood, 9 Wend. (N. Y.) 268; McFarland v. Wheeler, 26 Wend. (N. Y.) 467; Lowe v. Martin, 18 Ill. 286; Sears v. Wills, 4 Allen (Mass.), 212; Blake v. Nicholson, 3 M. & S. 168.

56. Gregory v. Stryker, 2 Denio (N. Y.), 628; Moore v. Hitchcock, 4 Wend. (N. Y.) 292; Wheeler v. McFarland, 10 Wend. (N. Y.) 318, 324.

erty in the chattel and his having added something to its value; the lien of the common carrier and innkeeper is based upon the fact that they are bound to receive the goods and perform the services required; the lien of the warehouseman and wharfinger is founded upon long established and well recognized usage; none of which reasons for a lien exist in the case of the private carrier. But it has been held that a carrier, by boat, of freight to a specified place and back, taking in and putting out freight at different places, as the shipper might direct, for a stipulated sum per day, has a lien on the freight remaining on board on the return of the boat, for the whole unpaid freight.⁵⁷ And, in a recent case, that the owner of a steamboat engaged in the business of towing is not a common carrier, entitled as such to a specific lien upon the goods carried, for his charges in transporting them, especially where he tows only for a single party, but that he has a common law bailee's lien thereon.⁵⁸

57. Fuller v. Bradley, 25 Pa. St. 120.

58. Knapp, etc., Co. v. McCaffrey, 178 Ill. 107, 52 N. E. 898, affg. 74 Ill. App. 80.

CHAPTER II.

COMMON CARRIERS.

- SECTION
- 1. What constitutes a common carrier.
 - 2. The liability of the common carrier.
 - 3. Liability in the carrying of live stock.
 - 4. Liability where the loss or injury results from the inherent nature of the goods.
 - 5. Where the loss or injury is the result of the acts of the shipper.
 - 6. Where the loss or injury is the result of delay in the transmission of the goods.
 - 7. Where the loss or injury is caused by the exercise of public authority.
 - 8. Liability of carriers of passengers.
 - 9. Express companies.
 - 10. Railroad companies.
 - 11. Receivers and assignees of railroad company operating the road.
 - 12. Trustees of mortgage bonds of railroad company.
 - 13. Street railroad companies.
 - 14. One railroad transporting the cars of another.
 - 15. Transportation or dispatch companies.
 - 16. Express freight lines.
 - 17. Owners of canal boats.
 - 18. Owners of tow boats towing water craft on the Mississippi.
 - 19. Owners of boats employed in towing other boats or vessels.
 - 20. Ferrymen.
 - 21. Hackmen.
 - 22. Proprietors of omnibuses.
 - 23. Proprietors of stage coaches.
 - 24. Palace and sleeping car companies.
 - 25. Pipe line for carrying oil.
 - 26. Wagoners.
 - 27. Carriers by river craft.
 - 28. Truckmen, Freightmen, Draymen, Cartmen, and Porters.
 - 29. Owners and masters of ships and steamboats or vessels.
 - 30. Owners of toll bridge.
 - 31. Canal companies.
 - 32. Forwarding merchants.
 - 33. Warehousemen and wharfingers.
 - 34. Postmasters, mail contractors, and mail carriers.
 - 35. Log-carrying, or log-driving, or boom companies.
 - 36. Telegraph companies.
 - 37. Telephone companies.

- SECTION 38. Railroad company transporting a circus or menagerie.
 39. Railroad company in South Carolina only over its own line.
 40. Railroad company carrying a dog for accommodation of passenger.
 41. Carrier under a contract exempting "river risks."
 42. Owners of passenger elevators.
 43. Car-switching companies.
 44. Telegraph messenger companies.
 45. An irrigation company.
 46. Transfer companies.
 47. Owners of grain elevators.

§ 1. What constitutes a common carrier.—A common or public carrier is one who, by virtue of his business or calling, undertakes, for compensation, to transport personal property from one place to another, either by land or water, and deliver the same, for all such as may choose to employ him; and every one who undertakes to carry and deliver, for compensation, the goods of all persons indifferently, is, as to liability, to be deemed a common carrier.¹ The employment of a common carrier is a public one

1. Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34, 38, 52 N. E. 665, 70 Am. St. Rep. 432; aff'g 15 Misc. Rep. (N. Y.) 93, 71 St. Rep. (N. Y.) 830, 36 N. Y. Supp. 808; Lough v. Outerbridge, 143 N. Y. 271, 145 N. Y. 601, aff'g 68 Hun (N. Y.) 486; Allen v. Sackrider, 37 N. Y. 341; Bank of Orange v. Brown, 3 Wend. (N. Y.) 158, 161, 9 Wend. (N. Y.) 85; Alexander v. Green, 7 Hill (N. Y.), 544; Blanchard v. Isaacs, 3 Barb. (N. Y.) 388; Schouler Bailm. & Car. (2nd ed.) 351; Story Bail. §§ 495, 496; 2 Kent's Com. (4th ed.) pp. 598, 599; 2 Pars. Cont. 165, 175; Angell Carr. 870; 1 Smith's Lead. Cas. (8th Am. ed.) 392; Smith's Mercantile Law (Pomeroy's ed.), § 356.

A common carrier was defined in Gisburn v. Hurst, 1 Salk. 249, to be "any man undertaking, for hire, to carry the goods of *all persons indifferently*," and in Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec.

133, to be "one who undertakes, for hire, to transport the goods of *such as choose to employ him* from place to place."

The former definition was held in Gordon v. Hutchinson, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464, to be "the best definition of a common carrier in its application to the business of this country;" and it has been approved in Jeremy on Carriers, 4; Mershon v. Hobensack, 22 N. J. L. 377; Verner v. Sweitzer, 32 Pa. St. 208; Bank of Orange v. Brown, *supra*, wherein Chief Justice Savage said: "Every person who undertakes to carry for a compensation, the goods of *all persons indifferently*, is as to the liability imposed, to be considered a common carrier. The distinction between a common carrier and a private or special carrier is, that the former holds himself out in common, that is to all persons who employ him, as ready to carry for hire; while the latter agrees in some

and he assumes a public duty, and is bound to receive and carry the goods of any one who offers, provided the goods be of the kind he professes to carry, and the person so offering agrees to have them carried upon the lawful terms prescribed by the carrier.²

special case with some private individual to carry for hire." Story Cont. § 752a.

Common carriers undertake generally, and not as a casual occupation, and for all people indifferent-
ly, to convey goods and deliver them at a place appointed for hire as a business, and with or without a special agreement as to price. 2 Kent's Com. 598.

The definition given in the text is substantially that approved by the following additional cases: The Propeller Niagara v. Cordes, 21 How. (U. S.) 22; Central R., etc., Co. v. Lampley, 76 Ala. 357, 52 Am. Rep. 334, 23 Am. & Eng. R. Cas. 720; Babcock v. Herbert, 3 Ala. 392, 37 Am. Dec. 695; Schloss v. Wood, 11 Colo. 287; Bennett v. Filyaw, 1 Fla. 453; Robertson v. Kennedy, 2 Dana (Ky.), 430, 26 Am. Dec. 466; Elkins v. Boston, etc., R. Co., 23 N. H. 275; Shelden v. Robinson, 7 N. H. 157, 163, 26 Am. Dec. 726; Fuller v. Bradley, 25 Pa. St. 120; Littlejohn v. Jones, 2 McMul. (S. C.) 365, 39 Am. Dec. 132; Chevallier v. Straham, 2 Tex. 115, 118, 47 Am. Dec. 639; Doty v. Strong, 1 Pin. (Wis.) 324, Burn. (Wis.) 158, 40 Am. Dec. 773.

2. Allen v. Sackrider, 37 N. Y. 341; Sanford v. American Dist. Tel. Co., 13 Misc. Rep. (N. Y.) 88, 34 N. Y. Supp. 144; Hutchinson Carr. § 47; Bishop Noncont. Law, §§ 1057, 1151, 1185; Garton v. Bristol, etc., R. Co., 1 B. & S. 112, 101 E. C. L. 112.

A common carrier is one who plys between certain termini and openly professes to carry for hire the goods

of all such persons as may choose to employ him. He may profess to carry all descriptions of goods or particular descriptions only. Redman's Law of Railway Carriers (2d ed.), 1.

To bring a person within the description of a common carrier, he must exercise it as a public employment, he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage the transportation of goods for hire, as a business, not as a casual occupation *pro hac vice*. Story Bail. § 495.

The common carrier is one who, by the ancient law, held as it were a public office and was bound to the public, and who, to become liable as a common carrier, must exercise the business of carrying as a public employment, and must undertake to carry goods for all persons indiscriminately and hold himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation. Chitty Carr.

A common carrier has also been defined to be "one who offers to carry goods for any person between certain termini or on a certain route, and who is bound to carry for all who tender him goods and the price of carriage." The Neaffie, 1 Abb. (U. S.) 467. See, also, Parsons on Shipping, Vol. 1, p. 245; Nugent v. Smith, 1 C. P. Div. 427.

A common carrier is one who undertakes and exercises as a public employment the transportation or carriage of goods, for persons generally, from place to place, whether by land

According to all the authorities, the essential characteristics of the common carrier are that he holds himself out as such to the world; that he undertakes generally, and for all persons indifferently, to carry goods and deliver them, for hire; and that his public profession of his employment be such that, if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action.³ The nature and extent of the employment and business in which he holds himself out to the public either expressly or impliedly, as engaged, furnish the true limits of the rights, obligations, duties and liabilities of the common carrier.⁴ The chief distinction between common carriers and all

or water, and to deliver them at the place appointed, for hire or reward and with or without a special agreement as to price. *McHenry v. Philadelphia, etc., R. Co.*, 4 Harr. (Del.) 448.

Statutory definitions. Every railroad corporation doing business in this State shall be a common carrier. Any one or two or more corporations owning or operating connecting roads, within this State, or partly within and partly without the State, shall be liable as a common carrier, for the transportation of passengers or delivery of freight received by it to be transported by it to any place on the line of a connecting road; and if it shall become liable to pay any sum by reason of neglect or misconduct of any other corporation, it may collect the same of the corporation by reason of whose neglect or misconduct it became liable. The Railroad Law of New York, § 48.

Every one who offers to the public to carry persons, property, or messages, except only telegraph messages, is a common carrier of whatever he thus offers to carry. Cal. Civ. Code, 1886, § 2168.

Any person undertaking to transport goods to another place for a compensation is a carrier. One who pursues the business constantly or continuously for any period of time, or any distance of transportation, is a common carrier. 2 Ga. Code, 1895, §§ 2263, 2264.

3. *Fish v. Clark*, 2 Lans. (N. Y.) 176, 178, aff'd 49 N. Y. 122; *Allen v. Sackrider*, *supra*; 3 Kent's Com. 597; *Story Bail.* § 495; 2 Parsons Cont. 166, note; *Angell Com. Carr.* § 46.

The liability to an action for a refusal to carry is perhaps the safest criterion of the character of the carrier. *Fish v. Chapman*, 2 Kelly (Ga.), 352; 46 Am. Dec. 393. *Compare Gordon v. Hutchinson*, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464; *Steinman v. Wilkins*, 7 W. & S. (Pa.) 466, 24 Am. Dec. 254. See, also, *Piedmont Manufacturing Co. v. Columbia*, etc., R., 19 S. C. 352, 16 Am. & Eng. R. R. Cas. 194.

4. *Citizens' Bank v. The Nantucket Steamboat Co.*, 2 Story (U. S.), 16, 35.

Holding out to the world as a test. For authorities, where this test has been applied, see *Kansas Pac.*

others lies in the fact that, in respect to the extent of their responsibility and the liability they assume in their undertaking, they effectually insure the safe transportation and delivery of the goods they carry, and are made liable, by reason of the public nature of their employment and the responsibility imposed upon them by the law, upon grounds of public policy, for loss or injury from whatever cause arising, excepting only acts of God and the public enemy, and in the further fact that, as public or common carriers for hire, they are obliged by law to carry for all persons indifferently.⁵ A common carrier may be a carrier of either passengers or freight, or both; but the nature of the responsibility incurred is very different in the two cases; in one, his responsibility being that of a carrier of passengers, and negligence being the essential element of the case, as will be hereafter shown, and in the other, that of a common carrier of goods.⁶ To constitute one a

R. Co. v. Nichols, 9 Kan. 253, 12 Am. Rep. 494; Kirby v. Adams Express Co., 2 Mo. App. 369; United States Exp. Co. v. Bachman, 28 Ohio St. 144, 14 Am. Ry. Rep. 82; Missouri Pac. R. Co. v. Harris, 1 Tex. Civ. App. Cas. § 1257; McClures v. Hammond, 1 Bay (S. C.), 99, 1 Am. Dec. 598; Moss v. Bettis, 4 Heisk. (Tenn.) 661, 13 Am. Rep. 1; Citizens' Bank v. The Nantucket Steamboat Co., *supra*; Fish v. Clark, *supra*; Ingate v. Christie, 3 C. & K. 61; Nugent v. Smith, 1 C. P. Div. 27, wherein the court said: "The test is not whether he is carrying on a public employment, or whether he carries to a fixed place; but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried." Schloss v. Wood, 11 Colo. 291, wherein the court said: "A person can hold himself out at a common carrier by engaging in the business generally, or by announcing or proclaiming it by cards, advertisements, or by any other

means that would let the public know that he intended to be a common or general carrier for the public." Rousseau v. Aumais, Rap. Jud. Que. 18, C. S. 474.

5. Price v. Hartshorn, 44 N. Y. 94, aff'g 44 Barb. (N. Y.) 455; South & North Alabama R. v. Wood, 66 Ala. 167, 9 Am. & Eng. R. R. Cas. 419; Gales v. Hailman, 11 Pa. St. 515; Hart v. Chicago, etc., R. Co., 27 Am. & Eng. R. R. Cas. 59; Texas Exp. Co. v. Scott, 16 Am. & Eng. R. R. Cas. 111; Houston, etc., R. Co. v. Burke, 55 Texas, 323, 9 Am. & Eng. R. R. Cas. 59; Davis v. Wabash, etc., R. Co., 26 Am. & Eng. R. R. Cas. 315; Hall v. Railroad Co., 13 Wall. (U. S.) 367; Hart v. Western, etc., R. Co., 13 Metc. (Mass.) 99; Van Santvoord v. St. John, 6 Hill (N. Y.), 157; Lane v. Cotton, 1 Salk. 143; Nugent v. Smith, L. R. 1 C. P. Div. 19, 423.

6. Thompson Houston Electric Co. v. Simon, 20 Or. 60, 25 Pac. 147, 10 L. R. A. 251, 43 Alb. L. J. 48; Boyce v. Anderson, 2 Peters (U. S.), 150; Stokes v. Saltonstall, 13 Peters

common carrier it is not necessary that his exclusive business shall be carrying.⁷ It has been held that in order to constitute one a common carrier the business of carrying must be habitual and not casual;⁸ and, to the contrary, that one who carries goods for hire contracts the responsibility of a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment.⁹ The rule has been laid down that one who undertakes, for a reward, to carry produce or goods of any sort from one place to another becomes thereby a common carrier;¹⁰ and that the distinctive characteristic of a common carrier is that he transports goods for hire for the public generally, and it is immaterial whether this is his usual or occasional occupation, his principal or subordinate pursuit.¹¹

It has been said that the true test of the character of a party is his legal duty and obligation with reference to transportation. If it is his legal duty to carry for all alike who comply with his terms as to freight, etc., then he is a common carrier, and is subject to all those stringent rules which for wise ends have long since been adopted and uniformly enforced, both in England and in all the States, upon common carriers. If, on the contrary, he may carry or not, as he deems best, he is but a private individual, and is

(U. S.), 181; Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Camden, etc., R. Co. v. Burke, 13 Wend. (N. Y.) 611; Aston v. Heaven, 2 Esp. 533; Crofts v. Waterhouse, 3 Bing. 319, 11 Moore, 133; Readhead v. Ry. Co., L. R. 2 Q. B. 412, L. R. 4 Q. B. 379; Pittsburgh, etc., R. Co. v. Hinds, 53 Pa. St. 512. See, also, Carriers of Passengers.

Common carriers of passengers are such as undertake to carry all persons who may apply for passage, so long as there is room and there is no legal excuse for refusing. Gillingham v. Ohio River R. Co., 35 W. Va. 588, 29 Am. St. Rep. 827; Bouv. Law Dict. tit. "Common Carriers of Passengers." The only distinction between a common or public carrier of passengers and a private or special carrier of passengers is that it is the

duty of the former to receive all persons who apply. Angell Carr. § 524.

7. Jackson A. Iron Works v. Hurlbut, 158 N. Y. 34, 52 N. E. 665; The Propeller Niagara v. Cordes, 21 How. (U. S.) 7; Dwight v. Brewster, 1 Pick. (Mass.), 50.

8. Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Samms v. Stewart, 20 Ohio, 69, 55 Am. Dec. 445; Nugent v. Smith, 1 C. P. Div. 27; Story Bail. § 495; 2 Kent's Com. 597.

9. Gordon v. Hutchinson, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464.

10. Craig v. Childress, Peck (Tenn.), 270, 14 Am. Dec. 751; Tunney v. Wilson, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515; Moses v. Norris, 4 N. H. 306.

11. Chevallier v. Straham, 2 Tex. 119, 47 Am. Dec. 639; Haynie v. Baylor, 18 Tex. 498.

invested, like all other private persons, with the right to make his own contracts, and when made to stand upon them, and he is not bound by the stringent rules applicable to common carriers.¹² On the other hand, it has been maintained that the duty to carry is one of the results of the relation of common carrier and in no way one of its causes or distinguishing features. If a carrier is sued for a refusal to carry, the first question presented, and the one upon which the case must depend, is whether or not it is a common carrier. The status of the defendant as a common carrier must be first established before the duty to carry can be known to exist.¹³ In the absence of charter or statutory provisions affecting its right, it is competent for a railroad company to determine for itself within what limits it will act as a common carrier, what business it will engage in, what means and methods of transportation it will employ, what goods it will carry, and between what points and under what circumstances and conditions it will receive the same, subject always to the limitation that it must act in good faith, reasonably, and not arbitrarily or capriciously, and without discrimination; doing for all under like circumstances what it does for any.¹⁴

§ 2. The liability of the common carrier.—The common law liability of the common carrier of goods, in the absence of special contract or proven custom limiting such liability, is that of an insurer against loss or injury of the property, while in its custody or under its control as a common carrier, or until delivery or what is deemed tantamount to delivery to the consignee or owner, excepting only those losses or injuries caused by the act of God or the public enemy.¹⁵ But the strict rule of the common

12. Piedmont Mfg. Co. v. Columbia, etc., R. Co., 19 S. C. 353, 16 Am. & Eng. R. Cas. 194.

13. Steinman v. Wilkins, 7 W. & S. (Pa.) 466, 42 Am. Dec. 254.

14. Harp v. Choctaw, etc., Ry. Co. (U. S. C. C. Ark.), 118 Fed. 169.

15. **Common law liability that of an insurer.** U. S.—Holladay v. Kennard, 12 Wall. (U. S.) 254; Pearson v. Duane, 4 Wall. (U. S.) 605; Dusar v. Murgatroyd, 1 Wash. (U.

S.) 17; Pendall v. Rench, 4 McLean (U. S.), 259; Burritt v. Rench, 4 McLean (U. S.), 325.

Ala.—Louisville, etc., R. Co. v. McGuire, 79 Ala. 395; Jones v. Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716.

Ark.—Packard v. Taylor, 35 Ark. 402, 37 Am. Rep. 37.

Cal.—Bohannan v. Hammond, 42 Cal. 227; Hooper v. Wells, 27 Cal. 161, 85 Am. Dec. 211.

law is not now held to apply to carriers of live stock;¹⁶ nor where

Conn.—Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235.

Del.—Culbreth v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 392.

Fla.—Clyde Steamer Co. v. Burrows, 36 Fla. 121.

Ga.—Cooper v. Berry, 21 Ga. 526, 68 Am. Dec. 468; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393.

Ill.—Chicago, etc., R. Co. v. Sawyer, 69 Ill. 285, 18 Am. Rep. 613; Chicago, etc., R. Co. v. Shea, 66 Ill. 471; Illinois Cent. R. Co. v. McClellan, 54 Ill. 58, 5 Am. Rep. 83; Western Transp. Co. v. Newhall, 24 Ill. 466, 76 Am. Dec. 760.

Ind.—Louisville, etc., R. Co. v. Nicholai, 4 Ind. App. 119, 30 N. E. 424, 45 Alb. L. J. 412; Adams Express Co. v. Darnell, 31 Ind. 20, 99 Am. Dec. 582; Bansemer v. Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367.

Ky.—Bland v. Adams Express Co., 1 Duv. (Ky.) 232, 85 Am. Dec. 623; Robertson v. Kennedy, 2 Dana (Ky.), 431, 26 Am. Dec. 466; Hall v. Renfro, 3 Metc. (Ky.) 51.

La.—Berje v. Texas, etc., R. Co., 37 La. Ann. 468; Cranwell v. Ship Fanny Fosdick, 15 La. Ann. 436, 77 Am. Dec. 190; Van Hern v. Taylor, 7 Rob. (La.) 201, 41 Am. Dec. 279.

Me.—Fillebrown v. Grand Trunk R. Co., 55 Me. 462, 92 Am. Dec. 606; Parker v. Flagg, 26 Me. 181, 45 Am. Dec. 101.

Md.—Ferguson v. Brent, 12 Md. 9, 71 Am. Dec. 582.

Mass.—Clafin v. Boston, etc., R. Co., 7 Allen (Mass.), 341.

Miss.—Mobile, etc., R. Co. v. Weiner, 49 Miss. 725; Southern Express Co. v. Moon, 39 Miss. 822; Bennett v. Byram, 38 Miss. 17, 75 Am. Dec. 90; Powell v. Mills, 30 Miss.

231, 64 Am. Dec. 158; Whitesides v. Thurlkill, 12 Smed. & M. (Miss.) 599, 51 Am. Dec. 128; Gilmore v. Carman, 1 Smed. & M. (Miss.) 279, 40 Am. Dec. 96; Neal v. Saunderson, 2 Smed. & M. (Miss.) 572, 41 Am. Dec. 609.

Mo.—Davis v. Wabash, etc., R. Co., 89 Mo. 340, 26 Am. & Eng. R. Cas. 315, revg. 13 Mo. App. 449; Daggett v. Shaw, 3 Mo. 264, 25 Am. Dec. 439.

N. H.—Moses v. Boston, etc., R. Co., 24 N. H. 71, 55 Am. Dec. 222.

N. J.—New Brunswick Steamboat, etc., Transp. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394.

N. Y.—McKinney v. Jewett, 90 N. Y. 267, 9 Am. & Eng. R. Cas. 209, affg. 24 Hun (N. Y.), 19; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426; Michaels v. New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292; Howe v. Oswego, etc., R. Co., 56 Barb. (N. Y.) 121; Heine-man v. Grand Trunk R. Co., 31 How. Pr. (N. Y.) 430; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; De Mott v. Laraway, 14 Wend. (N. Y.) 225, 28 Am. Dec. 523; Colt v. McMechen, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200.

N. C.—Boner v. Merchants' Steam-boat Co., 1 Jones L. (N. C.) 211; Harrell v. Owens, 1 Dev. & B. L. (N. C.) 273.

Ohio.—Welsh v. Pittsburg, etc., R. Co., 10 Ohio St. 65, 75 Am. Dec. 490.

Pa.—Willock v. Pennsylvania R. Co., 166 Pa. St. 184, 45 Am. St. Rep. 674, 61 Am. & Eng. R. Cas. 278; Leonard v. Hendrickson, 18 Pa. St. 40, 55 Am. Dec. 587; Simpson v. Hand, 6 Whart. (Pa.) 311, 36 Am. Dec. 231.

S. C.—Porcher v. Northeastern R.

the loss or injury resulted from the inherent nature of the goods;¹⁷ nor where the loss or injury was due to the negligence of the shipper;¹⁸ nor where the loss or injury resulted from delay in the transmission of the goods;¹⁹ nor where the loss or injury was caused by the exercise of public authority.²⁰ The rule imposing the severe responsibility of an insurer upon him who undertook the task of carrying goods for the public which prevailed under the common law of England and the civil law of Rome originated in times when transportation, both by land and water, was insecure, and when the risk of collusion between the carrier and pirates or thieves was great. It was thought that in no other way could fidelity be insured. The liability imposed was thus based largely upon reasons of public policy, and did not rest wholly on contract, express or implied, between the carrier and the shipper.²¹ It

Co., 14 Rich. L. (S. C.) 181; Ewart v. Street, 2 Bailey L. (S. C.) 157, 23 Am. Dec. 131; Smyrl v. Nilon, 2 Bailey L. (S. C.) 421, 23 Am. Dec. 146.

Tenn.—Watson v. Memphis, etc., R. Co., 9 Heisk. (Tenn.) 255; Nashville, etc., R. Co. v. David, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594; Turney v. Wilson, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515; Craig v. Childress, Peck (Tenn.), 270, 14 Am. Dec. 751; Lewis v. Ludwick, 6 Coldw. (Tenn.) 368, 98 Am. Dec. 454.

Tex.—Philleo v. Sanford, 17 Tex. 231, 67 Am. Dec. 654; Texas, etc., R. Co. v. Morse, 1 Tex. Civ. App. Cas. § 411; Texas Express Co. v. Scott, 16 Am. & Eng. R. Cas. 111; Chevalier v. Straham, 2 Tex. 115, 47 Am. Dec. 639.

Vt.—Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 349; Day v. Ridley, 16 Vt. 48, 42 Am. Dec. 489.

Va.—Farish v. Reigle, 11 Gratt. (Va.) 697, 62 Am. Dec. 666; Friend v. Woods, 6 Gratt. (Va.) 189, 52 Am. Dec. 119; Murphy v. Staton, 3 Munf. (Va.) 239.

Wis.—Strohn v. Detroit, etc., R.

Co., 23 Wis. 126, 99 Am. Dec. 114; Wood v. Crocker, 18 Wis. 345, 86 Am. Dec. 773.

Eng.—Coggs v. Bernard, 2 Ld. Raym. 909, 1 Smith's L. Cas. 199; Riley v. Horne, 5 Bing. 217, 15 E. C. L. 422; Nugent v. Smith, 1 C. P. Div. 19, 423; Forward v. Pittard, 1 T. R. 27, 1 Rev. Rep. 146.

16. See § 3.

17. See § 4, *post*.

18. See § 5, *post*.

19. See § 6, *post*.

20. See § 7, *post*.

21. Reasons for severe responsibility.—In the case of *Nugent v. Smith*, L. R. 1 C. P. 19, 423, Brett, J., after stating that the real test whether a man is a common carrier is whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried, says: “If he does this, his first responsibility naturally is that he is bound by a promise, implied by law, to receive and carry for a reasonable price the goods sent to him upon such an invitation. This

is upon this obligation to carry and deliver safely imposed by law, and existing independently of any special contract, founded upon grounds of public policy to give due security to property, that the liability of the common carrier for the loss of property

responsibility is not one adopted from the Roman law on grounds of policy; it arises according to the general principles which govern all implied promises. And his second responsibility, which arises upon reasons of policy, is that he carries the goods upon a contract of insurance. This policy has fixed the latter liability upon common carriers by land and water, not because they hold themselves out to carry for all persons indifferently; if that were all, there would be no ground for the policy; it would be without reason. Many other persons hold themselves out to act in their trade or business for all persons indifferently who will employ them, and the policy in question is not applied to such trades; the policy is applied to the trade of common carriers, because when the common law adopted that policy the business of common carriers in England was exercised in a particular manner and subject to particular conditions, which called for the adoption of that policy."

In *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Smith's L. Cas. 199, Lord Holt said: "The law charges this person, thus intrusted to carry goods, against all events but acts of God and of the enemies of the King. For, though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons,

that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc.; and yet doing it in such a clandestine manner as would be possible to be discovered. And this is the reason the law is founded upon in that point."

In *Riley v. Horne*, 5 Bing. 217, 15 E. C. L. 422, Best, C. J., said: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servants with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants; and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier, which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the act of God and the king's enemies."

intrusted to it for transportation rests.²² The rule of liability thus established by the common law, except as modified by statute and modern adjudications, in the respects already noted and herein-after referred to, to suit our character and circumstances applies to common carriers of all kinds whether by land or water.²³ The common law liability of a carrier, or the common law liability as modified by statute, is always presumed to be the measure of his liability, in the absence of evidence to the contrary, and the burden of proving the actual contract rests upon the party who claims exemption by reason thereof from the ordinary liability of common carriers in a particular case.²⁴

22. *Coggs v. Bernard, supra; Riley v. Horne, supra.* The liability exists independent of contract when the defendant, being a common carrier, has in his custody for transportation the plaintiff's property, and by his negligence or in violation of duty, it is lost. *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Allen v. Sewall*, 2 Wend. (N.Y.) 338; *Thurman v. Wells*, 18 Barb. (N. Y.) 500; *Johnson v. East Tennessee, etc.*, R. Co., 90 Ga. 810; *Delaware, etc.*, R. Co. v. *Trautwein*, 52 N. J. L. 169, 19 Am. St. Rep. 442, 41 Am. & Eng. R. Cas. 187; *Arnold v. Jones*, 26 Tex. 335, 82 Am. Dec. 617; *Wood v. Crocker*, 18 Wis. 345, 86 Am. Dec. 773.

The liability of a common carrier does not rest in his contract, but is a liability imposed by law. It exists independently of the contract, having its foundation in the policy of the law, and it is upon this legal obligation that he is charged as carrier for the loss of property intrusted to him. *Hollister v. Nowlen*, 19 Wend. (N. Y.) 239, 32 Am. Dec. 455; *Ansell v. Waterhouse*, 1 Chit. 1; *Edwards Bailm.* 466.

23. *Houston, etc., Nav. Co., v. Dwyer*, 29 Tex. 376. See Owners and masters of ships and steamboats or

vessels, § 29, *post*. *Angell Carr.* §§ 166, 223; 2 Kent's Com. 216; 9 U. S. Stat. at Large, 635.

24. *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, 447; *Park v. Preston*, 108 N. Y. 434; *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485, 62 Am. Dec. 125; *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Madan v. Sherrard*, 73 N. Y. 330, 29 Am. Rep. 153; *New Jersey R. Co. v. Pennsylvania R. Co.*, 27 N. J. L. 100; *Pittsburgh, etc., R. Co. v. Barrett*, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 257; *Graham v. Davis*, 4 Ohio St. 376, 62 Am. Dec. 285; *Peoria, etc., R. Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 29 Am. St. Rep. 348, 49 Am. & Eng. R. Cas. 81; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344.

The defendants, safe movers, are not relieved from liability as common carriers for the breaking of machinery being moved by them, because plaintiff insisted on having the machine placed after dark, they having a right to refuse if they chose, and to stipulate from immunity from damages if it increased their risk as insurers. *Jackson Architectural Iron Works v. Hurlburt*, 15 Misc. Rep. (N. Y.) 93, 36 N. Y. Supp. 808.

§ 3. Liability in the carrying of live stock.—The common law liability of a carrier may be limited by the intrinsic character of, or defects in, the subject matter of the contract. This limitation was applied to contracts for the carriage of slaves, when slavery existed in the United States, the carrier, in such cases, being held not to be an insurer but a carrier of passengers, and liable only for want of care and skill.²⁵ This rule has found its most frequent illustration in the case of contracts for the transportation of live stock. The carrier who undertakes the carriage of living animals is not answerable for damage caused by the conduct or propensities of the animals themselves. In other respects the common law responsibilities of the carrier will attach.²⁶

Upon the appeal in the case last cited, the court said: "This interference on the part of the plaintiff's agents is said to constitute contributory negligence. It is quite sufficient to say, with respect to that breach of the defense, that the evidence was of such a character that required the court to submit it to the jury, and it was submitted with instructions that, if it was shown that the negligence of the plaintiff or its agents contributed in any way to the injury, there could be no recovery. So the questions of negligence and contributory negligence have been removed by the verdict of the jury from the domain of controversy in this court. *Id.*, 158 N. Y. 34, 39.

Where a common carrier undertakes, by the contract expressed in the bill of lading, to deliver the goods at their destination, without stipulating that he shall not be liable for losses resulting from any cause, his undertaking will not amount to an absolute undertaking, and he will not be liable for losses resulting from an act of God or a public enemy. *Neal v. Saunderson*, 2 Smed. & M. (Miss.) 572, 41 Am. Dec. 609.

No presumption as to special contract.—The fact that defendant was accustomed to give shippers receipts containing a provision that it would not be liable for loss by fire will not support a presumption that there was a special contract between plaintiff's assignors and defendant, whereby its liability as a common carrier did not include loss by fire, in the absence of any showing that such a receipt was ever given to plaintiff's assignors, or came to their knowledge. *London, etc., Fire Ins. Co. v. Rome, etc., R. Co.*, 68 Hun (N. Y.) 598, 23 N. Y. Supp. 231.

25. *Williams v. Taylor*, 4 Porter (Ala.) 234; *Boyce v. Anderson*, 2 Peters (U. S.) 150; *Clark v. McDonald*, 4 McCord (S. C.) 223.

26. "**In the transportation of such stock**, in the absence of negligence, the carrier is relieved from responsibility for such injuries as occur in consequence of the vitality of the freight. He does not absolutely warrant live freight against the consequences of its own vitality. Animals may injure or destroy themselves or each other; they may die from fright or from starvation because they refuse to eat, or they may

§ 4. Liability where loss or injury results from the inherent nature of the goods.—The same principles which relieve the carrier from its strict liability in carrying live stock apply with equal force to contracts for the carriage of perishable property.

die from heat or cold. In all such cases the carrier is relieved from responsibility if he can show that he has provided all suitable means of transportation and exercised that degree of care which the nature of the property requires." Cragin v. New York Cent. R. Co., 51 N. Y. 61; Clarke v. Rochester, etc., R. Co., 14 N. Y. 570; Bissell v. New York Cent. R. Co., 25 N. Y. 442; Smith v. New Haven, etc., R. Co., 94 Mass. 531.

"According to the established rule as to the liability of a common carrier, he is understood to guarantee that (with the well known exception of the act of God and of public enemies) the goods intrusted to him shall seasonably reach their destination, and that they shall receive no injury from the manner in which their transportation is accomplished. But he is not, necessarily and under all circumstances, responsible for the condition in which they may be found upon their arrival. The ordinary and natural decay of fruit, vegetables and other perishable articles, the fermentation, evaporation or unavoidable leakage of liquids, the spontaneous combustion of some kinds of goods, are matters to which the implied obligation of the carrier, as an insurer, does not extend. He is liable for all accidents and mismanagement incident to the transportation and to the means and appliances by which it is effected; but not for injuries produced by, or resulting from, the inherent defects or essential qualities or of the articles

which he undertakes to transport. The extent of his duty in this respect is to take all reasonable care and use all proper precautions to prevent such injuries, or to diminish their effect as far as he can; but his liability, in such cases, is by no means that of an insurer. . . They would be unconditionally liable for all injuries occasioned by the improper construction or unsafe condition of the carriage in which the horses were conveyed, or by its improper position in the train, or by the want of reasonable equipment, or by any mismanagement, or want of due care, or by any other accident (not within the well known exception) affecting either the train generally or that particular carriage. But the transportation of horses or other domestic animals is not subject to precisely the same rules as that of packages and inanimate chattels. Living animals have excitabilities and volitions of their own which greatly increase the risks and difficulties of management. They are carried in a mode entirely opposed to their instincts and habits; they may be made uncontrollable by fright, or, notwithstanding every precaution, may destroy themselves in attempting to break loose, or may kill each other." Evans v. Fitchburg R. Co., 111 Mass. 142; Story Bailm., § 576.

"**The carrier would not be held responsible,**" it has been held, "where horses or other animals were being transported by water, and in consequence of a storm broke down the partitions between them, and by

The carrier is not liable for injuries caused by its intrinsic defects, and not from any want of care on the part of the carrier.²⁷ But he is bound to take reasonable means to guard against such

kicking each other some of them were killed." Lawrence v. Aberdein, 5 B. & Ald. 107; Angell Carr., § 214a.

In Myrrick v. Michigan Cent. R. Co., 107 U. S. 102, 107, the court said: "Although a railroad company is not a common carrier of live animals in the same sense that it is a carrier of goods, its responsibilities being in many respects different, yet, when it undertakes generally to carry such freight, it assumes under similar conditions the same obligations so far as the route is concerned over which the freight is to be carried."

In some states, however, the rule appears to be different. It is there held that railroads are not bound to receive live stock as common carriers, and if they carry them at all, they may do so under a different liability from that of other freight. See Carriers of Live Stock.

See also in support of the rule stated in the text: South & North Alabama R. Co. v. Henlien, 52 Ala. 606; Agnew v. Steamer Contra Costa, 27 Cal. 425; Indianapolis, etc., R. Co. v. Jurey, 8 Bradw. (Ill. App.) 160; Chicago, etc., R. Co. v. Harmon, 12 Bradw. (Ill. App.) 54; McCoy v. The K. & D. M. R. Co., 44 Iowa, 424; Chicago, etc., R. Co. v. Abels, 60 Miss. 1017; Mynard v. Syracuse, etc., R. Co., 71 N. Y. 180; Bamberg v. South Carolina R. Co., 9 S. C. 61; Palmer v. Grand Junction R. Co., 4 M. & W. 749; Kimball v. Rutland, etc., R. Co., 26 Vt. 247. Compare Missouri Pac. R. Co. v. Harris, 67 Tex. 166; Missouri Pac. R. Co. v. Fagan, (Tex.) 9 S. W. 749; Rixford v. Smith, 52 N. H.

355; Maslin v. Baltimore, etc., R. Co., 14 W. Va. 180. See Carriers of Live Stock.

Carriers of animals are common carriers subject to the same responsibilities imposed by law on carriers of other property, except as this is modified by the inherent character of such property. Missouri Pac. R. Co. v. Cornwall, 70 Tex. 611, 8 S. W. 312; Gulf, etc., R. Co. v. Ellison, 70 Tex. 491, 7 S. W. 785.

27. Evans v. Fitchburg R. Co., 111 Mass. 142, (opinion quoted from in note 26 to § 3, *ante*); Illinois Cent. R. Co. v. McClellan, 54 Ill. 58, 5 Am. Rep. 83; Vail v. Pacific R. Co., 63 Mo. 230; McGraw v. Baltimore, etc., R. C., 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188. See also Nugent v. Smith, 1 C. P. Div. 423, 45 L. J. C. P. Div. 697; Kendall v. London, etc., R. Co., L. R. 7 Exch. 373, 41 L. J. Exch. 184; Alston v. Herning, 11 Exch. 822; Brass v. Maitland, 6 El. & Bl. 471, 88 E. C. L. 471; Rohl v. Parr, 1 Esp. N. P. 445; Boyd v. Dubois, 3 Campb. 133; Hunter v. Potts, 4 Campb. 203.

The common law rule making carriers liable for loss or damage to goods, except such as result from the act of God or the public enemy, does not apply to a loss which results from deterioration in quantity or quality, or from any inherent natural infirmity, or tendency to damage, or decay of perishable articles, or ordinary wear or tear, or rubbing, in course of transportation, where these things occur without negligence on the part of the carriers; nor are they liable for injuries that arise

injuries,²⁸ to use special diligence to avoid delay in transportation,²⁹ and give it a preference in transportation over non-

from bad packing by the shippers. *Truax v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 233.*

28. *Davidson v. Gwynne*, 12 East, 381; *Notara v. Henderson*, L. R. 5 Q. B. 225, where the carrier failed to spread out and dry beans which had become wet by an accident to the vessel; *Bird v. Cromwell*, 1 Mo. 81, 13 Am. Dec. 470; *Chouteaux v. Leech*, 18 Pa. St. 224, 57 Am. Dec. 602, where, in the course of transportation, certain furs were wet, through an accident to the boat, it was held that it was the carrier's duty to unpack them and allow them to dry immediately, and for a failure to do so the carrier was liable for the damage which such attention would have averted.

So, where dressed meat was being carried, and, owing to a delay of the vessel, the ice in which it was packed melted away, it was held that the carrier was liable for the damage resulting from its failure to supply ice, it appearing that it was practicable to have done so. *Sherman v. Inman Steamship Co.*, 26 Hun (N. Y.), 107; *Peck v. Weeks*, 34 Conn. 145.

Failure to prevent leakage. A carrier was held liable for failure to wet casks containing oil in order to prevent their leakage; and the fact that loss from leakage was one of the special exceptions in the bill of lading releasing the carrier from liability was held not to affect the case, where the carrier had agreed to keep the casks wet. *Hennewell v. Taber*, 2 Sprague (U. S.) 1. A carrier was also held liable where, after becoming aware that a cask of

brandy which was being carried was leaking, he failed to take any steps to prevent further leakage. *Beck v. Evans*, 16 East, 244; *Cox v. London, etc., R. Co.*, 3 F. & F. 77. See also, *The Brig Collenberg*, 1 Black (U. S.) 170; *Warden v. Greer*, 6 Watts (Pa.) 424; *Leech v. Baldwin*, 5 Watts (Pa.) 446; *Gowdy v. Lyon*, 9 B. Mon. (Ky.) 112.

29. *Kinnick v. Chicago, etc., R. Co.*, 69 Iowa 665, 27 Am. & Eng. R. Cas. 55, where a railroad company received for carriage a car overloaded with hogs without objection, and by reason of delay the hogs "piled up" and were injured, the company was held liable.

A carrier was held liable for injuries done to plants by frost upon a connecting line, it being shown that the injury would have been avoided had the goods been promptly delivered. *Michigan Cent. R. Co. v. Curtis*, 80 Ill. 324.

In the transportation of meat it has been held that a provision in a bill of lading that a carrier should not be liable for decay did not protect him from anything more than the decay due to the intrinsic tendency of the meat, and not from bad judgment of the captain in persisting in his voyage after breaking his shaft, when by turning back he might have saved the meat. The jury had found that it was negligence in the captain to persist in continuing his voyage under the circumstances. *Sherman v. Inman Steamship Co.*, 26 Hun (N. Y.), 107.

A railroad company receiving cattle for transportation must carry them with reasonable despatch, and

perishable goods, if he is not able to forward both at once.³⁰ And he is required to take notice of any marks upon the package containing the goods, which indicate the character of its contents.³¹ But a carrier by water is not required to suspend a voyage to care for the damaged goods to the probable injury of the remainder of the cargo.³²

§ 5. Where the loss or injury is the result of the acts of the shipper.—The carrier is not liable for losses which are shown to have resulted from omissions or acts of the shipper which are the proximate cause of the loss, or for losses caused by the wrongful conduct or fraud of the shipper. Such contributory negligence on the part of the shipper will excuse the carrier from liability,³³

is liable for an injury resulting from delay. *Gulf, etc., R. Co. v. Ellison*, 70 Tex. 491, 7 S. W. 785; *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611, 8 S. W. 312.

30. Marshall v. New York Cent. R. Co., 45 Barb. (N. Y.) 502, wherein the charge of the judge at Circuit that "where two kinds of property are delivered at the same time by different owners, one of which kind is perishable and the other not, preference is to be given to that which is perishable in transportation, and if either must wait, it must be that which is not perishable," was sustained on appeal. The court said: "The question how the carrier was employed, and how he used and employed his means of transportation during any given period when property was delayed, would always be a proper subject of inquiry, and that on this inquiry proof that his means of transportation were employed in transporting perishable property, in preference to other property received at the same time, would always be held a sufficient excuse for delay."

Where there is a great press of business, the carrier may dis-

criminate in favor of perishable goods in determining which consignments it will carry first. *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6.

31. Hastings v. Pepper, 11 Pick. (Mass.) 41, where a box contained oil of cloves, and the mark held sufficient to notify the carrier was: "Glass--with care--this side up," the carrier was held bound to so carry. But an express company, in the transportation of brittle goods without notice of their character, was held not liable to the extent of common carriers. Bad faith, and suppression of the truth by the bailor, will relieve a common carrier of liability as insurer. *American Express Co. v. Perkins*, 42 Ill. 458.

32. Notara v. Henderson, L. R. 5 Q. B. 346; *The Steamboat Lynx v. King*, 12 Mo. 272, 49 Am. Dec. 135. See also *Rogers v. Murray*, 3 Bosw. (N. Y.) 357; *The Propeller Niagara v. Cordes*, 21 How. (U. S.) 7; *The Steamship America*, 8 Ben. (U. S.) 491; *The Gentleman*, 1 Blatchf. (U. S.) 196; *The Bark Gentleman*, 1 Ole. Adm. 110; *Blocker v. Whittenburg*, 12 La. Ann. 410.

33. Wilson v. Hamilton, 4 Ohio St.

as where goods are improperly marked by the consignor,³⁴ or improperly packed or loaded,³⁵ or where the shipper fails to inform the carrier of the character of the goods or of their value,³⁶ or fraudulently conceals the contents or value,³⁷ or where the loss or injury is due to the improper and unwarrantable interference of the shipper with the property.³⁸

§ 6. Where the loss or injury is the result of delay in the transmission of the goods.—The common law liability of the carrier as an insurer may be limited in cases of loss resulting from delay in the transportation and delivery of goods, occasioned by accident or misfortune not inevitable or produced by the act of God. But the carrier must exercise due discretion and reasonable care and diligence to guard against delay, and in forwarding the goods to their destination.³⁹ If, in the exercise of due care and diligence, it does not appear that a change of route would prevent

722. See generally, *Contributory negligence of shipper*, chap. 13.

34. *Southern Express Co. v. Kaufman*, 59 Tenn. 161; *The Huntress*, 12 Fed. Cas. No. 61, 914; *Conger v. Chicago*, etc., R. Co., 24 Wis. 157. But the rule does not apply where the carrier's agent at the time he receives the goods has knowledge of the error, *O'Rourke v. Chicago*, etc., R. Co., 44 Iowa, 526; *Forsythe v. Walker*, 9 Pa. St. 148.

35. *Ross v. Troy*, etc., R. Co., 49 Vt. 364; *Loveland v. Burke*, 120 Mass. 139, 21 Am. Rep. 507.

36. *Oppenheimer v. United States Express Co.*, 69 Ill. 62; *Magnin v. Dinsmore*, 70 N. Y. 410; *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 85; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185; *Western Transp. Co. v. Newhall*, 24 Ill. 466; *Farmers' Bank v. Champlain Trans. Co.*, 23 Vt. 186.

37. *Chicago*, etc., R. Co. v. *Shea*, 66 Ill. 471.

38. *Roderick v. Railroad Co.*, 7 W.

Va. 54; *Hutchinson v. Chicago*, etc., R. Co., 37 Minn. 524; *Conger v. Chicago*, etc., R. Co., 24 Wis. 157.

39. *Geismer v. Lake Shore*, etc., R. Co., 102 N. Y. 563, 55 Am. Rep. 837, 26 Am. & Eng. R. Cas. 287; *Wibert v. New York*, etc., R. Co., 12 N. Y. 245; *Blackstock v. New York*, etc., R. Co., 20 N. Y. 48, 75 Am. Dec. 372; *Truax v. Philadelphia*, etc., R. Co., 3 Houst. (Del.) 233; *Pittsburgh*, etc., R. Co. v. *Hollowell*, 65 Ind. 188, 32 Am. Rep. 63; *Gulf*, etc., R. Co. v. *Levi*, 76 Tex. 337, revg. 12 S. W. 677, 40 Am. & Eng. R. Cas. 115, the reasons upon which the common law doctrine that a common carrier is an insurer is based do not apply when the thing is actually transported and delivered, although, when delivered, it may be greatly diminished in value by a fall in the market price, or its value partially or entirely destroyed by reason of its inherent perishable nature, which has worked its partial or entire destruction while in transit.

the loss attendant upon delay, he is not bound to divert the goods to a route over which he has no control. He may sell the goods for the best price he can obtain, in order to convert what would inevitably be a total loss into one that is partial merely.⁴⁰

§ 7. Where the loss or injury is caused by the exercise of public authority.—Where goods are delivered to a common carrier for shipment, and are levied upon or attached in the hands of the carrier upon a valid writ of attachment or execution or other legal process, by means of which the carrier is deprived of possession of the property by the officer who serves the writ, the carrier is not liable to the shipper for the non-delivery of the goods, provided the writ upon its face is a valid writ and from a court having competent jurisdiction to issue it, and he immediately notifies the shipper.⁴¹ But an attachment of the goods against one not the owner does not excuse the carrier from delivering.⁴² It is a good defense to an action against a common carrier for preventing the levy of an attachment upon property in its hand, that the property does not belong to the defendant in the attachment.⁴³ A carrier is required to give prompt notice to the consignor or owner of goods, if known, of their seizure, or the institution of legal proceedings against them, but is not held to a technical observance of the rule, if the owner has timely notice, and is in a position by the exercise of ordinary diligence to protect his title. That goods stolen or lost by reason of the negligence of a carrier while in its possession as warehouseman had been attached, and were in the custody of the law, does not relieve the carrier from liability.⁴⁴ A common carrier is liable for the value of fish shipped over its line which were seized by a game warden on the ground that the fish were illegally caught, where such warden had neither legal nor apparent legal right to seize the same.⁴⁵

40. American Ex. Co. v. Smith, 33 Ohio St. 511. 214; Kiff v. Old Colony, etc., R. Co., 117 Mass. 591, 19 Am. Rep. 429.

41. Bliven v. Hudson River R. Co., 36 N. Y. 403; Adams v. Scott, 104 Mass. 164. See also cases cited under Seizure by legal process, chap. 7, §§ 5, 6, *post*. **43.** Simpson v. Dufour, 126 Ind. 322, 26 N. E. 69; Pingree v. Detroit, etc., R. Co., 66 Mich. 143, 11 Am. St. Rep. 479.

42. Edwards v. White Line Transit Co., 104 Mass. 159, 6 Am. Rep. 214; Frank v. Central R. Co. 9 Pa. Super. Ct. 129.

44. Merriman v. Great Northern

§ 8. Liability of carriers of passengers.—Carriers of passengers are common carriers in respect to the baggage of their passengers and also in respect to their passengers and those desiring passage on their conveyances, but their liability to passengers for personal injuries is limited to cases where their negligence in the performance of their duties is the proximate cause of the injury; they are not insurers of the safety of their passengers.⁴⁶ A carrier of passengers who undertakes to carry goods for hire subjects himself to the liability of a common carrier of goods, in respect to such goods, except where the compensation is so grossly inadequate as to render the application of such a rule of liability unjust; in such a case he is liable merely as a bailee.⁴⁷

§ 9. Express companies.—Express companies undertaking to carry or cause to be carried goods for hire for all persons indifferently who choose to employ them, are common carriers.⁴⁸ Joint stock companies engaged in the express business and persons whose business it is to receive packages of bullion, coin, bank notes, commercial paper and such other articles of value as persons see fit to trust to their care for the purpose of transporting the same from one place to another for a compensation, are common carriers, and responsible as such for the safe delivery of property entrusted to

Express Co., 63 Minn. 543, 65 N. W. 1080.

46. See Carriers of passengers, chap. 19.

47. Bean v. Sturtevant, 8 N. H. 146, 28 Am. Dec. 389.

48. Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Read v. Spaulding, 5 Bosw. (N. Y.) 395, affd. 30 N. Y. 630, 86 Am. Dec. 426; Place v. Union Express Co., 2 Hilt. (N. Y.) 19, overruling Hersfield v. Adams, 19 Barb. (N. Y.) 577; Sherman v. Wells, 28 Barb. (N. Y.) 403; Haslam v. Adams Express Co., 6 Bosw. (N.Y.) 235; Brockway v. American Express Co., 168 Mass. 257, 47 N. E. 87; Stadhecker v. Combes, 9 Rich. L. (S. C.) 193; Southern Express Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; U. S. Exp. Co. v. Bachman, 28 Ohio St. 144; Southern Exp. Co. v. Womack, 1 Heisk. (Tenn.) 256; Southern Exp. Co. v. Glenn, 16 Lea (Tenn.), 472; Southern Exp. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Bank of Kentucky v. Adams Exp. Co., 93 U. S. (3 Otto) 174; Southern Exp. Co. v. McVeigh, 20 Gratt. (Va.) 264; Lowell Wire Fence Co. v. Sargent, 8 Allen (Mass.) 189; Buckland v. Adams Exp. Co., 97 Mass. 124, 93 Am. Dec. 68; Baldwin v. American Express Co., 23 Ill. 197, 74 Am. Dec. 190, 26 Ill. 504; American Ins. Co. v. Pinckney, 29 Ill. 392; Gulliver v. Adams Exp. Co., 38 Ill. 503; Christensen v. American Exp. Co., 15 Minn. 270, 2 Am. Rep. 122; Verner v. Sweitzer, 32 Pa. St. 208; Kirby v.

them.⁴⁹ A city express company, engaged in carrying parcels between the city of New York and Brooklyn, and in carrying trunks to and from the passenger depots of the various railroads, is a common carrier, and performs its duties under the responsibility of common carriers.⁵⁰ Persons carrying on a transportation business, under circumstances which, in law, constitute them common carriers, cannot divest themselves of that character, nor secure an exemption from its liabilities, by declaring in their bills of lading, etc., that they are not to be deemed common carriers. What they are, is to be determined by the nature of their business.⁵¹ The fact that an express company, in their receipt for goods, style themselves "express forwarders," and agree to "forward" the goods, does not necessarily give them the character of simple forwarders, nor prevent them from being treated as common carriers.⁵² An express company is a common carrier and may limit its liability as such by special contract, which may be established by showing consignor's acceptance of a receipt stating a limitation; but this limitation cannot extend to losses attributable to the negligence of the company, or its servants, and the presumption from the fact of loss is that it was caused by neglect of duty.⁵³

Adams Exp. Co., 2 Mo. App. 369. An expressman, who is duly licensed by the mayor of New York City, and who transports for hire the goods of all persons indifferently, is a common carrier and liable as such for a parcel stolen from one of his wagons without the connivance of himself or driver. **Robinson v. Cornish**, 13 N. Y. Supp. 577, 34 St. Rep. (N. Y.) 695.

49. Sweet v. Barney, 23 N. Y. 335; **Russell v. Livingston**, 19 Barb. (N. Y.) 346, revd. on another point, 16 N. Y. 515; **Sherman v. Wells**, 28 Barb. (N. Y.) 403.

50. Richards v. Westcott, 2 Bosw. (N. Y.) 589; **Parmalee v. Lowitz**, 74 Ill. 116.

51. Bank of Kentucky v. Adams Exp. Co., 93 U. S. (3 Otto) 174; **Buckland v. Adams Exp. Co.**, 97 Mass. 124, 93 Am. Dec. 68; **Russell**

v. **Livingston**, 19 Barb. (N. Y.) 346; **Place v. Union Exp. Co.**, 2 Hilt. (N. Y.) 27; **U. S. Exp. Co. v. Bachman**, 28 Ohio St. 144. *Compare Hersfield v. Adams*, 19 Barb. (N. Y.) 577.

52. Christensen v. American Exp. Co., 15 Minn. 270, 2 Am. Rep. 122; **Read v. Spaulding**, 5 Bosw. (N. Y.) 395, affd. 30 N. Y. 630, 86 Am. Dec. 426; **Southern Exp. Co. v. McVeigh**, 20 Gratt. (Va.) 264; **Bank of Kentucky v. Adams Exp. Co.**, 93 U. S. (3 Otto) 174.

Nor calling themselves a "transportation company." **Mercantile Mut. Ins. Co. v. Chase**, 1 E. D. Smith (N. Y.) 115.

53. Kirby v. Adams Exp. Co., 2 Mo. App. 369; **Bank of Kentucky v. Adams Exp. Co.**, 93 U. S. 174; **Read v. Spaulding**, 5 Bosw. (N. Y.) 395; **Buckland v. Adams Exp. Co.**, 97 Mass. 124, 93 Am. Dec. 68.

§ 10. Railroad companies.—Railroad companies, receiving from the State a delegation of a portion of its sovereign power for the public good, being public agents, and, in the place and stead of the government, exercising public duties, being authorized by law to make roads as public highways, to lay down tracks, place cars upon them, and carry goods and passengers for hire, are, within all the rules of the common law, eminently common carriers of goods and passengers, possessed of all the rights, and subject to the liabilities and duties imposed by law upon common carriers of goods and passengers.⁵⁴ Whether or not a particular road is a

54. N. Y.—Weed v. Saratoga R. Co., 19 Wend. (N. Y.) 534; Root v. Great Western R. Co., 45 N. Y. 524; Camden, etc., R. Co. v. Burke, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488.

U. S.—Winona, etc., R. Co. v. Blake, 94 U. S. 180, 24 L. Ed. 99; Atlantic & P. R. Co. v. Laird (C. C. App. 9th C.) 15 U. S. App. 248, 58 Fed. Rep. 760, 7 C. C. A. 489, railroads are quasi public highways, and all railroad corporations actively engaged in operating passenger trains are subject to the liabilities and duties imposed by law upon common carriers of passengers.

Ala.—Southwestern R. Co. v. Webb, 48 Ala. 585; Mobile, etc., R. Co. v. Prewitt, 46 Ala. 63, 7 Am. Rep. 586; Selma, etc., R. Co. v. Butts, 43 Ala. 385, 94 Am. Dec. 694.

Ark.—Eureka Springs R. Co. v. Timmons, 51 Ark. 459.

Cal.—Davis v. Button, 78 Cal. 247; Contra Costa, etc., R. Co. v. Moss, 23 Cal. 323, 533.

Colo.—Schloss v. Wood, 11 Colo. 287; 35 Am. & Eng. R. Cas. 492, note.

Conn.—Fuller v. Naugatuck R. Co., 21 Conn. 570.

Fla.—Johnson v. Pensacola, etc., R. Co., 16 Fla. 623, 26 Am. Rep. 731.

Ga.—Falvey v. Georgia R. Co., 76 Ga. 597, 2 Am. St. Rep. 58.

Ill.—Peoria, etc., R. Co. v. U. S. Rolling Stock Co., 28 Ill. App. 79; Chicago, etc., R. Co. v. Thompson, 19 Ill. 578.

Mass.—Thomas v. Boston, etc., R. Co., 10 Metc. (Mass.) 472, 43 Am. Dec. 444; Norway Plains Co. v. Boston, etc., R. Co., 1 Gray (Mass.) 263, 61 Am. Dec. 424.

Miss.—Southern Exp. Co. v. Thornton, 41 Miss. 216; Southern Exp. Co. v. Moon, 39 Miss. 822; Mississippi Cent. R. Co. v. Kennedy, 41 Miss. 671; Const. of Mississippi, § 184.

N. H.—Elkins v. Boston, etc., R. Co., 3 Fost. (N. H.) 275.

N. J.—Rogers Locomotive, etc., Works v. Erie R. Co., 5 C. E. Greene (N. J.) 379, 20 N. J. Eq. 379; Messenger v. Pennsylvania R. Co., 36 N. J. L. 407, 13 Am. Rep. 457.

Ohio.—Scofield v. Lake Shore, etc., R. Co., 43 Ohio St. 571, 23 Am. & Eng. R. Cas. 612.

Or.—Thompson-Houston Electric Co. v. Simon, 20 Or. 60, 23 Am. St. Rep. 86, 47 Am. & Eng. R. Cas. 51.

Penn.—Eagle v. White, 6 Whart. (Pa.) 505; Sandford v. Catawissa, etc., R. Co., 24 Pa. St. 378, 64 Am. Dec. 667.

S. C.—Piedmont Mfg. Co. v. Columbia, etc., R. Co., 19 S. C. 353, 16 Am. & Eng. R. Cas. 194; Avinger v. South

common carrier in a certain case is a mixed question of law and fact.⁵⁵ A railroad company, operating a road belonging to the State, is liable as a carrier for negligence of State officers in the performance of duties connected with the road. Thus it will be liable as a common carrier, for an injury sustained by a passenger from the collision of two of its trains passing in the same direction, though the motive power of the road was furnished by the State and under the control of the State's agent, and though the accident happened through the negligence of the agents of the State.⁵⁶ Railroad companies in the transportation of animals are liable as common carriers.⁵⁷ A person transporting passengers for hire upon a railroad operated by him is a common carrier.⁵⁸ A railroad company operating its trains over another's road at the time of an accident is liable at common law as a common carrier.⁵⁹ A railroad company receiving freight before the road is completed, and when it is only running construction trains, has been held liable as a common carrier therefor.⁶⁰ A railroad company, which charges for the transportation of cattle, but permits the shipper to travel on a free pass upon the cars to take care of the cattle, is a common carrier for hire, both as to passenger and cattle.⁶¹ Railroad companies are common carriers under the common law, and,

Carolina R. Co., 29 S. C. 265, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 524; *Dill v. South Carolina R.*, 7 Rich. (S. C.) 158; *Ex parte Benson*, 18 S. C. 42.

Tenn.—*East Tennessee, etc., R. Co. v. Nelson*, 1 Cold. (Tenn.) 272.

Vt.—*Kimball v. Rutland, etc., R. Co.*, 26 Vt. 247, 62 Am. Dec. 567; *Jones v. Western Vermont R. Co.*, 27 Vt. 399; *Noyes v. Railroad*, 27 Vt. 110.

Eng.—*Pegler v. Monmouthshire R. Co.*, 30 L. J. Exch. 249, 6 H. & N. 644; *Palmer v. Grand Junction R. Co.*, 4 M. & W. 749, 1 H. & H. 489, 7 D. P. C. 232; *Crouch v. London, etc., R. Co.*, 23 L. J. C. P. 73, 14 C. B. 255, 78 E. C. L. 255; *Richards v. London, etc., R. Co.*, 18 L. J. C. P. 251, 7 C. B. 839, 62 E. C. L.

§39.

55. *Elkins v. Boston, etc., R. Co.*, 23 N. H. 275; *Avinger v. South Carolina R. Co.*, 29 S. C. 265, 35 Am. & Eng. R. Cas. 519; *Piedmont Mfg. Co. v. Columbia, etc., R. Co.*, 19 S. C. 353, 16 Am. & Eng. R. Cas. 194.

56. *Ryland v. Peters*, 5 Pa. Law G. Rep. 126.

57. *Union Pac. R. Co. v. Rainey*, (Colo.) 34 Pac. 986.

58. *Davis v. Button*, 78 Cal. 247, 20 Pac. 545.

59. *Eureka Springs R. Co. v. Timmons*, 51 Ark. 459, 11 S. W. 690. See One railroad transporting the cars of another, § 14, *ante*.

60. *Little Rock, etc., R. Co. v. Glidewell*, 39 Ark. 487, 18 Am. & Eng. R. Cas. 539.

61. *Maslin v. Baltimore & O. R. Co.*, 14 W. Va. 180.

when made so by general statute or by their charters, these provisions are held to be merely declaratory of the existing law, rather than introducing any new rule of law.⁶² Railroad companies are common carriers of passengers, but their liability as such is not that of an insurer of the safe transportation of the passenger; they are liable, however, for the exercise of the highest degree of care and diligence practicable to protect passengers from injury.⁶³

Such companies incur the ordinary responsibility of a common carrier with respect to the baggage of passengers, and all property accepted by them as such with knowledge of its character, although not properly baggage; and nothing but inevitable accident or the act of the public enemy, will excuse them for a loss of, or injury to, it.⁶⁴ They are liable for goods received for transportation on passenger trains, knowing it not to be baggage, whether the freight was paid in advance or not;⁶⁵ but not for such goods received without authority and carried without compensation by a conductor,⁶⁶ or for goods, not baggage, received as such without knowledge of its character.⁶⁷ As to branch lines constructed by a railroad company, their liability as common carriers depends upon the question as to whether such branch lines are actually used for

62. Root v. Great Western R. Co., 45 N. Y. 524; Chicago etc., R. Co. v. Thompson, 19 Ill. 578.

63. Thompson-Houston Elec. Co. v. Simon, 20 Or. 60, 47 Am. & Eng. R. Cas. 51; Nashville, etc., R. Co. v. Messino, 1 Sneed (Tenn.) 220; Shoemaker v. Kingsbury, 12 Wall. (U. S.) 369; Murch v. Concord R. Corp., 29 N. H. 9, 61 Am. Dec. 631, a railroad company is a carrier of passengers only as to its passenger trains. It does not become such a carrier as to its freight trains, although it may occasionally carry passengers on them as a matter of accommodation, and although in such cases it charges the usual fare. See also Carriers of passengers, chap. 19.

64. Burnell v. New York Cent. R. Co., 45 N. Y. 184; Merrill v. Grinnell, 30 N. Y. 594; Camden, etc., R. Co. v. Burke, 13 Wend. (N. Y.) 611,

28 Am. Dec. 488; Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Cole v. Goodwin, 19 Wend. (N. Y.) 251; Powell v. Myers, 26 Wend. (N. Y.) 591. See also Carriers of passengers, chap. 19.

65. Butler v. Hudson River R. Co., 3 E. D. Smith (N. Y.) 571; Langworthy v. New York, etc., R. Co., 2 E. D. Smith (N. Y.) 195.

66. Elkins v. Boston, etc., R. Co. 23 N. H. 275.

67. Humphreys v. Perry, 148 U. S. 627, 54 Am. & Eng. R. Cas. 29, 7 Am. R. & Corp. Rep. 686, 13 Sup. Ct. Rep. 711, 37 L. Ed. 587, 47 Alb. L. J. 386, wherein it was held that a passenger could not recover for the loss of a stock of jewelry contained in a trunk presented to the baggage agent as his personal baggage, unless the loss occurred through gross negligence.

purposes of general transportation, or for private purposes of their own.⁶⁸ As *quasi* public agents, railroad companies are subject to special limitations by law as to their rates and charges for transporting freight and passengers, and as to the manner in which they discharge their public duties.⁶⁹ The courts will take judicial notice of the fact that a railroad company is a common carrier where a statute declares it to be such, and allegation and proof of such fact is unnecessary.⁷⁰

§ 11. Receivers and assignees of railroad company operating the road.—The receiver and assignee in bankruptcy of a railroad corporation, who operates the road under the order of the court, is not personally liable for an injury caused by the negligence of a servant employed by him, in the absence of evidence that he was negligent in the selection of servants, or that he held himself out as operating the road otherwise than as receiver.⁷¹ Where such

68. Schloss v. Wood, 11 Colo. 287, 35 Am. & Eng. R. Cas. 492; Avinger v. South Carolina R. Co., 29 S. C. 265, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 526.

69. Scofield v. Lake Shore, etc., R. Co., 43 Ohio St. 571, 54 Am. Rep. 846, 23 Am. & Eng. R. Cas. 612; Norway Plains Co. v. Boston, etc., R. Co., 1 Gray (Mass.) 263, 61 Am. Dec. 423.

70. Caldwell v. Richmond, etc., R. Co., 89 Ga. 550; Denver, etc., R. Co. v. Cahill, 8 Colo. App. 158.

71. Cardot v. Barney, 63 N. Y. 281, 20 Am. Rep. 533; Murphy v. Holbrook, 20 Ohio St. 137; Potter v. Bunnell, 20 Ohio St. 150; Henderson v. Walker, 55 Ga. 481.

In *Cardot v. Barney*, *supra*, the court says: "The defendant was not individually the owner, or possessed of the property; he had neither a general or special property in the road or its earnings. The property was in the court for management and administration; and the defendant was an officer of the court, obeying its orders and carrying out its direc-

tions. His relation to the road and its operation was entirely official, and he had no interest in or control over the earnings, and was removable at the pleasure of the court. He was expressly authorized to employ all necessary assistants and laborers and operate the road. In the employment of subordinates, as well as in the other acts connected with the operation of the road, he acted officially and as the representative of, and by orders from the court, and was only held to diligence and good faith in the performance of any act which he was authorized to do. There is no evidence that he at any time assumed to act other than as receiver or assignee, or held himself out as a carrier of passengers, save as an officer of the court. I know of no principle upon which a receiver or other officer of a court, having no interest in the prosecution of the work and deriving no profit from it, should be answerable except for his own acts and neglects."

an officer displaces the directors or other body who by its charter are authorized to manage its affairs, and, under the direction of the court by which he is appointed, has the sole control of its property and effects, and, when authorized so to do, the executive power to use its franchises, he is responsible for his conduct in all these things to the court appointing him. In such a case the remedy for injuries resulting from his negligence, or the negligence of those operating a railroad under him, would be by application to the same tribunal, which might itself dispose of the matter by administering justice between the parties, or allowing the party aggrieved to bring his suit at law for the alleged injury.⁷² Damages for injury to the person, whether passenger or employe, for loss of goods in the course of transportation, or otherwise, would be chargeable upon, and payable out of the fund in court, the same as other expenses of administration.⁷³ But where a receiver is in possession of and operating a leased road not as an officer of any court or by its authority, but by virtue of a contract simply permitted by the court, he is not protected by being a receiver, but is liable like an individual for injuries resulting from his negligence, or the negligence of his employes in the operation of the road.⁷⁴ And, while a court of equity will protect persons acting under its process or authority, in the execution of a decree or decadal order, against suits at law, and will compel parties to apply to that court for relief, this protection is accorded by that court to its officers only on their own application, and is granted in the exercise of the court's discretion, and it is presumed that it would be granted in any necessary or proper case; waiving this right to invoke the aid of the court, they are amenable in the common law courts to actions for negligence as common carriers.⁷⁵ And the

72. *Kain v. Smith*, 80 N. Y. 468; *Metz v. Buffalo, Corry & P. R. Co.*, 58 N. Y. 61, 17 Am. Rep. 201; *Morse v. Brainerd*, 41 Vt. 551; *Klein v. Jewett*, 26 N. J. Eq. 474; *Little v. Dusenberry*, 46 N. J. L. 614, 50 Am. Rep. 445, 31 Alb. L. J. 490. See also *Village of Carterville v. Cook*, 129 Ill. 152, 16 Am. St. Rep. 248, 4 L. R. A. 721; *Rogers v. Wendell*, 54 Hun (N. Y.) 543.

73. *Klein v. Jewett*, *supra*; *Cow-*

drey v. G. H. & H. R. Co., 93 U. S. 352.

74. *Kain v. Smith*, 80 N. Y. 468, citing *Rogers v. Wheeler*, 43 N. Y. 598; *Sprague v. Smith*, 29 Vt. 421, 70 Am. Dec. 424; *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434; *Blumenthal v. Brainerd*, 38 Vt. 409, 91 Am. Dec. 350; *Paige v. Smith*, 99 Mass. 395; *Murphy v. Holbrook*, 20 Ohio St. 137.

75. *Blumenthal v. Brainerd*, 38 Vt.

mere fact that persons are acting as receivers, under the appointment of a court of equity, cannot be recognized as a defense to a suit at law for a breach of any obligation or duty which was fairly and voluntarily assumed by them in matters of business conducted or carried on by them while acting as such receivers.⁷⁶ Upon principle and authority, it has been held, a receiver, operating a railroad under the order of a court of equity, stands in respect to duty and liability, just where the corporation would, were it operating the road, and the question whether or not the receiver is liable for negligence must be tested by the same rules that would be applied if the corporation was the actual party defendant before the court.⁷⁷

§ 12. Trustees of mortgage bonds of railroad company.—The trustees of a mortgage, given to secure the bonds of a railroad company, who have possession and control of and actually operate the road for the benefit of their bondholders, are personally liable as common carriers of goods for the loss of goods transported over the road under their management.⁷⁸ The trustees of an insolvent railroad company who operate the road are liable for loss of goods as common carriers.⁷⁹ The cases cited proceeded upon the ground

402, 91 Am. Dec. 350; *Newell v. Smith*, 49 Vt. 260; *Paige v. Smith*, 99 Mass. 395; *Nichols v. Smith*, 115 Mass. 332; *Ballou v. Farnum*, 9 Allen (Mass.) 47; *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434; *Lamphear v. Buckingham*, 33 Conn. 237.

76. *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 350, in which the court says: "The assumption by the defendants of the peculiar duties and extraordinary responsibilities arising from the relation of common carriers is not to be considered as necessarily, if at all, incompatible with any duty or responsibility imposed upon them as receivers. The plaintiff's evidence tended to show that the defendants were managing and controlling a long line of railroad, and conducted and held themselves out as common carriers over that line. If in fact they

were common carriers over that line of railroad, we think that it is no defence to an action at law for a breach of a duty or obligation arising out of business intrusted to them in that relation, that they were running and managing the line of railroad as receivers under an appointment of the Court of Chancery." See also cases cited under last preceding note.

77. *Klein v. Jewett*, 26 N. J. Eq. 474.

78. *Rogers v. Wheeler*, 2 Lans. (N. Y.) 486, aff'd 43 N. Y. 598; *Sprague v. Smith*, 29 Vt. 421, 70 Am. Dec. 424; *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434.

79. *Faulkner v. Hart*, 44 N. Y. Super. Ct. 471, revd. 82 N. Y. 413, on other grounds.

that the defendants were the owners of the roads, and were bound personally by their contracts; and that the fact was unimportant that they were trustees and acted in a representative capacity. The actions were upon contracts made by the defendants, and, as in the case of executors and administrators,⁸⁰ they were held liable to answer for them. The legal title to the road was in the defendants, and they operated them as proprietors, and their liability legitimately resulted from their proprietorship, although the title was in trust for others. They were in no sense receivers or officers of the court. They had assumed to operate the roads, and had made contracts with the public in the course of that business, and there was no principle or policy that would shield them from liability if they failed to perform their engagements.⁸¹ Likewise such trustees and mortgagees in trust for the bondholders, in possession of and operating the roads as such trustees and mortgagees, are liable for injuries sustained by reason of the negligence of persons employed by them. They are regarded as the owners of the roads, and the real principals, receiving the earnings, and having the benefit of the services of the employes. The employes are the servants of the defendants operating the roads in virtue of the title and possession acquired under their mortgages; and whether a road is operated by mortgagees in possession, trustees, lessees or intruders, is not material, so long as they assume to operate the road and take the earnings either for themselves or those they represent.⁸² Where certain railroad companies carried on the business of common carriers of goods for hire, under the name of an association, and thereby acquired great gains and profits, it was held that they were liable as trustees to one who had obtained

80. Ferrin v. Myrick, 41 N. Y. 315.

81. See cases cited note 78.

82. Ballou v. Farnum, 9 Allen (Mass.) 47; Lamphear v. Buckingham, 33 Conn. 237; Sprague v. Smith, 29 Vt. 421, 70 Am. Dec. 424, wherein the question was, whether the defendants were personally liable upon the contracts made by the operatives on the road, or for their negligence or misconduct, while they continued to operate the road, and received freight and pay for carrying

passengers for the benefit of the *cestuis que trust*, and the court held that it could "see no reason why the defendants were not liable to the same extent as the company would have been, and upon similar grounds to those upon which lessees, or any others exercising the franchises of the company, for the time, must be; that is, that they are the ostensible parties, who appear to the public to be exercising the franchise of the company."

a judgment against the association for breach of duty in transporting his goods.⁸³

§ 13. Street railroad companies.—Street railroad companies are common carriers, and liable, like other common carriers, upon common law principles. They are always common carriers of passengers for hire, with rights, duties, and liabilities similar to those of general railroad companies. As such, they are required to exercise the highest degree of care, skill, diligence, and foresight consistent with their business for the safety of their patrons, and are liable for the slightest negligence causing injury or loss of life to their passengers.⁸⁴ They may be common carriers of goods, also, when expressly authorized by statute, or when organized under general laws not limiting their powers, or, under spe-

83. Clarkson v. Erie & North Shore Dispatch, 6 Ill. App. 284.

84. Spellman v. Lincoln Rap. Trans. Co., 36 Neb. 890, 55 N. W. 270, 20 L. R. A. 316; Lincoln St. R. Co. v. McClellan, 54 Neb. 672, 74 N. W. 1074; Topeka City R. Co. v. Higgs, 38 Kan. 375; Meier v. Pennsylvania R. Co., 64 Pa. St. 225; Indianapolis, etc., R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898, 3 Am. Rep. 581; Dean v. Chicago G. R. Co., 64 Ill. App. 165, 1 Chic. L. J. Wkly. 213, 28 Chic. Leg. N. 289; Citizens St. R. Co. v. Merl, 134 Ind. 609, 33 N. E. 1014; East Omaha St. R. Co. v. Godola, 6 Am. Electl. Cas. 424, 50 Neb. 906, 70 N. W. 491, 7 Am. & Eng. R. Cas. N. S. 300; Thompson-Houston Elec. Co. v. Simon, 20 Oreg. 60, 47 Am. & Eng. R. Cas. 51; Citizens St. R. Co. v. Twiname, 111 Ind. 587; Holly v. Atlanta St. R. Co., 61 Ga. 215, 7 Rep. 360. See Nellis' St. Rd. Act. Law, pp. 1, 12, 13 and notes.

Railway companies are bound to use reasonable care and diligence in the conveyance of passengers; but they are not common carriers of passengers, and are not under obligation to carry

safely. East Indian Railway v. Kalidas Mukerjee, 70 L. J. P. C. 396, 63 App. Cas. 396, 84 L. T. 210.

The highest degree of care and diligence is due to a passenger who has paid for a continuous passage, while he remains in or within the sphere of a transfer car supplied by the company for making transfers from one line to another. Citizens St. R. Co. v. Merl, 134 Ind. 609, 33 N. E. 1014.

The fact that a street railway is being operated by a construction company, under its contract to operate the road satisfactorily for ten days before delivery to the street railway company, is not a defense in an action against the latter for personal injury, received by a passenger upon a car in use for the purposes of traffic. Cogswell v. West St. & N. E. Elec. R. Co., 5 Wash. 46. 52 Am. & Eng. R. Cas. 500, 7 Am. R. & Corp. Rep. 48, 31 Pac. 411.

A street railway company assumes the relation of a common carrier by undertaking the transportation of passengers for hire, although its road may be constructed over private prop-

cial circumstances, when organized only for the purpose of carrying passengers.⁸⁵

§ 14. One railroad transporting the cars of another.—A railroad company that contracts to furnish the motive power to draw the passenger and freight cars of another with their contents over its road, assumes the liabilities of a common carrier in respect thereto, and is liable as a common carrier for loss or injury to certain cars and their contents, even though destroyed by fire or caused by a defect in the track of the transporting company, arising from a cause beyond its control.⁸⁶ So, where a railroad com-

erty. *East Omaha St. R. Co. v. Godolla*, 6 Am. Electl. Cas. 424, 50 Neb. 906, 70 N. W. 491, 7 Am. & Eng. R. Cas. N. S. 300.

85. Thompson-Houston Elec. Co. v. Simon, 20 Oreg. 60, 47 Am. & Eng. R. Cas. 51, 25 Pac. 147; *Levi v. Lynn*, etc., R. Co., 11 Allen (Mass.) 300, 87 Am. Dec. 713. In the case last cited, in an action to recover damages against a street railway company for the loss of merchandise delivered to one of its conductors for transportation on the platform of a car, for which money was paid by the owner to the conductor, the testimony of two other persons that they had paid money at other times to the defendant's conductors for the like transportation of merchandise, with the knowledge of the superintendent of the road, was held competent evidence to show, and, in the absence of anything to control or contradict it, sufficient evidence to warrant a jury in finding, that the defendants had assumed the business of common carriers of merchandise on their cars. See *Nellis' St. Rd. Acct. Law*, pp. 1, 12, 13 and notes. See also *Spellman v. Lincoln Rap. Trans. Co.*, *supra*; *Citizens St. R. Co. v. Twiname*, *supra*.

86. *Missouri Pac. R. Co. v. Chi-*

cago, etc., R. Co., 25 Fed. 317, 23 Am. & Eng. R. Cas. 718; *Hannibal, etc., R. Co. v. Swift*, 12 Wall. (U. S.) 262; *East St. Louis, etc., R. Co. v. Wabash, etc., R. Co.*, 123 Ill. 594, 32 Am. & Eng. R. Cas. 522, revg. 24 Ill. App. 279; *Peoria, etc., R. Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 29 Am. St. Rep. 348, 49 Am. & Eng. R. Cas. 81, revg. 28 Ill. App. 79; *Austin v. St. Louis, etc., Packet Co.*, 15 Mo. App. 197. But if destroyed by fire after delivery to the consignee, or after they have been tendered to him, the company is not liable if not in fault. In the latter case its duties are only those of warehousemen. *Missouri Pac. R. Co. v. Chicago, etc., R. Co.* *supra*. *Mallory v. Tioga, etc., R. Co.*, 39 Barb. (N. Y.) 488, aff'd. 32 How. Pr. (N. Y.) 616; *Vermont, etc., R. Co. v. Fitchburg R. Co.*, 14 Allen (Mass.) 460, 92 Am. Dec. 785; but where the contract provided that the company owning the cars agreed to save the transporting company harmless from all claims and expenses arising from any injury to passengers, or loss or damage of baggage, goods, and freight, while in transit over their road unless occasioned by the negligence or default of the transporting company,

pany is bound by statute to haul the cars of another company, and, having received a car to be hauled to a certain point, it, without authority, hauls it to another point, where it is destroyed by fire, it incurs the liability of a common carrier.⁸⁷ If a railroad company take a car for transportation over their road, and, though it remains on its own tracks, take sole possession and care of it, they are responsible as common carriers.⁸⁸ It has been held that when the railroad company merely furnishes the motive power and the roadbed, and contracts to haul the cars of the shipper, it is not liable as a common carrier of the goods in such cars, but that it is liable only for losses resulting from its negligence.⁸⁹ But it is held that this rule should prevail only when it appears that all control over the goods was taken from the carrier and confided to agents of the shipper.⁹⁰

in which case the loss or damage should be borne by the latter, it was held that the latter, although liable as common carriers, were not liable on the contract.

Hauling Engines.—A railroad company which agrees for a stipulated compensation to draw another company's engines over its line, and furnishes an employe to act as pilot, he having the exclusive control of the movement of the engines, is liable for their destruction in a collision caused by his negligence in moving them, although the company owning them furnishes an engineer and fireman to operate them under the pilot's direction. *Terre Haute, etc., R. Co. v. Chicago, etc., R. Co.*, 150 Ill. 502, 37 N. E. 915.

87. *Peoria, etc., R. Co. v. Chicago, etc., R. Co.*, 109 Ill. 135, 50 Am. Rep. 605, 18 Am. & Eng. R. Cas. 506.

88. *New Jersey R. Co. v. Pennsylvania R. Co.*, 27 N. J. L. (3 Dutch.) 100.

89. *East Tennessee, etc., R. Co. v. Whittle*, 27 Ga. 535, 73 Am. Dec. 741; *Ohio, etc., R. Co. v. Dunbar*, 20 Ill. 623. See also *Kimball v. Rut-*

land, etc., R. Co.

26 Vt. 247, 62 Am. Dec. 567.

90. *Mallory v. Tioga R. Co.*, 39 Barb. (N. Y.) 488; *New Jersey, etc., R. Co. v. Pennsylvania R. Co.*, 27 N. J. L. 100, wherein it was said: "The point was incidentally made . . . that this was not a case of carrying at all, but was analogous to that of towing a boat upon a water navigation, where the party supplying the motive power does not receive the boat into his custody or exercise any control over it other than such as results from the act of towing; in which case it has been held that the common law liability of a carrier does not attach. *Caton v. Rumney*, 13 Wend. (N. Y.) 387. This doctrine has been denied or doubted in *Smith v. Pierce*, 1 La. 349. But however the rule may be in the cases of towing boats under these circumstances, the analogy does not hold good in the present case. Here the defendants received the car to take over their road and had exclusive charge of it, though they took it on its own tracks."

§ 15. Transportation or dispatch companies.—A transportation company not owning or controlling any means of conveyance itself, but engaging on its own behalf in the business of transporting goods through the agency and over the lines of other carriers of its own selection and employment, is a common carrier, and subject to all the responsibilities attaching to that character.⁹¹ The duties which it undertakes and which it holds itself out to the public as willing to undertake and perform give it that character. In many cases it has been expressly adjudged to be a common carrier, and in others such has been assumed to be its character without a discussion of the question.⁹² Such a company cannot stipulate for exemption from liability for damages to goods caused by the default of its agents, the sub-carriers.⁹³

§ 16. Express freight lines.—An express freight company which received goods for transportation but unreasonably delayed shipping them, and meanwhile they were injured by an extraordinary flood, was held liable as a common carrier for the loss occasioned. A common carrier, in order to claim exemption from liability for damage done to goods in his hands in course of transportation, though injured by what is deemed the act of God, must be without fault himself; his act or neglect must not concur and contribute to the injury. If he departs from the line of duty and violates his contract, and while thus in fault, and in consequence of the fault, the goods are injured by the act of God, which would not otherwise have caused the injury, he is not protected.⁹⁴

91. Merchants Dispatch Transp. Co. v. Bloch, 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881; Merchants Dispatch, etc., Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757; Mercantile Mut. Marine Ins. Co. v. Chase, 1 E. D. Smith (N. Y.) 115, a company doing business under the name of a "transportation company" is to be held liable as a common carrier, if it in fact transacts business as such.

92. Robinson v. Merchants Despatch Transp. Co., 45 Iowa 470; Stewart v. Merchants Despatch Transp. Co., 47 Iowa 229, 29 Am.

Rep. 476; Wilde v. Merchants Despatch Transp. Co., 47 Iowa, 247, 29 Am. Rep. 479; Bancroft v. Merchants Despatch Transp. Co. 47 Iowa, 262, 29 Am. Rep. 482; Merchants Despatch Transp. Co. v. Bolles, 80 Ill. 473.

93. Merchants Dispatch Transp. Co. v. Bloch, 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881.

94. Read v. Spaulding, 5 Bosw. (N. Y.) 395, affd. 30 N. Y. 630. See also Michaels v. New York Cent. R. Co., 30 N. Y. 564; Whitworth v. Erie Ry. Co., 87 N. Y. 419; Reed v. United States Express Co., 48 N. Y.

§ 17. Owners of canal boats.—Owners of canal boats, employed in the transportation of merchandise, are common carriers when they hold themselves out as willing to carry for all persons indifferently.⁹⁵ But the owner of a canal boat, generally used only in transporting his own merchandise, applying to a common carrier, who has knowledge of the facts, and receiving a load of freight which he enters into a contract to transport for an agreed price, does not thereby become liable for it as a common carrier. It is the business of carrying goods for others, not a single act, known to the consignor to be outside of the usual employment, which fixes the liability of a common carrier.⁹⁶ A canal boat hired at a daily rate for use in storing grain about the harbor, to be subject wholly to the control of the hirer in respect to loading, unloading, navigation, and delivery of cargo, is not a carrier or a warehouse, and is not liable for a shortage in cargo by a sale thereof by a man whose services in taking care of the boat were included in its hire, but who, though called "captain," had nothing to do with the cargo or navigation.⁹⁷

§ 18. Owners of tow boats towing water craft on the Mississippi.—The courts of Louisiana have held that a towboat used in towing barges or other water craft, which are loaded with freight, from one point to another on the Mississippi River, is a common

470; *Beach v. Raritan, etc., R. Co.*, 37 N. Y. 468. *Compare Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 695; *Denny v. New York Cent. R. Co.*, 13 Gray (Mass.) 481, 74 Am. Dec. 645.

95. *Arnold v. Hallenbake*, 5 Wend. (N. Y.) 33; *Parsons v. Hardy*, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; *DeMott v. Laraway*, 14 Wend. (N. Y.) 225, 28 Am. Dec. 523; *Bowman v. Teall*, 23 Wend. (N. Y.) 306; *Fulmer v. Bradley*, 25 Pa. St. 120; *Humphrey v. Read*, 6 Whart. (Pa.) 435; *Spencer v. Daggett*, 2 Vt. 92; *Harrington v. Lyles*, 2 Nott & M. (S. C.) 88; *Hyde v. Trent Nav. Co.*, 5 T. R. 389; *Trent Nav. Co. v. Wood*, 3 Esp. N. P. 127; *Williams v. Bran-*

son, 1 Murph. (N. C.) 417, 4 Am. Dec. 562.

96. *Fish v. Clark*, 49 N. Y. 122, 2 Lans. (N. Y.) 176; *Flaught v. Lashley*, 36 La. Ann. 106, wherein it was held that a boat used by its owners for their own purposes and those of others who agree to pay certain rates for the transportation of their goods from one point to another, and which is not shown to have been held out as a common carrier, cannot be declared to be such at the instance of one of the agreeing parties. See also *Beckwith v. Frisbie*, 32 Vt. 559.

97. *The Daniel Burns* (D. C. S. D. N. Y.), 52 Fed. Rep. 159, affd. 56 Fed. Rep. 605.

carrier. Persons owning such a tow boat, who undertake to tow a barge, loaded with freight or merchandise, from one given point to another, first giving a bill of lading for the transportation of the cargo on board of the barge, are liable for the delivery of the cargo at the port of destination, the same as if it had been placed on board the tow boat herself.⁹⁸ Owners of tow boats have also been held to be common carriers in certain other jurisdictions.⁹⁹ This ruling is contrary to the general rule maintained in the United States courts, the courts of other states, and the English courts.¹

§ 19. Owners of boats employed in towing other boats or vessels.—The United States courts have held that an engagement to tow does not impose an obligation to insure or the liability of a common carrier, and that owners of a tug engaged in towing are

98. Bussey v. Mississippi Val. Transp. Co., 24 La. Ann. 165, 13 Am. Rep. 120; Clapp v. Stanton, 20 La. Ann. 495; Smith v. Pierce, 1 La. 350.

99. White v. Tug Mary Ann, 6 Cal. 462, 65 Am. Dec. 523; Walston v. Myers, 5 Jones L. (N. C.) 172; Ashmore v. Pennsylvania, etc., Co., 28 N. J. L. 180.

1. See § 19, *post*. In explanation of this conflict of authority, it was said by Howe, J., in *Bussey v. Mississippi Val. Transp. Co.*, *supra*: “Such conflict of authority might be very distressing to the student but for the fact that when these writers and cases cited by them are examined, the discrepancy, except in the decisions in *Brown v. Clegg*, 63 Pa. St. 51, 3 Am. Rep. 522, is more imaginary than real. There are two very different ways in which a steam towboat may be employed, and it is likely that Mr. Story (*Story on Bailments*, § 496) was contemplating one method, and Mr. Kent (*2 Kent's Com.* 599) the other. In the first place it may be employed as a mere means of locomotion under the entire control of

the towed vessel; or the owner of the towed vessel and goods therein may remain in possession and control of the property thus transported to the exclusion of the bailee; or the towing may be casual merely, and not as a regular business between fixed termini. . . . And it might well be said that under such circumstances the towboat or tug is not a common carrier. But a second and quite different method of employing a towboat is where she plies regularly between fixed termini, towing for hire and for all persons barges laden with goods, and taking into her full possession and control and out of the control of the bailor the property thus transported. Such is the case at bar. It seems to satisfy every requirement in the definition of a common carrier. . . . We must think that in all reason the liability of the defendants under such circumstances should be precisely the same as if, the barge being much smaller, it had been carried, cargo and all, on the deck of their tug.”

not liable as carriers, but for reasonable care. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services.² Such is maintained to be the law in New York, where, in the leading case, the court said: "It is a great misnomer to call the defendants common carriers, or carriers of any kind in relation to the business of towing boats. Nor are they bailees of any description; for the property towed is not delivered to them, nor placed within their exclusive custody or control. It remains in the possession and for most purposes in the exclusive care of the owners or their servants. There is no bailment within any definition of that term to be found in the books. But whether a bailment or not, it is clear that those who tow boats and vessels are not common carriers of the things towed."³

2. The J. P. Donaldson, 167 U. S., 603; The Propeller Burlington, 137 U. S. 386; Munks v. Jackson (C. C. App. 9th C.), 13 C. C. A. 641, 66 Fed. Rep. 571; The L. P. Dayton, 120 U. S. 337; Transportation Line v. Hope, 95 U. S. (5 Otto) 297; Hinter v. Steamer Napoleon, 3 Wall. (U. S.) 5; The Quickstep, 9 Wall. (U. S.) 665; The Steamer Webb, 14 Wall. (U. S.) 406; The Lyon, 1 Brown's Adm. (U. S.) 59; The Stranger, 1 Brown's Adm. (U. S.) 281; The Oconto, 5 Biss. (U. S.) 460; The Merrimac, 2 Sawy. (U. S.) 586; The Steamboat Angelina Corning, 1 Ben. (U. S.) 109; The Princeton, 3 Blatchf. (U. S.) 54; The Neaffie, 1 Abb. U. S. Rep. 465; Brawley v. Watson, 2 Bond (U. S.) 356; The Margaret, 94 U. S. 494; The Steamer New Philadelphia, 1 Black (U. S.), 62.

3. Wells v. Steam Navigation Co., 2 N. Y. 204, 205, Bronson, J.; s. c. 8 N. Y. 375; Arctic, etc., Ins. Co. v. Austin, 54 Barb. (N. Y.) 559; Caton v. Rumney, 13 Wend. (N. Y.) 387; Alexander v. Green, 3 Hill (N. Y.), 9, revd. 7 Hill (N. Y.), 533; Wooden v. Austin, 51 Barb. (N. Y.) 9; Ab-

bey v. Str. Stephens, 22 How. Pr. (N. Y.) 78.

Worth preserving.—The remarks of Bronson, J., in his opinion above quoted, concerning the reversal of the decision in the case of Alexander v. Green: "It is true that the judgment in Alexander v. Green was reversed by the Court of Errors. (7 Hill, 583.) But what particular point or principle of law was decided by the court, or what a majority of the members thought upon any particular question of law, no one can tell. It appears by the reporter's head note, that he could not tell, and from his note at the end of the case, it is apparent that the court itself could not tell. Two merchants and two lawyers thought the defendants were common carriers, while other senators expressed a different opinion, and went upon other grounds; and it does not appear that more than four of the seventeen senators who voted for the reversal were agreed concerning any one of the questions in the case. Two efforts were made at the time to ascertain "the ground of the judgment," but

That towing vessels or boats are not common carriers as to the tow, but incur only the responsibility of ordinary bailees for hire, is maintained by many decisions of the courts of Pennsylvania and other states.⁴ The English courts hold the same doctrine.⁵ In Kentucky it has been held, contrary to the view taken by the Louisiana courts in reference to tow boats on the Mississippi River, that owners of tow boats on the Ohio River and its tributaries are merely private carriers, and are only liable to exercise ordinary care and skill, considering the nature of their business. Unless he has made a special agreement therefor, a private carrier is not bound to carry or tow for all persons tendering to him anything to be transferred or towed. Otherwise as to a common carrier, or one who has so acted as to justify the belief that he offers to carry for any person between certain termini, or on a certain route.⁶

§ 20. Ferrymen.—A ferry is a continuation of the highway from one side of the water over which it passes to the other, and is for the transportation of passengers, or of travelers with their

both proved abortive; and thus the majority virtually said, that although the judgment was reversed, no point or principle of law was settled by the decision. It happened in that case, as it has happened on other occasions, that a majority of the members of that multitudinous court made up their minds to reverse a judgment, and they did it; but not being able to agree concerning the ground of their action, they plainly enough admitted that nothing was settled by the decision. The case is not an authority for anything; it could only have been reported for the purpose of preserving the reasons of those who delivered opinions."

4. Hays v. Millar, 77 Pa. St. 238, 18 Am. Rep. 445; Brown v. Clegg, 63 Pa. St. 51, 3 Am. Rep. 522; Leonard v. Hendrickson, 18 Pa. St. 40; Hayes v. Paul, 51 Pa. St. 134; Sproul v. Hemingway, 14 Pick. (Mass.) 1; Pennsylvania-Navy Co. v. Dandridge,

8 Gill & J. (Md.) 248, 29 Am. Dec. 543.

As to whether persons engaged in towing vessels are liable as common carriers, *quaere*, Ashmore v. Pennsylvania, etc., Co., 28 N. J. L. (4 Dutch.) 180.

5. Symonds v. Pain, 6 Hurl. & N. 709; The Julia, 14 Moore P. C. 210; The Minnehaha, 1 Lush. 335.

6. Varble v. Bigley, 14 Bush (Ky.) 698; 9 Cent. L. J. 153, 29 Am. Rep. 435. See § 18, *ante*. In a later case it has been held that the question whether the owner of a tow boat held himself out as a common carrier for the time being was for the jury, and that if the jury found that he had, then he was liable as a common carrier. Bassett & Stone v. Aberdeen Coal & Mining Co. (Ky.), 88 S. W. 318. See, also, Farley v. Lavary, 107 Ky. 523, 54 S. W. 840, 47 L. R. A. 383.

teams and vehicles and such other property as they may carry or have with them.⁷ In a strictly ferry business, property is always transported only with the owner or custodian thereof; and ferrymen who do nothing but a ferry business, and have nothing but a ferry franchise, are bound to transport no other property; and in the transportation of persons with their property, they are not under the obligations of a common carrier, but are bound only to use due care and diligence. It is well settled that if the owner retains control of the property himself, and does not surrender the charge of it to the ferrymen, he is not a common carrier and liable as such for all losses and injuries except those caused by the act of God or the public enemies, but is only responsible for actual negligence.⁸ But ferrymen may combine, and usually do combine, with the ferry business, the business of a common carrier, carrying freight and merchandise without the presence of the owner or custodian, like other carriers engaged in the transportation of such freight; and as to such freight, they are under the duties and obligation of a common carrier. As ferrymen, they are under a public duty to transport with suitable care and diligence all persons with or without their vehicles and other property; and as common carriers, it is their duty to carry all freight and merchandise delivered to them.⁹ It is maintained by many authorities and seems to be well settled that ferrymen, when they receive property for transportation, and have the exclusive custody of it, are to be held to the strict liability of common carriers.¹⁰ It is held that public ferrymen are presumably responsible,

7. Broodnox v. Baker, 94 N. C. 675.

8. Wyckoff v. Queens County Ferry Co., 52 N. Y. 35, 11 Am. Rep. 650; Evans v. Rudy, 34 Ark. 385; Harvey v. Rose, 26 Ark. 3, 7 Am. Rep. 595; Davies v. Mann, 10 Mees. & W. (Eng.) 546; Dudley v. Camden & Phila. Ferry Co., 13 Vroom. (N. J.) 25; White v. Winnisimmet Co., 7 Cush. (Mass.) 155.

9. Mayor, etc., of New York v. Starin, 106 N. Y. 1.

10. Wyckoff v. Queens County Ferry Co., 52 N. Y. 35, 11 Am. Rep. 650, the liability of a common carrier in all its extent only attaches when

there is an actual bailment and the party sought to be charged has the exclusive custody and control of property for carriage; Clark v. Union Ferry Co., 35 N. Y. 485; Evans v. Rudy, 34 Ark. 385; Harvey v. Rose, 26 Ark. 3; Pomeroy v. Donaldson, 5 Mo. 36; Babcock v. Herbert, 3 Ala. 392; Sanders v. Young, 1 Head (Tenn.), 219; May v. Hanson, 5 Cal. 360; Smith v. Seward, 3 Pa. St. 342; Albright v. Penn, 14 Tex. 290; Sohen v. Hume, 1 McCord (S. C.), 444; Miles v. James, 1 McCord (S. C.), 157; White v. Winnisimmet Co., 7 Cush. (Mass.) 155; Joy v. Winnisimmet Co., 114 Mass. 63; Miller v.

as common carriers, for property received by them for transportation; that to relieve themselves, they must show that they had no such control over it as invested them with the character of a common carrier; that after the property has been put on board their boats, it is *prima facie* in their charge, and they are responsible for it; and it makes no difference that the owner is present, unless he consent to assume the charge thereof.¹¹ Other cases hold that ferrymen are chargeable as common carriers for the absolute safety of property thus carried, and that the owner, in taking care of the property during the passage of the boat, may be regarded as the agent of the ferryman;¹² but this position is questioned as not based upon any just principle and as not within the reasons of public policy upon which the extreme liabilities of common carriers rest.¹³ One who keeps a ferry for his own use and for the convenience of customers to his mill, but who charges no ferriage, is not a common carrier, and is only bound to ordinary diligence.¹⁴ But the owner of a private ferry, although not on a road opened by public authority, or repaired by public labor, may so use it as to subject himself to the liability of a common carrier, if he undertakes for hire, to convey across the river all persons indifferently, with their carriages and goods; but this is a question for a jury.¹⁵

§ 21. Hackmen.—Proprietors of hacks have been held to be common carriers and bound to exercise the utmost care and skill.¹⁶ But whether the hackman's business can be justly considered that of a common carrier under all circumstances has been questioned. It is said that he transports passengers here and there about the

Pendleton, 8 Gray (Mass.), 574; Claypool v. McAllister, 20 Ill. 504; Garner v. Green, 8 Ala. 96; Trent v. Cartersville Bridge Co., 11 Leigh (Va.), 544; Walker v. Jackson, 10 M. & W. 161; Rutherford v. McGowen, 1 Nott & M. (S. C.) 19; Wiloughby v. Horridge, 12 C. B. 742.

11. Harvey v. Rose, 26 Ark. 3; Powell v. Mills, 37 Miss. 691; Slimmer v. Merry, 23 Iowa, 91; Whitmore v. Bowman, 4 G. Gr. (Iowa) 148; LeBarron v. East Boston Ferry Co., 11 Allen (Mass.), 312; Richards

v. Fuqua, 28 Miss. 793; Griffith v. Cave, 22 Cal. 535.

12. Fisher v. Clisbee, 12 Ill. 344; Powell v. Mills, 37 Miss. 691; Wilson v. Hamilton, 4 Ohio St. 722.

13. Wyckoff v. Queens County Ferry Co., *supra*.

14. Self v. Dunn, 42 Ga. 528, 5 Am. Rep. 544.

15. Littlejohn v. Jones, 2 McMUL. (S. C.) 366, 39 Am. Dec. 132.

16. Bonce v. Dubuque St. Ry. Co., 53 Iowa, 278, 36 Am. Rep. 221.

streets of a village or city, having no established route over which his conveyance runs, nor any specified times for making his trips. He assumes the right to let his rig for a day, or any other specified time, to suit the convenience or wishes of his patrons. He gives the exclusive use of his carriage to a less number of persons than it can conveniently accommodate. He pursues his business if he finds it profitable to do so; if not, he remains idle. The obligations and duties of a common carrier are very different.¹⁷

§ 22. Proprietors of omnibuses.—The proprietor of a line of omnibuses and baggage wagons, engaged in the business of carrying, for hire, passengers and baggage, or either alone, between the hotels and depots of a city, is a common carrier; and is answerable as such for the safe delivery of articles received for transportation.¹⁸ Omnibus proprietors who carry passengers and baggage for hire incur the ordinary responsibility of a common carrier, with respect to their baggage; nothing will excuse them for a loss of, or injury to it, but inevitable accident, or the act of the public enemy.¹⁹ A carrier of passengers is responsible for their baggage, if lost, though no distinct price be paid for its transportation; but he is not liable for a large sum of money, in a trunk, in excess of an amount ordinarily carried for travelling purposes.²⁰

17. Brown v. N. Y. Cent. & H. R. R. Co., 75 Hun (N. Y.), 355, 56 St. Rep. (N. Y.) 748, 27 N. Y. Supp. 69. The point actually decided in the case last cited was that a hackman is not a common carrier within the meaning of N. Y. Laws 1892, chap. 676, providing that no preference for the transaction of the business of a common carrier upon its cars, or in its depots or buildings, or upon its grounds, shall be granted by any railroad company to any one of two or more persons competing in the same business, or in that of transporting for themselves or others.

18. Parmelee v. Lowitz, 74 Ill. 116, 24 Am. Rep. 276.

19. Powell v. Myers, 26 Wend. (N.

Y.) 591; Camden & Amboy R. Co. v. Belknap, 21 Wend. (N. Y.) 354; Clark v. Faxton, 26 Wend. (N. Y.) 153; Cole v. Goodwin, 19 Wend. (N. Y.) 251; Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Camden & Amboy R. Co. v. Burke, 13 Wend. (N. Y.) 611; Dibble v. Brown, 12 Ga. 217, 56 Am. Dec. 460; Jones v. Voorhees, 10 Ohio, 145.

20. Orange Co. Bank v. Brown, 9 Wend. (N. Y.) 85; Hawkins v. Hoffman, 6 Hill (N. Y.), 586; Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Cole v. Goodwin, 19 Wend. (N. Y.) 251; McGill v. Rowand, 3 Barr (Pa.), 451; Bomer v. Maxwell, 9 Humph. (Tenn.) 621; Brooke v. Pickwick, 4 Bing. (Eng.) 218.

§ 23. Proprietors of stage coaches.—Stage coach proprietors are answerable as common carriers for the baggage of passengers, and cannot restrict their liability by a general notice that "the baggage of passengers is at the risk of the owners."²¹ An established practice of conveying for hire, in a stage coach, parcels not belonging to passengers, constitutes the proprietors of the coach common carriers, and renders them liable for the loss or injury of such parcels.²² The driver of a stage coach, in the general employ of the proprietors of the coach, and in the habit of transporting small packages of money for a small compensation, which was uniform, whatever might be the amount of the package, is a bailee for hire, answerable for ordinary negligence, and not subject to the responsibilities of a common carrier.²³ The owners of the coach in such a case were held answerable for the negligence of the driver in not delivering a parcel of that description, intrusted to him to carry, unless the arrangement was known to the owner of the goods, so that he contracted with the driver as principal.²⁴ The responsibility of a carrier does not attach, until there has been a complete delivery for transportation, to him, or to a servant instructed to receive goods for such purpose.²⁵

§ 24. Palace and sleeping car companies.—Sleeping car companies are not insurers of the baggage, money, or other personal

21. Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Cole v. Goodwin, 19 Wend. (N. Y.) 251; Clark v. Paxton, 21 Wend. (N. Y.) 153; Powell v. Myers, 26 Wend. (N. Y.) 591; Camden & Amboy R. Co. v. Belknap, 21 Wend. (N. Y.) 354; Jones v. Voorhees, 10 Ohio, 145.

22. Dwight v. Brewster, 1 Pick. (Mass.) 53, 11 Am. Dec. 133; Beckman v. Shouse, 5 Rawle (Pa.), 179, 28 Am. Dec. 653; Robertson v. Kennedy, 2 Dana (Ky.), 430; Merwin v. Butler, 17 Conn. 138; McHenry v. Philadelphia, etc., Co., 4 Har. (Del.) 448; Jones v. Voorhees, 10 Ohio, 145; Powell v. Mills, 30 Miss. 231, 64 Am. Dec. 158, *prima facie*, the proprietors of stage coaches, used for carrying the mails, passengers and their bag-

gage, are not to be considered common carriers as to articles not strictly within their line of business, in the technical sense of that term. They may, however, make themselves such by special contract, in a particular case, or by their general course of business. Peizotti v. McLaughlin, 1 Strob. (S. C.) 468, 47 Am. Dec. 563; Walker v. Skipwith, Meigs (Tenn.), 502.

23. Shelden v. Robinson, 7 N. H. 157.

24. Bean v. Sturtevant, 8 N. H. 146; Dwight v. Brewster, 1 Pick. (Mass.) 53; Beckman v. Shouse, 5 Rawle (Pa.), 179.

25. Blanchard v. Isaacs, 3 Barb. (N. Y.) 388.

effects of a passenger, and the courts have almost universally refused to impose upon them the absolute liability attaching to inn-keepers and common carriers of goods.²⁶ While the law, however, does not make a sleeping car company the insurer of the effects of the occupants of its berths, it does not absolve it from all liability. But the ground of this liability rests simply and solely in negligence. The company is bound to exercise reasonable care and vigilance in looking after the person and property of a passenger during the night while the passenger is asleep, or using the necessary conveniences of the car, and it is bound so to manage its car as not unreasonably to expose his property to an unusual risk of

26. N. Y.—Williams v. Webb, 27 Misc. Rep. (N. Y.) 508, 58 N. Y. Supp. 300, 6 Am. Neg. Rep. 129, modg. 22 Misc. Rep. (N. Y.) 513, 49 N. Y. Supp. 1111; Carpenter v. New York, etc., R. Co., 124 N. Y. 53, 26 N. E. 277; 21 Am. St. Rep. 644, 47 Am. & Eng. R. Cas. 421; Tracy v. Pullman Palace Car Co., 67 How. Pr. (N. Y.) 154; Welch v. Pullman Palace Car Co., 16 Abb. Pr. N. S. (N. Y.) 352; Palmetter v. Wagner, 11 Alb. L. J. 149.

U. S.—Barrott v. Pullman Palace Car Co., 51 Fed. 796; Lemon v. Pullman Palace Car Co., 52 Fed. 262; Blum v. Southern Pullman Palace Car Co., 1 Flip. (U. S.) 500.

Ala.—Pullman Palace Car Co. v. Adams (Ala.), 24 So. 921.

Ill.—Pullman Palace Car Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258.

Ind.—Woodruff Sleeping, etc., Coach Co. v. Diehl, 84 Ind. 474, 9 Am. & Eng. R. Cas. 294, 43 Am. Rep. 102.

Ky.—Pullman Palace Car Co. v. Gaylord, 6 Ky. L. Rep., 23 Am. L. Reg. N. S. 788.

La.—Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 33 Am. & Eng. R. Cas. 407, 8 Am. St. Rep. 512.

Mass.—Lewis v. New York Sleeping Car Co., 143 Mass. 269, 28 Am. & Eng. R. Cas. 148, 58 Am. Rep. 145;

Dawley v. Wagner Palace Car Co., 169 Mass. 315.

Miss.—Illinois Cent. R. Co. v. Handy, 63 Miss. 609, 56 Am. Rep. 846; Pullman Palace Car Co. v. Lawrence, 74 Miss. 784, 22 So. 53.

Mo.—Morrow v. Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281; Bevis v. Baltimore, etc., R. Co., 26 Mo. App. 19; Scaling v. Pullman Palace Car Co., 24 Mo. App. 29; Root v. New York C. Sleeping Car Co., 28 Mo. App. 199; Hampton v. Pullman Palace Car Co., 42 Mo. App. 134.

Ohio.—Falls River & M. Co. v. Pullman Palace Car Co., 4 Ohio N. P. 26, 6 Ohio Dec. 85.

Pa.—Pullman Palace Car Co. v. Gardner, 3 Penny. (Pa.) 78, 16 Am. & Eng. R. Cas. 324.

Tenn.—Pullman Palace Car Co. v. Gavin (Tenn.), 23 S. W. 70, 21 L. R. A. 298.

Tex.—Pullman Palace Car Co. v. Matthews, 74 Tex. 654, 15 Am. St. Rep. 873; Pullman Palace Car Co. v. Pollock, 69 Tex. 120, 34 Am. & Eng. R. Cas. 217, 5 Am. St. Rep. 31; Belden v. Pullman Palace Car Co. (Tex. Civ. App.), 43 S. W. 22, 3 Am. Neg Rep. 746.

Can.—Smith v. Pullman Palace Car Co. (Can.), 60 Alb. L. J. 188.

loss by thieves or otherwise, and it is liable only for its failure so to do.²⁷ A contrary doctrine has been enunciated in one or two cases.²⁸ It has been held that a passenger is entitled to recover from a sleeping car company for the loss or theft, through the negligence of the car employes, of such articles in a valise as are usually carried by hand, which add to the comfort, pleasure, and enjoyment of the traveler, and they may include an opera glass and compass, but not a pistol;²⁹ for the theft of a diamond ring although placed in a pocket book;³⁰ for rings stolen from her fingers while she slept;³¹ for such sum of money only as is reasonably necessary to defray the expenses of his trip, taking into considera-

27. Williams v. Webb, *supra*; Pullman's Palace Car Co. v. Hall, 106 Ga. 765, 71 Am. St. Rep. 293, 32 S. E. 923; Voss v. Wagner Palace Car Co., 16 Ind. App. 271, 43 N. E. 20; Stevenson v. Pullman Palace Car Co. (Tex. Civ. App.), 26 S. W. 112, 32 S. W. 335; Chamberlain v. Pullman Palace Car Co., 55 Mo. App. 474; Henderson v. Louisville & N. R. Co., 20 Fed. 437; Pullman Palace Car Co. v. Hunter (Ky.), 54 S. W. 845, 47 L. R. A. 286; Pullman Palace Car Co. v. Hatch (Tex. Civ. App.), 70 S. W. 771; Pullman Palace Car Co. v. Adams, 120 Ala. 581; Pullman Palace Car Co. v. Arents (Tex. Civ. App.), 66 S. W. 329; Dawley v. Wagner Palace Car Co., 169 Mass. 315, 47 N. E. 1024; Hughes v. Pullman Palace Car Co., 74 Fed. 499, it is bound to the exercise of ordinary and reasonable care over the passengers and their effects, whether the contract involved in the ticket sold by it prescribes it in terms or not. See also cases cited in last preceding note.

The question of the company's negligence is a question for the jury. Arthur v. Pullman Co., 44 Misc. Rep. (N. Y.) 229, 88 N. Y. Supp. 981; Hatch v. Pullman Sleeping Car Co. (Tex. Civ. App.), 84 S. W. 246.

28. Pullman Palace Car Co. v.

Lowe, 28 Neb. 239, 40 Am. & Eng. R. Cas. 637, 26 Am. St. Rep. 325, holding the liability of a sleeping car company in the case of articles of wearing apparel lost in the car to be similar to the innkeeper's liability; Nashville, etc., R. Co. v. Lillie (Tenn.), 78 S. W. 1055, where a passenger carried a valise into a sleeping car and on retiring placed it under his berth, the valise was, in effect, placed in charge of the railroad company, and hence it was liable as an insurer thereof; Voss v. Wagner Palace Car Co., 16 Ind. App. 271, 43 N. E. 20, a sleeping car company becomes responsible as a common carrier for the safe delivery of the baggage of a passenger intrusted to the porter to be carried to a given place.

29. Cooney v. Pullman Palace Car Co., 121 Ala. 368, 25 So. 713, 6 Am. Neg. Rep. 1. See also Blum v. Southern Pullman Palace Car Co., 1 Flip. (U. S.) 500; Hampton v. Pullman Palace Car Co., 42 Mo. App. 134.

30. Pullman Palace Car Co. v. Adams, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, but not where it was not in a condition to be worn for the use, convenience, or ornament of the passenger on his trip.

31. Pullman Palace Car Co. v. Hunter (Ky.), 54 S. W. 845, 47 L. R. A. 286.

tion his station in life, the length, duration, and purposes of his journey, as well as emergencies that may probably arise.³² The mere proof of loss of money or personal effects by a passenger while occupying a berth in a sleeping car does not make out a *prima facie* case against the company, but some evidence of negligence on the part of the defendant must be given.³³ Neither the railroad company nor the sleeping car company is liable for a loss of baggage when the passenger himself was negligent.³⁴ A sleeping car company will not be liable for sickness contracted by an occupant of an upper berth from water dripping from an open ventilating window during a heavy rain storm in the night, where he did not notify those in charge of the train that he needed special care, or request those in charge of the car to close the ventilator and was in a position to reach and close it himself at any time.³⁵ A sleeping car company is bound to furnish the required accommodations to a passenger if it has them;³⁶ but not to one who by the rules of the company is not entitled to use these accommodations, as, for example, one not holding a through ticket or a

32. Williams v. Webb, 27 Misc. Rep. (N. Y.) 508, 58 N. Y. Supp. 300, 6 Am. Neg. Rep. 129; Barrott v. Pullman Palace Car Co., 51 Fed. 796; Hills v. Chicago, etc., R. Co., 72 Iowa, 228; Pfaelzer v. Palace Car Co., 4 W. N. C. (Pa.) 240. It does not extend to an amount which he is carrying for the purpose of depositing in a bank. Williams v. Webb, 22 Misc. Rep. (N. Y.) 513, 49 N. Y. Supp. 1111.

33. Carpenter v. New York, etc., R. Co., 124 N. Y. 53; Tracy v. Pullman Palace Car Co., 67 How. Pr. (N. Y.) 154; McMurray v. Pullman's Palace Car Co., 86 Mo. App. 619; Hills v. Chicago, etc., R. Co., 72 Iowa, 228; Root v. New York C. Sleeping Car Co., 28 Mo. App. 199; Pullman Palace Car Co. v. Pollock, 69 Tex. 120; Stearns v. Pullman Car Co., 8 Ont. Rep. 171. Compare Pullman Palace Car Co. v. Lowe, 28 Neb. 239; Railroad Co. v. Walrath, 38 Ohio St. 461. The company cannot

avoid liability for property lost or stolen through its negligence, by posting in the car a notice disclaiming responsibility, if it does not appear that the passenger saw the notice. Lewis v. New York Sleeping Car Co., 143 Mass. 267.

34. Welch v. Pullman Palace Car Co., 16 Abb. Pr. N. S. (N. Y.) 352; Whicher v. Boston, etc., R. Co., 176 Mass. 275, 57 N. E. 601; Whitney v. Pullman Palace Car Co., 143 Mass. 243; Hills v. Chicago, etc., R. Co., 72 Iowa, 228; Barrott v. Pullman's Palace Car Co., 51 Fed. 796; Root v. New York Sleeping Car Co., 28 Mo. App. 199; Illinois Cent. R. Co. v. Handy, 63 Miss. 609; Pullman Palace Car Co. v. Matthews, 74 Tex. 654.

35. Edmunson v. Pullman Palace Car Co., 92 Fed. 824, 14 Am. & Eng. R. Cas. N. S. 336.

36. Searles v. Mann Boudoir Car Co., 45 Fed. 330; Nevin v. Pullman Palace Car Co., 106 Ill. 222, 11 Am. & Eng. R. Cas. 92, 46 Am. Rep. 688.

second class passenger.³⁷ The company is liable in damages for breach of contract to reserve a berth for a passenger or for failure to furnish him with a berth in accordance with a ticket purchased and paid for by him.³⁸ The company is bound, and it is its right, to preserve order and enforce a proper decorum, as well as to keep a reasonable watch over the persons and property of passengers.³⁹ The business of running drawing room, or palace or sleeping cars in connection with ordinary passenger cars has become one of the common incidents of passenger traffic on the leading railroads of the country. These cars are mingled with the other cars of the company, and are open to all who desire to enter them, and who are willing to pay a sum in addition to the ordinary fare, for the special accommodation afforded by them. They are owned in most instances, though not always, by corporations other than those operating the trains, such corporations making a business of the ownership and management of such cars. But they form

37. Lemon v. Pullman Palace Car Co., 52 Fed. 262; Pullman Palace Car Co. v. Taylor, 65 Ind. 153, 32 Am. Rep. 57; Lawrence v. Pullman Palace Car Co., 144 Mass. 1, 28 Am. & Eng. R. Cas. 151, 59 Am. Rep. 58. A sleeping car company is not liable for the refusal of its conductor to permit a passenger's son to occupy a section with his parents without payment therefor, where the son was not named in the pass with them, and a rule of the company required payment from any one not so named. Pullman Palace Car Co. v. Marsh (Ind.), 53 N. E. 782, 1 Repr. 1024.

38. Pullman Palace Car Co. v. Cain, 15 Tex. Civ. App. 503, 40 S. W. 220; Pullman Palace Car Co. v. Nelson, 22 Tex. Civ. App. 223, 54 S. W. 624, for breach of contract to reserve a berth for a passenger who boarded a sleeping car, suffering from illness, and in consequence, owing to the negligence of the sleeping car company, was compelled to sleep in the waiting room, where her privacy was frequently intruded on by the porter

and others, and she was kept awake, resulting in great physical pain, mental distress, and humiliation during the entire night, a judgment of \$900 is not excessive.

Plaintiff bought and paid for a sleeping car ticket several hours before the train left. At the time of starting he was received as a guest on the train and assigned to his section, but was afterwards told by the conductor that he could not have the berth, because it was occupied by someone else, and plaintiff was compelled to sit all night in an ordinary day coach. On his application for redress, he was told that he could have his money back. Held, that the evidence sustained a verdict for plaintiff. Braun v. Webb, 65 N. Y. Supp. 668, 32 Misc. Rep. (N. Y.) 243, affg. on rehearing 62 N. Y. Supp. 1037.

39. Nevin v. Pullman Palace Car Co., 106 Ill. 222; Lewis v. New York Sleeping Car Co., 143 Mass. 267; Pullman Palace Car Co. v. Balles, 80 Tex. 211, 47 Am. & Eng. R. Cas. 416.

a part of the train and are put on presumably in the interest of the railroad company, and the railroad company, as a rule, cannot relieve itself of its obligations and liabilities as a common carrier of passengers to those who make use of the accommodations afforded by such sleeping and palace or drawing room cars. In all matters relating to the safety of the passengers the conductor, porter, and other servants of such cars are the servants of the company of whose train the car is for the time being a part.⁴⁰ A passenger may assume, in the absence of notice to the contrary, that the whole train is under one management.⁴¹ Allowing a valise to stand in the aisle of a dimly-lighted sleeping car, where passengers are apt to stumble over it, is negligence.⁴² But an experienced traveler who opens a vestibule door of a sleeping car by mistake, in the early morning, while the train is passing through a tunnel and the car is dark, and steps off upon the track, when he supposes he is entering the car closet, is guilty of such negligence as will preclude his recovery, even if the carrier is deemed negligent.⁴³ It is the duty of a carrier toward a passenger holding a ticket to one point and a sleeping car ticket to another at which she must change cars in order to reach her destination, to awake her in time to make the necessary preparation for the

40. Dwinelle v. New York Cent., etc., R. Co., 120 N. Y. 117, 44 Am. & Eng. R. Cas. 384; Thorpe v. New York Cent., etc., R. Co., 76 N. Y. 402, 32 Am. Rep. 325; Pennsylvania R. Co. v. Roy, 102 U. S. 451, 1 Am. & Eng. R. Cas. 225; Evansville, etc., R. Co. v. Athon, 2 Ind. App. 295, 33 N. E. 469; Williams v. Pullman Palace Car Co., 40 La. Ann. 417, 4 So. 85; Kinsley v. Lake Shore, etc., R. Co., 125 Mass. 54, 28 Am. Rep. 200; Wilson v. Baltimore, etc., R. Co., 32 Mo. App. 682; Bevis v. Baltimore, etc., R. Co., 26 Mo. App. 19; Hillis v. Chicago, etc., R. Co., 72 Iowa, 228; Louisville & N. R. Co. v. Ray, 101 Tenn. 1, 46 S. W. 554, 11 Am. & Eng. R. Cas. N. S. 174.

41. Ulrich v. New York Cent., etc., R. Co., 108 N. Y. 80, 2 Am. St. Rep. 369, 34 Am. & Eng. R. Cas. 350;

Thorpe v. New York Cent., etc., R. Co., 76 N. Y. 402; Cleveland, etc., R. Co. v. Walrath, 38 Ohio St. 461; Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 417. See Paddock v. Atchison, etc., R. Co., 37 Fed. 841.

42. Levien v. Webb, 30 Misc. Rep. (N. Y.) 196, 61 N. Y. Supp. 1113. See Lycett v. Manhattan Ry. Co., 12 App. Div. (N. Y.) 326, 42 N. Y. Supp. 431.

43. Piper v. New York Cent., etc., R. Co., 156 N. Y. 224, 41 L. R. A. 744, 50 N. E. 851, 11 Am. & Eng. R. Cas. N. S. 202, rev'd 89 Hun (N. Y.), 75. A passenger on a sleeping car is not, as a matter of law, guilty of negligence in attempting to reverse her position in her berth while the car is in rapid motion. Smith v. Canadian Pac. R. Co. (Can.), 34 N. S. 22.

change in a suitable and decent manner upon reaching the station, or, failing to do so, to hold the train for a sufficient time to enable her to make such preparation as is necessary to change cars without trepidation or the exposure of her person to the gaze of spectators, whether or not such duty is stipulated in the contract of carriage.⁴⁴ As the conductor of a train has control of a car of the Pullman Palace Car Company attached to the train, the railroad company cannot recover over against the other company for damages to a passenger on the palace car from mental suffering caused by the language of drunken persons permitted to enter and remain in the car.⁴⁵

§ 25. Pipe line for carrying oil.—Statutes recently enacted in Kansas and Texas declare a pipe line to be a common carrier. The power of the state to make every pipe line a common carrier if it engages in the transportation of oil for persons other than the owner may be questioned. The right of the state to do so will, doubtless, be asserted upon the strength of those authorities which establish the power of the State to regulate the business of grain elevators and warehouses,⁴⁶ and hold them subject to statutory legislation requiring them to receive and store grain of other persons offered at lawful prices, when there is room for it,⁴⁷ and authorities sustaining the power of the State to declare a telegraph company a common carrier,⁴⁸ which are in many respects analogous cases.

§ 26. Wagoners.—It has been held that a wagoner who, upon his own request, carries goods for hire, is a common carrier,

44. *McKeon v. Chicago, etc., R. Co.*, 64 Wis. 477, 35 L. R. A. 252, 69 N. W. 175, 2 Chic. L. J. Wkly. 175. Duty to awaken passenger in time to leave train: *Texas, etc., R. Co. v. Alexander* (Tex. Civ. App.), 30 S. W. 1113; *Nichols v. Chicago etc., R. Co.*, 90 Mich. 204; *Nunn v. Georgia R. Co.*, 71 Ga. 710; *Sevier v. Vicksburg, etc., R. Co.*, 61 Miss. 8, 48 Am. Rep. 74; *Airey v. Pullman Palace Car Co.*, 50 La. Ann. 648, 23 So. 512.

45. *Houston, etc., R. Co. v. Perkins*, 21 Tex. Civ. App. 508, 52 S. W. 124.

46. *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247, 45 Alb. L. J. 354, 36 Am. & Eng. Corp. Cas. 31, 12 Sup. Ct. Rep. 468, 5 Am. Ry. & Corp. Rep. 610, 4 Inters. Com. Rep. 45; *Munn v. Illinois*, 94 U. S. 113.

47. *Brass v. North Dakota*, 153 U. S. 391, 38 L. Ed. 757, 14 Sup. Ct. Rep. 857, 4 Inters. Com. Rep. 670.

48. *Kirby v. Western Union Tel. Co.*, 7 S. D. 623, 65 N. W. 37, 30 L. R. A. 621.

49. *Gordon v. Hutchinson*, 1 W. and S. (Pa.) 285, 37 Am. Dec. 464; *Moses v. Norris*, 4 N. H. 304; *Moses*

whether the transportation be his principal and direct business, or an occasional and incidental employment, even where the principal business of the wagoner is that of a farmer.⁴⁹ But the weight of authority seems to favor the contrary position, that an occasional undertaking to carry goods will not make a person a common carrier, but that the business must be habitual, not casual.⁵⁰ Where the undertaking to carry is an unauthorized act of the driver or agent of the owner of the wagon, the carrier is not liable.⁵¹

§ 27. Carriers by river craft.—A person who undertakes, though only as a casual employment *pro hac vice*, to carry by river, for hire, without special contract, incurs the responsibility of a common carrier.⁵² This rule has been maintained in Ten-

v. Boston, etc., R. Co., 24 N. H. 71, 55 Am. Dec. 222; Powers v. Davenport, 7 Blackf. (Ind.) 497, 43 Am. Dec. 100; Chevalier v. Straham, 2 Tex. 115, 47 Am. Dec. 639, wherein the court said that there were no grounds in reason why the occasional carrier, who periodically, in every recurring year, abandons his other pursuits and assumes that of transporting goods for the public, should be exempted from any of the risks incurred by those who make the carrying business their constant or principal occupation.

50. Fish v. Chapman, 2 Ga. 353, 46 Am. Dec. 393, approved in Nugent v. Smith, 1 C. P. Div. 27, the leading authority sustaining this view, was a case where a farmer had never held himself out as a carrier generally, but was employed by the plaintiff to carry goods which, in crossing a stream upon the way, were injured by the upsetting of the wagon. The court, referring to the case of Gordon v. Hutchinson, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464, says: "This decision no doubt contemplates an undertaking to carry generally without a special contract, and does not deny

to the undertaker the right to define his liability. There are cases in Tennessee and New Hampshire which favor the Pennsylvania rule, but there can be little doubt that that case is opposed to the principles of the common law, and its rule wholly inexpedient." In Harrison v. Roy, 39 Miss. 396, while, under the circumstances of that case, it was held that the wagoner had made himself liable as a common carrier, the court said that, if the transaction had been a mere isolated undertaking, such as he had not been in the habit of engaging in, and which was foreign to his regular and usual business, there would have been force in the position that he could not be so held. In Steinman v. Wilkins, 7 W. & S. (Pa.) 466, 42 Am. Dec. 254, it was held that a wagoner was not a common carrier to the extent of rendering him liable for a refusal to carry.

51. Jenkins v. Pickett, 9 Yerg. (Tenn.) 480; Satterlee v. Groat, 1 Wend. (N. Y.) 272; Haynie v. Baylor, 18 Tex. 498.

52. Moses v. Bettis, 4 Heisk. (Tenn.) 661, 13 Am. Rep. 1; Craig v. Childress, Peck (Tenn.), 270, 14

nessee, New Hampshire and South Carolina as to carriers by river craft, but, as to carriers by land the rule has been held to be the same as at common law.⁵³ But, in New York, it has been held that the owner of a sloop specially employed to make a trip, for a specified compensation, is not thereby shown to be a common carrier and that the owner of a canal boat, generally used only in transporting freight for himself, applying to a common carrier, who has knowledge of the facts, and receiving a load of freight, does not thereby become liable as a common carrier.⁵⁴

§ 28. Truckmen, freightmen, draymen, cartmen, and porters.—Wagoners and teamsters, whose business it is to carry on hire goods and chattels from one locality to another, common porters, drivers, truckmen, freightmen, draymen, and cartmen, whether their employment be carried on from town to town, or from one part of a town to another are common carriers.⁵⁵ It is not necessary that the exclusive business of the party should be carrying. Where one, whose principal pursuit is farming, solicits goods to carry to the market town in his wagon on certain convenient occasions, he makes himself a common carrier for those who employ him.⁵⁶ The transportation must be in pursuance of

Am. Dec. 751; Johnson v. Friar, 4 Yerg. (Tenn.) 48; Gordon v. Buchanan, 5 Yerg. (Tenn.) 71; Turney v. Wilson, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515; Moses v. Norris, 4 N. H. 304; Elkins v. Boston, etc., R. Co., 3 Fost. (N. H.) 275; McClure v. Hammond, 1 Bay (S. C.), 99; McClure v. Richardson, Rice (S. C.), 215.

53. Walker v. Skipwith, Meigs (Tenn.), 502. See § 26 as to "wagoners."

54. Allen v. Sackrider, 37 N. Y. 341; Fish v. Clark, 49 N. Y. 122, affg. 2 Lans. (N. Y.) 176.

55. Richards v. Westcott, 2 Bosw. (N. Y.) 589 (city expressman); Jackson Architectural Iron Works v. Hurlbut, 15 Misc. Rep. (N. Y.) 93, 36 N. Y. Supp. 808, 71 St. Rep. (N. Y.) 830, affd. 158 N. Y. 34; Story Bailm. § 496; Robertson v. Ken-

nedy, 2 Dana (Ky.), 431, 26 Am. Dec. 466, so held of the driver of a slide with an ox team; Powers v. Davenport, 7 Blackf. (Ind.) 497, 43 Am. Dec. 100; McHenry v. Philadelphia, etc., R. Co., 4 Har. (Del.) 448; Campbell v. Morse, Harper (S. C.), 468; Gordon v. Hutchinson, 1 W. & S. (Pa.) 285; Lacky v. McDermott, 8 S. & R. (Pa.) 500; 2 Kent's Com. 598 n. The mode of transporting is immaterial. Where the defendant was a lighterman, who carried goods between wharves and ships for any persons who chose to employ him, he was held liable as a common carrier. Ingate v. Christie, 3 C. & K. 61. Compare Moses v. Boston, etc., R. Co., 24, N. H. 71; Brind v. Dale, 8 C. & P. 207.

56. Jackson Architectural Iron Works v. Hurlbut, *supra*; Chevalier v. Strahan, 2 Tex. 115, 47 Am. Dec.

some carriage vocation which the carrier exercises; but one may be a common carrier, who has no fixed termini, but leaves the course of transportation in each case to depend upon his customer's wishes.⁵⁷ General truckmen who describe their specialty to be "heavy machinery," which they transport by wagons and trucks adapted to such purpose, and who make no discrimination as to customers, and do not refuse to move anything on request, if reasonably paid, are common carriers and liable as such, although a special price is fixed by agreement in each case.⁵⁸ But a person trucking goods for particular customers at prices fixed in each case by special contract is not a common carrier so as to be liable as an insurer of the goods.⁵⁹ A person engaged in the business of carrying freight in wagons from depots to other places, and of delivering packages for all persons who choose to employ him, is a common carrier.⁶⁰ One who, under a license so to do, hauls goods within the limits of a city for any person desiring his services, is a common carrier; and, while he cannot be compelled to go beyond his territorial limits, yet, if he undertakes so to do, he is liable as a common carrier for the whole distance.⁶¹ It is sometimes a question of fact for the jury whether, under the circumstances of a case the person sought to be charged with liability is a common carrier or not.⁶²

639; *Harrison v. Roy*, 39 Miss. 396; *Schouler, Bailm.* 355, 356; *Ang. Carr.* 870, 871; *Staub v. Kendrick*, 121 Ind. 226, 6 L. R. A. 619.

57. *Alkali Co. v. Johnson*, L. R. 7 Exch. 267, L. R. 9 Exch. 338.

58. *Jackson Architectural Iron Works v. Hurlbut*, *supra*.

59. *Faucher v. Wilson*, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431.

60. *Cayo v. Pool's Assignee*, 55 S. W. (Ky.) 887, 49 L. R. A. 251.

61. *Farley v. Lavary*, 54 S. W. (Ky.) 840. But a carter who takes goods from a railroad office at the end of its line and transfers them to a connecting line is not a common carrier, but a mere agent of the first road, though he is in the habit of advancing its freight charges and collecting them, with his own transfer

charges, from the connecting carrier. *Hooper v. Chicago, etc., R. Co.*, 27 Wis. 81, 9 Am. Rep. 439. *Compare Parmalee v. Lowitz*, 74 Ill. 116, 24 Am. Rep. 276.

62. *Schloss v. Wood*, 11 Colo. 287, 17 Pac. 910, 35 Am. & Eng. R. Cas. 492.

Furniture mover not a common carrier.—Where defendant corporation, engaged in furniture moving, contracted to move plaintiff's furniture for a certain price, and its agent stated that defendant had previously safely moved furniture and bric-a-brac for others, was responsible, and would move plaintiff's furniture with care and deliver it safely, defendant did not thereby assume the responsibility of a common carrier, but was only liable as a

§ 29. Owners and masters of ships and steamboats or vessels.—The master and owner of a general ship, or steam vessel, carrying goods for hire in internal, coasting or foreign commerce, is a common carrier with the liability of an insurer against losses, except from irresistible causes, as, the act of God and public enemies.⁶³ When engaged in the coasting trade, or upon the lakes, bays and sounds, transporting goods from one port to another for the general public, for hire, steamboats or vessels are common carriers.⁶⁴ Likewise, steamboats upon navigable rivers, which carry

bailee for hire for negligence of its servants. *Jaminet v. American Storage & Moving Co.*, 109 Mo. App. 257, 84 S. W. 128.

63. *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788, 5 R. R. & Corp. L. J. 435, 39 Alb. L. J. 373, 9 Sup. Ct. Rep. 469; *Hall v. Connecticut River Steamboat Co.*, 13 Conn. 324; *Peters v. Rylands*, 20 Pa. St. 497; *Tuckerman v. Brown*, 17 Barb. (N. Y.) 191; *Saltus v. Everett*, 20 Wend. (N. Y.) 267; *Jencks v. Coleman*, 2 Sumner (U. S.), 221; *Dibble v. Brown*, 12 Ga. 217; *Wilsons v. Hamilton*, 4 Ohio St. 722; *Dunseth v. Wade*, 2 Seam. (Ill.) 285; *King v. Shepherd*, 3 Story (U. S.), 349; *Hastings v. Pepper*, 11 Pick. (Mass.) 41; *Gage v. Tirrell*, 9 Allen (Mass.), 299; *Clark v. Barnwell*, 12 How. (U. S.) 272; *The Niagara v. Cordes*, 21 How. (U. S.) 7; *The Delaware*, 14 Wall. (U. S.) 579; *The Maggie Hammond*, 9 Wall. (U. S.) 435; *Garrison v. Memphis Ins. Co.*, 19 How. (U. S.) 312; *The Lady Pike*, 21 Wall. (U. S.) 14; *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235; *Clark v. Richards*, 1 Conn. 54; *Richards v. Gilbert*, 5 Day (Conn.), 415; *Bennet v. Filyaw*, 1 Fla. 451; *Dwight v. Brewster*, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; *Gilmore v. Carman*, 1 Smed. & M. (Miss.) 279, 40 Am. Dec. 96;

Colt v. McMechen, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200; *Schieffelin v. Harvey*, 6 Johns. (N. Y.) 170, 5 Am. Dec. 206; *Bowman v. Teall*, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562; *Bell v. Reed*, 4 Binn. (Pa.) 127, 5 Am. Rep. 398; *Miles v. James*, 1 McCord L. (S. C.) 157; *Cohen v. Hume*, 1 McCord L. (S. C.) 439; *Murphy v. Staton*, 3 Munf. (Va.) 239; *Steele v. McTyer*, 31 Ala. 667, 70 Am. Dec. 516; *Nugent v. Smith*, 1 C. P. Div. 423; *Morse v. Slue*, 1 Vent. 190; *Boson v. Sanford*, 2 Salk. 440; *Laveroni v. Drury*, 8 Exch. 166, 16 Eng. L. & E. 510; *Coggs v. Bernard*, 2 Ld. Raym. 909. Compare *Smith v. Pierce*, 1 La. 349; *Adams v. New Orleans Tow-boat Co.*, 11 La. 46; *Walston v. Myers*, 5 Jones (N. C.), 174; *White v. The Mary Ann*, 6 Cal. 462; *Ashmore v. Penn. Steam Tow Co.*, 28 N. J. L. 180, and cases cited § 19.

64. *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398; *Powell v. Myers*, 26 Wend. (N. Y.) 591; *Pardee v. Drew*, 25 Wend. (N. Y.) 459; *Allen v. Sewall*, 2 Wend. (N. Y.) 327, 6 Wend. (N. Y.) 335; *Elliott v. Rossell*, 10 Johns. (N. Y.) 1, 6 Am. Dec. 306; *Garrison v. Memphis Ins. Co.*, 19 How. (N. Y.) 312; *Kemp v. Coughtry*, 11 Johns. (N. Y.) 107; *Gage v. Tirrell*, 9 Allen (Mass.), 299; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745;

both passengers and freight, are liable as common carriers, as to such freight and the baggage of their passengers.⁶⁵ But, an ocean steamship company is not responsible, as a common carrier or an innkeeper, for the baggage of a passenger, which he keeps in his own possession in his stateroom, but must answer, in such cases, for its negligence, like other bailees for hire.⁶⁶ And a vessel chartered to transport a specific cargo is not a common carrier.⁶⁷ Where the vessel is chartered by another who is using it for transportation generally, the party chartering and in control of the vessel, and not the owner, is liable; and when the vessel is run by the master on shares, the owner is not liable merely by virtue of his ownership, for goods entrusted to the master for transportation.⁶⁸

§ 30. Owners of a toll bridge.—The owner of a toll bridge is not a common carrier, for, in general he has no possession or control over the goods. He is bound to keep the bridge in proper condition for the safe passage of passengers and goods, and is

Schooner Reeside, 2 Sumn. (U. S.) 567; Gordon v. Little, 8 S. & R. (Pa.) 533, 11 Am. Dec. 632; McClure v. Hammond, 1 Bay (S. C.) 99, 1 Am. Dec. 598; Sch'r Emma Johnson, 1 Spr. (U. S.) 527; Hastings v. Pepper, 11 Pick. (Mass.) 41; Parker v. Flagg, 26 Me. 181, 45 Am. Dec. 101; Oakey v. Russell, 18 Mar. (La.) 58; The Propeller Commerce, 1 Black (U. S.), 582; The Niagara v. Cordes, 21 How. (U. S.) 26; Clark v. Barnwell, 12 How. (U. S.) 272; The Commander-in-chief, 1 Wall. (U. S.) 51. Compare Aymar v. Astor, 6 Cow. (N. Y.) 266; Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745, and cases cited § 19.

65. Citizens' Bank v. The Nantucket S. B. Co., 2 Story (U. S.) 16; McGregor v. Kilgore, 6 Ohio, 358, 27 Am. Dec. 260; Bowman v. Hilton, 11 Ohio, 303; McArthur v. Sears, 21 Wend. (N. Y.) 190; Dunseth v. Wade, 2 Seam. (Ill.) 285; Hart v. Allen, 2 Watts (Pa.), 114; Harring-

ton v. McShane, 2 Watts (Pa.), 443, 27 Am. Dec. 321; Warden v. Greer, 6 Watts (Pa.), 424; Pardee v. Drew, 25 Wend. (N. Y.) 459; Porterfield v. Humphreys, 8 Humph. (Tenn.) 497; Kirtland v. Montgomery, 1 Swan (Tenn.), 452; Swindler v. Hilliard, 2 Rich. (S. C.) 286, 45 Am. Dec. 732; Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Cole v. Goodwin, 19 Wend. (N. Y.) 251; Hale v. N. J. Nav. Co., 15 Conn. 539; Jones v. Pitcher, 3 Stew. & P. (Ala.) 136, 24 Am. Dec. 716; Sprowl v. Kellar, 4 Stew. & P. (Ala.) 382.

66. American Steamship Co. v. Bryan, 83 Pa. St. 446.

67. The Dan (D. C. S. D. N. Y.), 40 Fed. Rep. 691.

68. Tuckerman v. Brown, 17 Barb. (N. Y.) 191; Thompson v. Hamilton, 12 Pick. (Mass.) 425; 23 Am. Dec. 619; Cutler v. Winsor, 6 Pick. (Mass.) 335, 3 Kent's Com. 138; Manter v. Holmes, 10 Metc. (Mass.) 402.

liable only for negligence in so keeping it.⁶⁹ A bridge company owning no freight cars, which solicits freight for railway companies who will furnish the cars and over whose lines the freight is to go, and merely transfers such cars over its bridge to the railway companies furnishing them, charging for its service its regular bridge toll, but making no charge for transporting the freight contained or carried in the cars, is not a common carrier of such interstate freight.⁷⁰

§ 31. Canal companies.—A company owning a canal, which they allow boatmen to use upon the payment of tolls, is not a common carrier, and is only bound to take reasonable care that its canal may be navigated without danger; and it is not responsible for accidents which do not arise from the want of such reasonable care.⁷¹ The Pennsylvania Canal Company is neither liable as a common carrier nor as an insurer. As owner and operator of a

69. Grigsby v. Chappell, 5 Rich. (S. C.) 443, wherein Evans, J., says: "He is not like a stage owner or a railroad company. In these cases the passenger is passive, the government of the stage or the car is under the driver or the engineer. But in crossing a bridge the acts and conduct of a passenger are regulated by his own will. . . . He is more like the owner of a turnpike road, and his liabilities are analogous."

70. Kentucky & I. Bridge Co. v. Louisville & N. R. Co. (C. C. D. Ky.), 37 Fed. Rep. 567, 2 L. R. A. 289, 2 Inters. Com. Rep. 351.

The franchises and powers of building, maintaining and operating a bridge and approaches, designated as its terminal facilities, do not, in and of themselves constitute the bridge company a common carrier of property; nor do they, by any clear implication, confer upon it authority "to equip its road, and to transport goods and passengers thereon, and charge compensation therefor." Id.

Where a railroad company, by contract with a bridge company, ac-

quires the right to use a bridge, with its approaches, for its engines, cars and trains, it is regarded, under the Act to Regulate Commerce, § 1, as the owner or operator of the bridge and approaches, for the time being, as to all freight transported by it over the bridge. And as to all such traffic, it, and not the bridge company, must be regarded as the common carrier. Id.

71. Exchange Fire Ins. Co. v. Delaware & Hudson Canal Co., 10 Bosw. (N. Y.) 180; Weitner v. Delaware & Hudson Canal Co., 4 Rob. (N. Y.) 234. "There is no consideration of public policy to enlarge the liability of the owners of a canal beyond the employment of reasonable diligence. Unless they owned the canal boats, they could reap no real benefit from either the simulated or real destruction of them or their cargoes, and, therefore, there is no reason for putting them on a footing with common carriers so as to render them insurers. No case has been cited which goes to this length." Robertson, J., in case first cited, *supra*.

public water highway, it is bound to so maintain and manage the canal that it can be used with reasonable safety and convenience by the public, but it is not liable for an injury resulting from an unknown obstruction, which could not have been guarded against without the exercise of extraordinary and unreasonable care.⁷² An incorporated canal company, whose business is to maintain and keep open a waterway for the use of the public, taking tolls for such use, is not liable as a common carrier, in the absence of special contract, for the loss of timber from rafts transported by it and lying in the basins or in the canal itself, by theft, sinking or otherwise.⁷³

§ 32. Forwarding merchants.—A forwarder of goods, who takes upon himself all the expenses of transportation, for which he receives a compensation from the owner, but who has no concern in the means of transportation, or interest in the freight, is not a common carrier, but is liable as warehouseman.⁷⁴ He is not

72. Pennsylvania Canal Co. v. Burd, 90 Pa. St. 281, 35 Am. Rep. 659.

73. Watts v. Savannah, etc., Canal Co., 64 Ga. 88, 37 Am. Rep. 53.

74. Roberts v. Turner, 12 Johns. (N. Y.) 232; Platt v. Hibbard, 7 Cow. (N. Y.) 497; Ackley v. Kellogg, 8 Cow. (N. Y.) 223; Sage v. Gittner, 11 Barb. (N. Y.) 120; Cowles v. Pointer, 26 Miss. 253; Maybin v. South Carolina, etc., R. Co., 8 Rich. (S. C.) 240, 64 Am. Dec. 753; Denny v. New York, etc., R. Co., 13 Gray (Mass.), 487, 74 Am. Dec. 645; Nichols v. Smith, 115 Mass. 332; Briggs v. Boston, etc., R. Co., 6 Allen (Mass.), 246; Brown v. Dennison, 2 Wend. (N. Y.) 593; Stannard v. Prince, 64 N. Y. 300; Teall v. Sears, 9 Barb. (N. Y.) 317; Wade v. Wheeler, 3 Lans. (N. Y.) 201; Story, Bailm. § 502.

Forwarders.—Plaintiffs were forwarding merchants at T., and were employed by defendant to ship certain marble to him at P. The

marble was shipped on a canal boat, which proceeded on the way as far as A. Learning that it was there delayed, one of the plaintiffs went to A, and there learned that the only towboat company it was practicable to employ to tow the boat down the H. river declined to take the boat unless the captain would pay an old bill, and would pay in advance the charge for towing. The captain had gone home to procure the money. Plaintiffs thereupon advanced the money, and the boat was put into a tow and, by the negligence or unskillfulness of the employes of the towboat company, was injured and sunk. In an action to recover for advances and charges, wherein the loss was set up as a counterclaim, it was held that plaintiffs acted simply as forwarders, not as carriers; that, by the transactions at A. they did not assume the carriage of the property; that they had a right, and it was their duty, to pay the advance charges, and, although the defendant

an insurer of the safety of the goods delivered to him for transportation, but is liable only for his own negligence and that of his agents or servants.⁷⁵ When a person or corporation act both as forwarder and carrier, their liability in each capacity is separate and distinct, and whether or not they are liable as carrier, or merely as forwarder, depends upon the circumstances and conditions of each particular case.⁷⁶

§ 33. Warehousemen and wharfingers.—Warehousemen and wharfingers, acting strictly as such, and confining themselves to the business which their names import, cannot be held liable as common carriers, their business being simply to receive and store goods and merchandise or to ship them to their destination, for hire.⁷⁷ But when a person or company is at the same time a warehouseman or wharfinger and a carrier, if the deposit of the goods

was not liable for the advance on the account of captain, it was for his benefit, and he could not complain; and that as the loss did not occur by any negligence on the part of plaintiffs, and was not a natural or ordinary consequence of any act of theirs, they were not liable therefor. *Stannard v. Prince*, 64 N. Y. 300.

75. *Roberts v. Turner*, 12 Johns. (N. Y.) 232, 7 Am. Dec. 311; *Christenson v. American Express Co.*, 15 Minn. 270, 2 Am. Rep. 122; *Hooper v. Wells*, 27 Cal. 11, 85 Am. Dec. 211.

76. *Ladue v. Griffith*, 25 N. Y. 364; *Blossom v. Griffin*, 13 N. Y. 569, 67 Am. Dec. 75; *Teall v. Sears*, 9 Barb. (N. Y.) 317; *Roberts v. Turner*, 12 Johns. (N. Y.) 232, 7 Am. Dec. 311; *Kreuder v. Woolcott*, 1 Hilt. (N. Y.) 223; *Clarke v. Needles*, 25 Pa. St. 338; *Mellier v. St. Louis*, etc., *Transp. Co.*, 14 Mo. App. 281; *Parmalee v. Western Transp. Co.*, 26 Wis. 439; *Plantation No. 4 v. Hall*, 61 Me. 517; *Burroughs v. Norwich*, etc., R. Co., 100 Mass. 26, 1 Am. Rep. 78; *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Smith (N. Y.), 115; *Maybin v. South Carolina R. Co.*, 8

Rich. L. (S. C.) 240, 64 Am. Dec. 753.

Proof that persons claiming to be only forwarders, and not common carriers, are engaged in the business of receiving merchandise from a railroad company at its terminus, for delivery by them at a neighboring town, and that they have an office at such town, where they collect freight bills and solicit business, is sufficient to warrant a submission to the jury of the question whether they are common carriers or not. *Schloss v. Wood*, 11 Colo. 287, 17 Pac. 910, 35 Am. & Eng. R. Cas. 492.

77. *Platt v. Hibbard*, 7 Cow. (N. Y.) 497; *Knapp v. Curtis*, 9 Wend. (N. Y.) 60; *Roberts v. Turner*, 12 Johns. (N. Y.) 232, 7 Am. Dec. 311; *Bouvier's L. Dict.*

Wharfingers who describe themselves as such and also as lightermen and carmen, and who carry goods from their wharf for their wharf customers, but not for strangers unless at arranged prices and unless they consider the business good, are not carriers, or, at least, not common carriers. *Chattock v. Bellamy*, 64 L. J.

in the warehouse or on the wharf is a mere accessory to the carriage, in other words, if they are deposited for the purpose of being carried without further orders, the responsibility of the carrier, as a common carrier, begins from the time they are received, the duty to transport having actually arisen.⁷⁸ Whenever the goods are not to be shipped in the regular course of business, but are to be retained to await the orders of the shipper, the carrier's liability is that of a warehouseman until the orders are given to forward the goods, when his liability as a common carrier commences.⁷⁹ So, when anything remains to be done by the shipper, after the delivery of the goods for transportation, the liability of the carrier as an insurer does not commence, and he is responsible only as a warehouseman, until the conditions have been performed upon which their transportation was suspended.⁸⁰

Q. B. (N. S.) 250, 15 Rep. 340. *Compare* Maving v. Todd, 1 Stark. 72, 2 E. C. L. 37; Cobban v. Downe, 5 Esp. N. P. 41; British Columbia, etc., Spar, etc., Co. v. Nettleship, L. R. 3 C. P. 499.

78. Blossom v. Griffin, 13 N. Y. 569; Ladue v. Griffith, 25 N. Y. 364; Read v. Spaulding, 30 N. Y. 630, 34 N. Y. 497, 47 Barb. (N. Y.) 152, Barron v. Eldridge, 100 Mass. 455; Rogers v. Wheeler, 52 N. Y. 262, 6 Lans. (N. Y.) 420; O'Neil v. New York Cent., etc., R. Co., 60 N. Y. 138, 10 Am. Ry. Rep. 121.

The owner of a warehouse who contracts with the owner of goods stored therein, to deliver them at her house at a specified time, three or four hours later, is liable as a common carrier instead of a warehouseman, although the goods remain in the warehouse, where they are destroyed by fire less than an hour before the time agreed on for delivery. Snelling v. Yetter, 25 App. Div. (N. Y.) 590, 27 Civ. Pro. (N. Y.) 158, 49 N. Y. Supp. 917.

79. O'Neil v. New York Cent. etc., R. Co., 60 N. Y. 138; Platt v. Hibbard, 7 Cow. (N. Y.) 499; Michigan

Southern, etc., R. Co. v. Shurtz, 7 Mich. 515; Little Rock, etc., R. Co. v. Hunter, 42 Ark. 200, 18 Am. & Eng. R. Cas. 527; St. Louis, etc., R. Co. v. Montgomery, 39 Ill. 335; Moses v. Boston, etc., R. Co., 24 N. H. 71, 55 Am. Dec. 222; Rogers v. Wheeler, 52 N. Y. 262; Fitchburg, etc., R. Co. v. Hanna, 6 Gray (Mass.), 539; Barron v. Eldridge, 100 Mass. 455; Nichols v. Smith, 115 Mass. 332; Dickinson v. Winchester, 4 Cush. (Mass.) 114, 50 Am. Dec. 760; Illinois Cent. R. Co. v. Troutine, 64 Miss. 834; Basnight v. Atlantic, etc., R. Co., 111 N. C. 592; Pittsburgh, etc., R. Co. v. Barrett, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 256; Schmidt v. Chicago, etc., R. Co., 90 Wis. 504; Milloy v. Grand Trunk R. Co., 23 Ont. Rep. 454, 55 Am. & Eng. R. Cas. 579; Foard v. Atlantic, etc., R. Co., 8 Jones L. (N. C.) 235, 78 Am. Dec. 277; Goodbar v. Wabash R. Co., 53 Mo. App. 434.

80. Wade v. Wheeler, 3 Lans. (N. Y.) 201; St. Louis, etc., R. Co. v. Knight, 122 U. S. 79; Alabama, etc., R. Co. v. Mt. Vernon Co., 84 Ala. 173; Cairus v. Robins, 8 M. & W. 258; Barron v. Eldridge, 100 Mass.

§ 34. Postmasters, mail contractors, and mail carriers.—The constitution of the United States bestows upon Congress power “to establish post-offices and post-roads.”⁸¹ The postal service is organized and maintained as one of the departments of the General Government.⁸² The regulation and conduct of the post offices and the entire postal service, including the money order system and other branches, is provided for in the statutes under the title “The Postal Service.”⁸³ The Postmaster-General, local postmasters, mail contractors, and mail carriers act in the character of public officers or agents; they enter into no contracts with individuals who derive benefit from their services, and receive no hire from them, like common carriers, in proportion to the value of the letters or merchandise carried by them; but their contracts are with the government, from whom they receive only a general compensation. They are, therefore, not liable, as common carriers for the safety of such things as may be transmitted through the mails, or for the malfeasance or embezzlement of clerks and deputies duly employed by them; but they must answer for the use of reasonable diligence in discharging their duties.⁸⁴ A postmaster is

455, 1 Am. Rep. 126; Watts v. Boston, etc., R. Corp., 106 Mass. 467; Illinois Cent. R. Co. v. Ashmead, 58 Ill. 487; Illinois Cent. R. Co. v. McClellan, 54 Ill. 58, 5 Am. Rep. 83; Illinois Cent. R. Co. v. Homberger, 77 Ill. 457; Mulligan v. Northern Pac. R. Co. (Dak.), 29 N. W. 659, 27 Am. & Eng. R. Cas. 33; Milloy v. Grand Trunk R. Co., 21 Ont. App. 404, revg. 23 Ont. Rep. 454, 55 Am. & Eng. R. Cas. 579; Basnight v. Atlantic, etc., R. Co., 111 N. C. 592.

81. U. S. Const. art. 1, § 8, par. 7.

82. R. S. U. S. pp. 65-70.

83. R. S. U. S. pp. 750-783.

84. Central R., etc., Co. v. Lampley, 76 Ala. 357, 52 Am. Rep. 334, 23 Am. & Eng. R. Cas. 720; Powell v. Mills, 30 Miss. 231, 64 Am. Dec. 158; Wiggins v. Hathaway, 6 Barb. (N. Y.) 632; Franklin v. Low and Swartwout, 1 Johns. (N. Y.) 396; Conwell v. Voorhees, 13 Ohio, 523, 42 Am. Dec. 206; Schroyer v. Lynch, 8

Watts (Pa.), 453; Dunlop v. Munroe, 7 Cranch (U. S.), 242; Bolan v. Williamson, 2 Bay (S. C.), 551, 1 Brev. (S. C.) 181; Maxwell v. McIvry, 2 Bibb. (Ky.) 211; Foster v. Metts, 55 Miss. 77, 30 Am. Rep. 504; Hutchins v. Brackett, 22 N. H. 252, 53 Am. Dec. 248; Story Bailm. § 463; 2 Kent's Com. 610. Compare Sawyer v. Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; Christy v. Smith, 23 Vt. 663; Ford v. Parker, 4 Ohio St. 576; Fitzgerald v. Burrill, 106 Mass. 446; Bishop v. Williamson, 11 Me. 495.

By the common law and in the days of private posts a liability as common carriers naturally attached to postmasters. Jones Bailm. 109, 110. A mail carrier is not an officer of the Government, but is the private agent of the contractor for carrying the mail, and the contractor is liable to third persons for any injury or loss, as of money in a letter, sus-

liable as a public officer, to the government, for the discharge of the general duties imposed on him by statute;⁸⁵ and to individuals, in either a United States or State court, for money or property lost or stolen from his office through his negligence or wrongful act, or that of his assistants or servants, whereby special damage is sustained;⁸⁶ and to an action of trover, for unlawfully refusing to deliver mail matter to an individual, to whom it is addressed.⁸⁷ A railroad carrying mail for the government owes no duty to the addressee of a package rendering the railroad liable for the loss of the same through its negligence; but conceding that it may be liable to such addressee for the loss of the same in the mail through its negligence, the degree of care required is only the reasonable care exacted of an ordinary bailee for hire.⁸⁸

§ 35. Log-carrying, or log-driving, or boom companies.—One who contracts to cut a lot of timber and transport it to a place where it is to be delivered and used, does not act, while transporting the timber, as a common carrier, and incur responsibility as such; he is only liable for the want of ordinary prudence, care and skill.⁸⁹ A common carrier's liability does not attach to a log-

tained through the negligence or default of such agent in the performance of his duties. *Hall v. Smith*, 2 Bing. C. P. 156, 9 E. C. L. 357; *Holiday v. St. Leonard*, 103 E. C. L. 192.

The same principle that gives relief against a contractor with the government gives the like relief against an officer of government. *Robinson v. Chamberlain*, 34 N. Y. 389; *Hicks v. Dorn*, 42 N. Y. 47; *Hover v. Barkhoof*, 44 N. Y. 113.

When the government assumed control of the post office (stat. 12 Car. II.) it was held that the postmaster was not liable for the loss of a letter with exchequer bills in it, and that postmasters enter into no contracts with individuals, and receive no hire, like common carriers, in proportion to the value of the letters under their charge, but only a general compensation from government, and are, therefore, not liable,

as common carriers. *Lane v. Cotton*, 1 Ld. Raym. 646; *Whitfield v. Le Desprurer*, Cowp. K. B. 754.

85. Strong v. Campbell, 11 Barb. (N. Y.) 135.

86. Idaho Gold Reduction Co. v. Croghan (*Id.*), 56 Pac. 164; *Bishop v. Williamson*, 11 Me. 495; *Coleman v. Frazier*, 4 Rich. (S. C.) 146, 53 Am. Dec. 727; *Bolan v. Williamson*, 1 Brev. (S. C.) 181, 2 Bay (S. C.), 551; *Christy v. Smith*, 23 Vt. 663; *Sawyer v. Corse*, 17 Gratt. (Va.), 230, 94 Am. Dec. 445.

87. Teall v. Felton, 1 N. Y. 537, 3 Barb. (N. Y.) 512, 12 How. (U. S.) 284; *Bank of Columbia v. Lawrence*, 1 Pet. (U. S.) 578; *Nevins v. Bank of Lansingburgh*, 10 Mich. 547.

88. German State Bank v. Minneapolis, etc., R. Co., (U. S. C. C., Minn.), 113 Fed. 414.

89. Pike v. Nash, 3 Abb. App. Dec. (N. Y.) 610, 1 Keyes (N. Y.), 335.

driving company for failure to deliver logs received by it to be driven to their destination.⁹⁰ A lumber company owning a logging railroad appurtenant to a saw-mill, wholly upon private ground and operated for private purposes, is not made a common carrier by a constitutional provision, declaring all railroads, public highways and railroad companies common carriers, although such lumber company is authorized by its charter to construct such road. The owners of a logging railway operated by independent contractors are not chargeable as common carriers towards a person permitted to ride thereon gratuitously.⁹¹

§ 36. Telegraph companies.—Telegraph companies are not insurers of the safe and accurate transmission of messages, and, like common carriers, liable for all losses resulting from an incorrect transmission, unless occasioned by an act of God or of the public enemy.⁹² The reasons which have impelled the courts to

90. Mann v. White River Log, etc., Co., 46 Mich. 38, 41 Am. Rep. 141.

91. Wade v. Lutcher, etc., Cypress Lumber Co., 74 Fed. 517; Const. of La. art. 244.

92. Not liable as insurers.—*Breese v. United States Teleg. Co.*, 48 N. Y. 132, 141, 8 Am. Rep. 526, affg. 45 Barb. (N. Y.) 274, 31 How. Pr. (N. Y.) 86; *Leonard v. New York, etc., Teleg. Co.*, 41 N. Y. 544, 571, 1 Am. Rep. 446; *De Rutte v. New York, etc., Tel. Co.*, 1 Daly (N. Y.), 547, 30 How. Pr. (N. Y.) 403; *Schwartz v. Atlantic, etc., Tel. Co.*, 1 Am. Electl. Cas. 284, 18 Hun (N. Y.), 157; *Ellis v. American Tel. Co.*, 13 Allen (Mass.), 232; *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 310, 41 Am. Rep. 500; *Little Rock, etc., Tel. Co. v. Davis*, 1 Am. Electl. Cas. 526, 41 Ark. 79, 8 Am. & Eng. Corp. Cas. 102; *Hart v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 734, 66 Cal. 579, 8 Am. & Eng. Corp. Cas. 24, 56 Am. Rep. 119 (rule changed by Civil Code, §§ 2162, 2168); *Western Union Tel. Co. v. Hyer*, 2

Am. Electl. Cas. 484, 22 Fla. 637, 16 Am. & Eng. Corp. Cas. 232, 1 Am. St. Rep. 222; *Central Union Teleph. Co. v. Bradbury*, 2 Am. Electl. Cas. 14, 106 Ind. 1; *Tyler v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 14, 60 Ill. 421, 14 Am. Rep. 38; *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa, 458, 1 Am. Rep. 285; *Aken v. Western Union Tel. Co.*, 2 Am. Electl. Cas. 566, 69 Iowa, 31, 13 Am. & Eng. Corp. Cas. 585, 58 Am. Rep. 210; *Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164, 71 Am. Dec. 461; *Fowler v. Western Union Tel. Co.*, 2 Am. Electl. Cas. 607, 80 Me. 381, 6 Am. St. Rep. 211; *Bartlett v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 45, 62 Me. 209, 16 Am. Rep. 437; *Birney v. New York, etc., Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *Grinnell v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 70, 113 Mass. 299, 18 Am. Rep. 485; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Wann v. Western Union Tel. Co.*, 37 Mo. 472, 90 Am. Dec. 395; *New York, etc., Print Co. v. Dryburg*, 35

adopt the rule that such companies should not be charged with the absolute liability of a common carrier are, in substance, as follows: That liability was founded upon the necessities of the case, real or fancied, and has never been applied to any person or to any occupation, except those of carriers of goods and innkeepers. The carrier had the exclusive possession and control of

Pa. St. 298, 78 Am. Dec. 338; Passmore v. Western Union Tel. Co., 1 Am. Electl. Cas. 168, 78 Pa. St. 238; Aiken v. Western Union Tel. Co., 1 Am. Electl. Cas. 121, 5 S. C. 358; Western Union Tel. Co. v. Neill, 1 Am. Electl. Cas. 352, 57 Tex. 283, 44 Am. Rep. 589; Western Union Tel. Co. v. Edsall, 1 Am. Electl. Cas. 715, 63 Tex. 668, 8 Am. & Eng. Corp. Cas. 70; Washington, etc., Tel. Co. v. Hobson, 15 Gratt. (Va.) 122; Hibbard v. Western Union Tel. Co., 1 Am. Electl. Cas. 62, 33 Wis. 565; Candee v. Western Union Tel. Co., 1 Am. Electl. Cas. 99, 34 Wis. 471, 17 Am. Rep. 452; Abraham v. Western Union Tel. Co., 1 Am. Electl. Cas. 728, 23 Fed. Rep. 315, 8 Am. & Eng. Corp. Cas. 130, 11 Sawy. (U. S.) 28; Southern Express Co. v. Caldwell, 21 Wall. (U. S.) 269; Baxter v. Dominion Tel. Co., 37 U. C. Q. B. 470; Western Union Tel. Co. v. Reynolds, 1 Am. Electl. Cas. 487, 77 Va. 173, 46 Am. Rep. 715, 5 Am. & Eng. Corp. Cas. 182.

The transmission of messages is necessarily subject to the risk of mistake and interruption. The wire is exposed to the interference of strangers; a surcharge of electricity in the atmosphere, or a failure of or an irregularity in the electrical current, may stop communication; and it is continually subject to danger from accident, malice, and climatic influence, when the company has not the actual immediate custody of the messages, as the common carrier has of the merchandise it carries; and it

should not, therefore, like a common carrier, be treated not only as a bailee, but as an insurer. Smith v. Western Union Tel. Co., 1 Am. Electl. Cas. 743, 83 Ky. 104, 8 Am. & Eng. Corp. Cas. 20, 4 Am. St. Rep. 126. The nature of the business is suggestive of many risks and contingencies to which no other business or agency is subject. The electric current may be interrupted and the current broken without fault of the corporation, so as to obstruct telegraphic communication, and words of different signification may be represented by characters so similar that errors in transcribing may occur without fault on the part of the person transcribing it, or technical terms may be used not easily expressed by telegraphy, and in which errors may occur without fault. These and risks of the like character are upon the person sending the message, unless he elects to comply with the terms of the company, and have the dispatch repeated, by which certain risks are guarded against and errors prevented or insured against. But an error in transcribing the direction, and a consequent misdelivery, are *prima facie* evidence of neglect and want of care in the operator, and cast the burden upon the company of explaining the error and showing that it occurred without fault. This is upon the supposition that the message is received for transmission unconditionally. Baldwin v. United States Tel. Co., 45 N. Y. 744, 751, 6 Am. Rep. 165.

the goods, often in secret, away from the supervision of any other person, with opportunity for embezzlement and collusion with evil-minded persons, and without means of discovery by the owner, especially in the ruder stages of civilization, and before the present modes of communication, rapid and easy, were in existence. It was, upon this view, early adopted, as a rule of safety to the community, that the carrier should always be *prima facie* liable, in case of non-delivery of the goods, and that he should not be excused for any causes, except those occurring by the act of God or of the public enemies, and these were to be shown by himself. Whether its liability is based upon the contract it makes, or upon its public duty, the telegraph company does not come within any of these principles. Its liability for error or failure in the transmission of a dispatch is quite unlike that of a common carrier. A telegraph company is intrusted with nothing but an order or message, which is not to be carried in the form in which it is received, but is to be transmitted or repeated by electricity, and is peculiarly liable to mistake; which cannot be the subject of embezzlement; which is of no intrinsic value; the importance of which cannot be estimated except by the sender, nor ordinarily disclosed by him without the danger of defeating his own purposes; which may be wholly valueless, if not forwarded immediately; for the transmission of which there must be a simple rate of compensation; and the measure of damages for failure to transmit or deliver which has no relation to any value which can be put on the message itself.⁹³ On the other hand, the authorities which have maintained that telegraph companies are common carriers and, therefore, liable as insurers, have urged the following reasons in support of their proposition: Such companies hold themselves out to the public as engaged in a particular branch of business, in which the interests of the public are deeply concerned. They propose to do a certain thing for a given price. There is no difference, in the general nature of the legal obligation of the contract, between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same. The breach of the contract, in the one case or in the other,

93. Leonard v. New York, etc., Co., 1 Am. Electl. Cas. 70, 113 Mass. Tel. Co., 41 N. Y. 544, 1 Am. Rep. 299, 18 Am. Rep. 485; see, also, cases 446; Grinnell v. Western Union Tel. cited note 92.

is, or may be, attended with the same consequences, and the obligation to perform the stipulated duty is the same in both cases. The importance of the discharge of it in both cases is the same. In both cases the contract is binding, and the responsibilities of the parties is governed by the same general rules.⁹⁴ The rule established by the latter cases has been changed by special statutory provisions in California and is not now accorded much weight elsewhere.⁹⁵ But, although telegraph companies are not liable as insurers, they are bound to transmit all proper messages with the care and diligence adequate to the business which they undertake, to serve the public in good faith, impartially and without discrimination, and, if they fail so to do, they become responsible for any losses occasioned by the neglect and omission of duty, or willful default, of their servants and agents.⁹⁶ Like common carriers, however, they cannot contract with their employers for exemption from liability for the consequences of their own negligence or that of their servants.⁹⁷ They are re-

94. Parks v. Alta, etc., Tel. Co., 13 Cal. 422, 73 Am. Dec. 589; Western Union Tel. Co. v. Fontaine, 1 Am. Electl. Cas. 229, 58 Ga. 433; Western Union Tel. Co. v. Meek, 1 Am. Electl. Cas. 138, 49 Ind. 53; Bowen v. Lake Erie Tel. Co. (Ohio), 1 Am. L. Reg. 685; True v. International Tel. Co., 60 Me. 9, 11 Am. Rep. 156; Bryant v. American Tel. Co., 1 Daly (N. Y.), 575; Bell v. Dominion Tel. Co., 25 L. C. J. (Can.), 248; MacAndrew v. Electric Tel. Co. (Eng.), 17 C. B. 3, 84 E. C. L. 3; Gray on Telegraphs, §§ 6, 7; Shear. & Red. on Neg. (4th ed.), § 554, *et seq.*; Kirby v. Western Union Tel. Co., 6 Am. Electl. Cas. 824, 7 S. D. 623, 30 L. R. A. 621, 65 N. W. 37, telegraph companies are made common carriers by statute.

95. Cal. Civ. Code, §§ 2162, 2168; see cases cited note 92.

96. See cases cited note 92 under this section.

97. Southern Express Co. v. Caldwell, 21 Wall. (U. S.) 269; White v. Western Union Tel. Co., 14 Fed.

Rep. 710; American Union Tel. Co. v. Daugherty, 3 Am. Electl. Cas. 579, 89 Ala. 191; Stiles v. Western Union Tel. Co., 2 Am. Electl. Cas. 471 (Ariz.), 15 Pac. 712; Western Union Tel. Co. v. Short, 3 Am. Electl. Cas. 592, 53 Ark. 434; Western Union Tel. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136; Western Union Tel. Co. v. Blanchard, 1 Am. Electl. Cas. 404, 68 Ga. 299, 45 Am. Rep. 480; Western Union Tel. Co. v. Fontaine, 1 Am. Electl. Cas. 229, 58 Ga. 433; Western Union Tel. Co. v. Meredith, 1 Am. Electl. Cas. 643, 95 Ind. 93, 8 Am. & Eng. Corp. Cas. 54; Western Union Tel. Co. v. Adams, 1 Am. Electl. Cas. 442, 87 Ind. 598, 44 Am. Rep. 776; Western Union Tel. Co. v. Meek, 1 Am. Electl. Cas. 138, 49 Ind. 53; Western Union Tel. Co. v. Fenton, 1 Am. Electl. Cas. 198, 52 Ind. 1; Harkness v. Western Union Tel. Co., 2 Am. Electl. Cas. 571, 73 Iowa 190, 21 Am. & Eng. Corp. Cas. 182, 5 Am. St. Rep. 672; Sweatland v. Illinois, etc., Tel. Co., 27 Iowa 433, 1 Am. Rep.

sponsible only for failure to exercise ordinary care and vigilance in the performance of their duties.⁹⁸ In New York and some of the other States telegraph companies have the right to make reasonable rules and regulations for the conduct of their business, and they can thus limit their liability for mistake, not occasioned by gross negligence or willful misconduct, and this they can do by notice brought home to the sender of the message, or by special contract entered into with him.⁹⁹

285; Granville v. Western Union Tel. Co., 37 Iowa 214, 18 Am. Rep. 8; Tyler v. Western Union Tel. Co., 1 Am. Electl. Cas. 14, 60 Ill. 421, 14 Am. Rep. 38; Western Union Tel. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279; Smith v. Western Union Tel. Co., 1 Am. Electl. Cas. 743, 83 Ky. 104, 8 Am. & Eng. Corp. Cas. 15, 4 Am. St. Rep. 126; Camp v. Western Union Tel. Co., 1 Metc. (Ky.) 164, 71 Am. Dec. 461; De La Grange v. Southwestern Tel. Co., 1 Am. Elect. Cas. 59, 25 La. Ann. 383; Bartlett v. Western Union Tel. Co., 1 Am. Electl. Cas. 45, 62 Me. 209, 16 Am. Rep. 437; Ayer v. Western Union Tel. Co., 2 Am. Electl. Cas. 601, 79 Me. 493, 21 Am. & Eng. Corp. Cas. 145, 1 Am. St. Rep. 353; Western Union Tel. Co. v. Griswold, 37 Ohio St. 303, 41 Am. Rep. 500; Marr v. Western Union Tel. Co., 2 Am. Electl. Cas. 720, 85 Tenn. 529, 16 Am. & Eng. Corp. Cas. 243; Pepper v. Western Union Tel. Co., 2 Am. Electl. Cas. 756, 87 Tenn. 554, 25 Am. & Eng. Corp. Cas. 542, 10 Am. St. Rep. 699; Western Union Tel. Co. v. Broesche, 2 Am. Electl. Cas. 815, 72 Tex. 654, 13 Am. St. Rep. 843; Wertz v. Western Union Tel. Co., 3 Am. Electl. Cas. 808, 7 Utah 446; Gillis v. Western Union Tel. Co., 2 Am. Electl. Cas. 841, 61 Vt. 461, 25 Am. & Eng. Corp. Cas. 568, 15 Am. St. Rep. 917; Thompson v. Western Union Tel. Co., 64 Wis. 531, 54 Am.

Rep. 644; Candee v. Western Union Tel. Co., 1 Am. Electl. Cas. 99, 34 Wis. 471, 17 Am. Rep. 452.

The reason of the rule.—“Courts and legislatures have been liberal in allowing telegraph companies to provide against such risks as arise out of atmospheric influences and kindred causes. At this point they have properly stopped. To permit them to contract against their own negligence would be to arm them with a most dangerous power, and indeed that would leave the public almost entirely remediless. It must be borne in mind that the public have but little choice in the selection of the company which is to perform the desired service. They are bound to take it as they find it, and to commit to its agents their messages, however valuable. Such being the case, public policy as well as commercial necessity require that companies engaged in telegraphing should be held to a high degree of responsibility.” Western Union Tel. Co. v. Graham, 1 Colo. 237, 9 Am. Rep. 136.

98. Baldwin v. United States Tel. Co., 45 N. Y. 744, 6 Am. Rep. 165.

99. Breese v. United States Tel. Co., 48 N. Y. 141, 8 Am. Rep. 526; Mowry v. Western Union Tel. Co., 2 Am. Electl. Cas. 679, 51 Hun (N. Y.), 126, 4 N. Y. Supp. 666; Pearsall v. Western Union Tel. Co., 3 Am. Electl. Cas. 724, 124 N. Y. 256, 21 Am. St. Rep.

§ 37. Telephone companies.—Telephone companies do not offer to transmit messages, but merely furnish to subscribers the means of transmitting their own by word of mouth, and they have been held not to be common carriers.¹ But telephone companies, like telegraph companies, are analogous to common carriers in that they are bound to afford equal facilities to all, and

662; *Nicholas v. New York Cent., etc., R. R. Co.*, 89 N. Y. 370; *Kenney v. New York Cent., etc., R. R. Co.*, 124 N. Y. 256; *Will v. Postal Tel. Cable Co.*, 6 Am. Electl. Cas. 807, 3 App. Div. (N. Y.), 22, 73 St. Rep. (N. Y.) 552, 37 N. Y. Supp. 933, 3 N. Y. An. Cas. 123; *Birney v. New York & Washington Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *New York & Washington Printing Tel. Co. v. Dryburg*, 35 Pa. St. 298; *Ellis v. American Tel. Co.*, 13 Allen (Mass.), 226; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Wann v. Western Union Tel. Co.*, 37 Mo. 472, 90 Am. Dec. 395; *Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164; *McAndrew v. Electric Tel. Co.*, 33 Eng. L. & Eq. 180; *Lassiter v. Western Union Tel. Co.*, 89 N. C. 336, 5 Am. & Eng. Corp. Cas. 230; *Pegram v. Western Union Tel. Co.*, 97 N. C. 57, 21 Am. & Eng. Corp. Cas. 122; *Becker v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 337, 11 Neb. 87, 38 Am. Rep. 356; *Grinnell v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 70, 113 Mass. 299, 18 Am. Rep. 485; *Redpath v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 40, 112 Mass. 71, 17 Am. Rep. 69; *United States Tel. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519; *Hart v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 734, 66 Cal. 579, 8 Am. & Eng. Corp. Cas. 24, 56 Am. Rep. 119; *White v. Western Union Tel. Co.*, 14 Fed. Rep. 710, 5 McCrary (U. S.), 103.

See also *Kemp v. Western Union Tel. Co.*, 3 Am. Electl. Cas. 711, 28 Neb. 661, 30 Am. & Eng. Corp. Cas. 607, holding that a statute of that state prohibiting exemption from liability by contract is reasonable, and binding on all companies in that State; *Western Union Tel. Co. v. Neill*, 1 Am. Electl. Cas. 352, 57 Tex. 283, 44 Am. Rep. 589; *Womack v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 454, 58 Tex. 176, 44 Am. Rep. 614, holding that a stipulation against liability will not extend to injuries caused by "the misconduct, fraud, or want of due care on the part of the company, its servants or agents." *Western Union Tel. Co. v. Goodbar* (Miss.), 7 So. 214, holding the company liable for gross negligence, notwithstanding an exemption clause in the contract.

Fraud or bad faith.—Telegraph companies cannot relieve themselves by their regulations from liability for "fraud or any conduct inconsistent with good faith." *Schwartz v. Atlantic, etc., Tel. Co.*, 1 Am. Electl. Cas. 284, 18 Hun (N. Y.), 157; *Candee v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 99, 34 Wis. 471, 17 Am. Rep. 452; *United States Tel. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519; *Jones v. Western Union Tel. Co.*, 1 Am. Electl. Cas. 561, 18 Fed. Rep. 717; 3 Suth. on Dam. 296.

1. *American Rapid Tel. Co. v. Connecticut Teleph. Co.*, 1 Am. Electl. Cas. 390, 49 Conn. 352, 1 Am. & Eng.

may be compelled by mandamus to furnish facilities to one offering to comply with their regulations, even though such party is a rival company, and are responsible only for failure to exercise proper care.² A private corporation engaged in the business of operating a telephone plant is a common carrier of news and intelligence, within the scope of a statute providing for the regulation of the rates of common carriers.³

§ 38. Railroad company transporting a circus or menagerie.— A railroad company is not a common or public carrier in respect to a special train of cars loaded with wild animals and other property, as well as persons, belonging to or connected with a circus, which is loaded and unloaded by the proprietor of the circus and is run on special time to suit his convenience, under a special contract that he shall assume all the risks of accidents, the only duty of the railroad company being to haul the cars.⁴ A common carrier's liability does not attach to a railroad company contracting to move a menagerie in the latter's own cars, controlled by its own agents, and, though operated by railroad employes, run upon a time schedule to suit the menagerie. And a stipulation that the company shall not be liable for injuries to the

Corp. Cas. 378, 44 Am. Rep. 237; State v. Nebraska Teleph. Co., 1 Am. Electl. Cas. 700, 17 Neb. 126, 52 Am. Rep. 404, 8 Am. & Eng. Corp. Cas. 1. Cases have arisen where the parties, being unable to communicate directly with each other, have done so through the medium of an operator of an intermediate station, but the liability of the company in such cases was not adjudicated. Sullivan v. Kuykendall, 82 Ky. 483, 56 Am. Rep. 901; Oskamp v. Gadsden, 35 Neb. 7, 52 N. W. 718.

2. Chesapeake, etc., Teleph. Co. v. Baltimore, etc., Tel. Co., 2 Am. Electl. Cas. 416, 66 Md. 399, 16 Am. & Eng. Corp. Cas. 219, 59 Am. Rep. 167; State v. Nebraska Teleph. Co., *supra*; Delaware v. Delaware, etc., Tel. Co., 3 Am. Electl. Cas. 533, 47 Fed. Rep. 633, 35

Am. & Eng. Corp. Cas. 15; Central Union Teleph. Co. v. Bradbury, 2 Am. Electl. Cas. 14, 106 Ind. 1; People v. Manhattan Gas Light Co., 45 Barb. (N. Y.) 136; Central Union Teleph. Co. v. State, 3 Am. Electl. Cas. 529, 2 Am. Electl. Cas. 27, 123 Ind. 113, 118 Ind. 194, 10 Am. St. Rep. 113, 25 Am. & Eng. Corp. Cas. 481.

3. Nebraska Teleph. Co. v. State, Yeiser, 7 Am. Elect. Cas. 860, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113.

4. Chicago, etc., R. Co. v. Wallace, 66 Fed. 506, 24 U. S. App. 589. The court held that the defendant was not chargeable as a common carrier, since it did not hold itself out as a carrier of wild animals, etc., nor as carrying on special schedules or trains; that the defendant could only

menagerie caused by want of care may be upheld.⁵ A railroad company is not required, as a common carrier, to take a circus train, a part of which is loaded with wild animals, and transport the same over its line, but may refuse to transport such train, except under a special contract limiting its liability to that assumed by a private carrier.⁶

§ 39. Railroad company in South Carolina liable only over its own line.—In South Carolina a railroad company, which is liable as a common carrier within the termini of its own line, is not liable as such beyond its own line and over connecting lines, unless it has assumed such liability by special contract, or become so by usage or the character of its business.⁷

§ 40. Railroad company carrying a dog for accommodation of passenger.—A railroad company which does not assume the transportation of dogs, but permits its baggage-masters to take charge of them as a matter of accommodation and for a fee retained by the baggage-master, is not liable as a common carrier, if the dogs come to harm.⁸ To the contrary, it has been held that, where a

be charged upon the special contract, and that being valid, the stipulation against liability would preclude a recovery. *Robertson v. Old Colony R. Co.*, 156 Mass. 525, 31 N. E. 650, a railroad company is not liable for injury to an employe of a circus, arising from a defect in a car truck which inspection would have revealed, when such company is transporting a circus for a gross sum under a contract by which the proprietors of the circus agree to assume all risk of accident from any cause and save the company harmless. See also *Watson v. North British R. Co.*, 3 Ry. and C. T. Cas. 17.

5. *Coup v. Wabash, etc., Ry. Co.*, 56 Mich. 111, 56 Am. Rep. 374, 18 Am. & Eng. R. Cas.⁵⁴². The court, in this case, held that the railroad did not sustain the relation of common carrier, and was therefore entitled to stipulate against any lia-

bility whatever. At most, it was liable only for negligence. It did not profess, and was under no obligation, to undertake such transportation.

6. *Wilson v. Atlantic, etc., R. Co.*, 129 Fed. 774.

7. *Piedmont Mfg. Co. v. Columbia, etc., R. Co.*, 19 S. C. 353, 16 Am. & Eng. R. R. Cas. 194.

8. *Honeyman v. Oregon & California R. R. Co.*, 13 Ore. 352, 57 Am. Rep. 20, 25 Am. & Eng. R. R. Cas. 380, wherein the court said: "The facts disclose that the defendant did not hold itself out as a common carrier of dogs, or assume their transportation in that character, but that the defendant expressly refused to accept hire and furnish tickets for their transportation. The evidence shows that, when the party having in charge the dogs applied to the ticket agent of the defendant for transportation for himself and dogs, the agent re-

railroad passenger, without special notice of the company's regulation that "live animals are allowed as baggagemen's perquisites," committed a dog to the baggage-master and paid him for its transportation, the company was liable for the loss of the dog by the baggageman's delivering it to the wrong person.⁹ The loss of a dog by negligence of a baggage-master will render the carrier liable, although a rule of the company provided that it would not be responsible for dogs, where the owner was not notified of such rule or of the company's refusal to be responsible; but put the dog in the baggage car under instruction of the conductor.¹⁰ In an action for a breach of a contract for the special transportation of a crate containing five dogs, where the carrier receiving the dogs for shipment by a certain train shipped them by an earlier train, and, no one being present to receive them, returned them to the place of shipment, and the shipper, learning of the return, directed them to be reshipped on the next day, without in any way providing for them, the shipper was held not entitled to damages for the death of one of the dogs, resulting from his long confinement, the proximate cause of the death being the neglect of the shipper to have the dogs attended to before reshipment.¹¹ But the general rules of law respecting the obligations and liability of a carrier of animals under an ordinary contract of carriage were not the subject of discussion in that case, as such questions did not arise. The rule which obtained at common law that there was no property in a dog, it being held to be *ferae naturae*, has been changed by

fused tickets for the dogs, and referred him to the baggage-master, who told him, 'You know the rules about dogs;' but, as an accommodation, consented to take the dogs in his car, and promised to look after them, for which he received two dollars. These circumstances do not show that it was the business of the defendant to carry dogs, or to receive pay for their transportation, but that, as a matter of accommodation to a passenger, it permitted the baggage-master, after the party was notified of the rules, to carry them in his car, and to accept pay for them."

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9. *Cantling v. Hannibal, etc., R. R. Co.*, 54 Mo. 385, wherein it was shown that the company's rules and regulations were printed and posted at the various stations, but no special notice of this rule was brought home to the owner of the dog.

10. *Kansas City, etc., R. Co. v. Higdon*, 94 Ala. 286, 33 Am. St. Rep. 119, 52 Am. & Eng. R. Cas. 495.

11. *Harrison v. Weir*, 71 App. Div. (N. Y.) 248, 75 N. Y. Supp. 909, revg. 34 Misc. Rep. (N. Y.) 519, 69 N. Y. Supp. 957. See also 73 N. Y. Supp. 1119.

statute and judicial construction, and recovery may now be had by the owner for a loss of or injury to a dog delivered to a carrier for transportation, and the rules governing the liability of the carrier are the same as apply to other classes of animals.¹² A conductor is justified in removing from a passenger car on his train a passenger, who, in defiance of a rule of the company against the carrying of dogs in passenger coaches, has a dog there which he refuses to remove on a request to do so by the conductor.¹³

§ 41. Carrier under a contract exempting "river risks."—Where the contract of a carrier for the United States, to transport certain goods to points in Montana, contained the clause: "No river risk on the part of the contractor for unavoidable accidents," and, while the goods were being transported up a river, they were burned with the steamer, it was held that the person so contracting was but a private carrier, whose liabilities were limited, and he was only bound to the exercise of ordinary care, and that loss by fire on board the steamer transporting the goods fell within the exemption from liability for loss by "river risks" incorporated in the contract.¹⁴

§ 42. Owners of passenger elevators.—The courts differ as to the exact status and character of the owners and operators of elevators used in public office buildings for the purpose of carrying the occupants of the buildings and the public from one floor to another as to the relations between them and their passengers, and as to the rule of liability applicable. In a recent New York case the court said: "Doubtless no distinction can be drawn between vertical transportation and horizontal transportation, or transportation along the surface of the earth. If the relationship between the parties and the character of the carrier are the same in both cases, there is no reason why the same measure of diligence should not be exacted in one case as in the other. But the defendant was

12. Winchell v. National Express Co., 64 Vt. 15, 55 Am. & Eng. R. Cas. 400, note; Stuart v. Crawley, 2 Stark. 323, 3 E. C. L. 428; Dickson v. Great Northern R. Co., 18 Q. B. Div. 176, 28 Am. & Eng. R. Cas. 92; Harrison v. London, etc., R. Co., 110

E. C. L. 122, 31 L. J. Q. B. 113; Richardson v. Northeastern R. Co., L. R. 7 C. P. 75, 20 W. R. 461.

13. Gregory v. Chicago, etc., R. Co., 100 Iowa, 345, 69 N. W. 532.

14. United States v. Power, 6 Mont. 271, 12 Pac. 639.

not a common carrier, and received no compensation, at least directly, for carrying persons from one floor to another. The right of any person to be carried in the elevator was based on the implied invitation to enter, which the defendant as owner of the property is deemed to have extended to all who might have business on the premises." To such persons, the court held, the law imposed upon the occupant or owner of the premises the duty of reasonable prudence and care as to the machinery and appliances by which the elevator was moved, and in its maintenance and operation, the same general standard of care imposed upon the owners and occupants of real property. The court further held that an instruction that the same rule that is applicable to a railroad company, as to its roadbed, engine and machinery, that it is bound to exercise the utmost care and diligence and is liable for the slightest neglect against which human prudence and foresight might have guarded, is applicable to the owner of an elevator, was erroneous.¹⁵ The courts of Michigan, following this decision, have also held that the owner of a building having an elevator for passengers, in operating such elevator, is not "bound to exercise the highest degree of care and diligence of a cautious person so far as human care and foresight can go," but is only bound to use the

15. *Griffin v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, revg. 47 App. Div. (N. Y.) 70, 62 N. Y. Supp. 364; *Griffin v. Manice*, 36 Misc. Rep. (N. Y.) 364, 73 N. Y. Supp. 559, affd. 74 App. Div. 371, 77 N. Y. Supp. 626, affd. 174 N. Y. 505, 66 N. E. 1109. See also *McGrell v. Buffalo Office Building Co.*, 153 N. Y. 265, 47 N. E. 305, revg. 90 Hun (N. Y.), 30, 35 N. Y. Supp. 599; *Hubener v. Heide*, 62 App. Div. (N. Y.) 368, 70 N. Y. Supp. 1115; *Grifhahn v. Kreizer*, 62 App. Div. (N. Y.) 414; *Tousey v. Roberts*, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 655.

Burden of proof.—The plaintiff in an action for injuries received by a passenger through the defective working of an elevator has the bur-

den of showing that the injury resulted from defendant's negligence. Where an elevator installed by a reputable firm has all the appliances known to stop the machinery when the car reaches the bottom of the shaft, even if the operator is remiss in his duties, and the machinery is in perfect order, as shown by various inspections by the person installing the elevator, insurance companies, and the city,—one inspection being made only a few hours before an accident occurring by reason of the unexplained failure of the machinery to stop, though the car is properly operated,—there is no liability for the accident, though there has been an occasional bumping of the cars on the springs, which was shown not to be uncommon or to have been the cause

care required of an ordinarily prudent person under the circumstances.¹⁶ In Massachusetts it has been held that the owner of a passenger elevator for the use of tenants and others in a building, being under no obligation to carry passengers, is not a common carrier of passengers, within the meaning of a statute relating to the liabilities of common carriers of passengers, and hence is not liable for the death of a passenger caused by the elevator being out of repair.¹⁷ In the Federal Courts and the courts of some of the other states it has been held that persons operating elevators are carriers of passengers, the relation between them and their passengers being similar to that between an ordinary common carrier and those carried by it, and that they are subject to the same rules as to the degree of care required and the onus of proof in case of injury from defects in or the giving away of machinery as are applicable to common carriers of passengers. The degree of care required is variously stated to be the utmost human care and foresight, the highest degree of care, extraordinary care, and the highest degree of care and diligence practically consistent with the

of the accident. Griffen v. Manice, 74 App. Div. (N. Y.) 371, 77 N. Y. Supp. 626, affd. 174 N. Y. 505, 66 N. E. 1109.

16. Burgess v. Stowe, 10 Detroit Leg. N. 434 (Mich.), 96 N. W. 29. Citing Michigan Cent. R. Co. v. Coleman, 28 Mich. 440; Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321; Hall v. Murdock, 114 Mich. 233, 72 N. W. 150.

17. Seaver v. Bradley, (Mass.) 69 N. E. 795. See Gibson v. International Trust Co., 186 Mass. 454, 72 N. E. 70. In *Seaver v. Bradley*, *supra*, Holmes, C. J., said: "The modern liability of common carriers of goods is a resultant of the two long accepted doctrines that bailees were answerable for the loss of goods in their charge, although happening without their fault, unless it was due to the public enemy, and that those exercising a common calling were bound to exercise it on demand and

to show skill in their calling. Both doctrines have disappeared, although they have left this hybrid descendant. The law of common carriers of passengers, so far as peculiar to them, is a brother of the half blood. It also goes back to the old principles concerning common callings. Carriers not exercising a common calling as such are not common carriers, whatever their liabilities may be. But the defendant did not exercise the common calling of a carrier, as sufficiently appears from the fact that he might have shut the elevator door in the plaintiff's face and arbitrarily have refused to carry him without incurring any liability to him. Apart from that consideration, manifestly it would be contrary to the ordinary usages of English speech to describe by such words the maintaining of an elevator as an inducement to tenants to occupy rooms which the defendant wished to let."

efficient use and operation of such modes of transportation.¹⁸ In Missouri it has been held that a company operating an elevator in its office building for the use of tenants and their visitors is a common carrier of passengers for hire, and, though not an insurer of the safety of a passenger, must use such care, prudence, and caution to prevent injury to a passenger as a very careful and prudent person would use and exercise in a like business and under similar circumstances.¹⁹ And in Illinois the rule has been carried to the extent of holding that the owner of a building in which a freight elevator is operated, who permits an employe of his tenant to ride thereon in the discharge of his duties, occupies the relation of a common carrier of passengers for hire towards such employe, the hire received being the rent of the building, and is held to the highest degree of care to prevent injury to such employe.²⁰ Some of the cases maintain that this strict liability is more expedient and conforms better with the present needs of society. For although an elevator operator is not technically a common carrier, yet the considerations of public policy which require extraordinary diligence of the latter, would seem to require a similar degree of diligence of the former. In each case the passenger's safety depends wholly upon the operator's vigilance; in each case the probability of a serious accident, unless extraordinary vigilance is exercised, is imminent. The objection that an elevator operator receives no compensation for the carriage is met

18. U. S.—*Mitchell v. Marker*, 62 Fed. 139, 22 U. S. App. 325, 10 C. C. A. 306, 25 L. R. A. 133.

Cal.—*Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175.

Ill.—*Chicago Exchange Bldg. Co. v. Nelson*, 197 Ill. 334, 64 N. E. 369, affg. 98 Ill. App. 189; *Springer v. Schultz*, 205 Ill. 144, 68 N. E. 753, affg. 105 Ill. App. 544; *Deposit Co. v. Sollitt*, 172 Ill. 222, 50 N. E. 178; *Hodges v. Percival*, 132 Ill. 53, 23 N. E. 23; *Western Union Telegraph Co. v. Woods*, 88 Ill. App. 375.

Ky.—*Hotel Co. v. Camp*, 97 Ky. 424, 30 S. W. 1010.

Minn.—*Goodsell v. Taylor*, 41

Minn. 207, 42 N. W. 873, 4 L. R. A. 673, 16 Am. St. Rep. 700.

Pa.—*Riland v. Hirshler*, 7 Pa. Super. Ct. 384.

R. I.—*Blackwell v. O'Gorman*, 22 R. I. 638, 49 Atl. 28.

Tenn.—*Southern, etc., Ass'n v. Lawson*, 97 Tenn. 367, 37 S. W. 86, 56 Am. St. Rep. 804.

Wis.—*Oberndorfer v. Pabst*, 100 Wis. 505, 76 N. W. 338.

19. Mo.—*Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597, 81 S. W. 1112; *Becker v. Lincoln Real Estate, etc., Co.*, 174 Mo. 246, 73 S. W. 581; *Lee v. Knapp*, 155 Mo. 610, 58 S. W. 458.

20. Springer v. Ford, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 930.

by the fact that he receives adequate compensation, indirectly at least, from the rent paid by the tenants.

§ 43. Car-switching companies.—A railroad company in the general business of switching cars for all railroads which will furnish its business is a common carrier.²¹ A company whose principal business is switching cars for other railroad companies, its tracks being connected with those of the other railroads by a transfer switch, and with mills, elevators, and manufactories near where its business is transacted, will be held liable, as a common carrier, for the loss of a car taken, without orders of the owner, to a manufactory, to be loaded and then switched to the transfer track for shipment.²² So, a railroad company which takes loaded cars from its connection with another railroad, and transfers them by a switch engine over a portion of its own track to a spur of its own, receiving its compensation from the connecting road, is liable as a common carrier for the safety of the goods transported, regardless of the distance from the place of receipt to that of delivery.²³ But a corporation which, being under no legal obligation to do so, voluntarily contracts to switch cars over its tracks, between two or more railways, for which service it collects a certain switching charge for switching the cars, loaded or empty, but charges no traffic rates on the freight transported or transferred in the cars in the performance of such service, assumes none of the responsibilities of a common carrier, but only those of a switchman.²⁴

§ 44. Telegraph messenger companies.—A company which furnishes messengers to any who may desire them is a common carrier, and is liable as such for any property which is intrusted to its messengers to deliver.²⁵ A telegraph messenger company,

21. Peoria, etc., R. Co. v. United States Rolling-Stock Co., 28 Ill. App. 79.

Louisville & N. R. Co., 37 Fed. 567, 2 L. R. A. 289, 2 Inters. Com. R. 351.

22. Peoria, etc., R. Co. v. Chicago, etc., R. Co., 109 Ill. 135, 18 Am. & Eng. R. Cas. 506, 50 Am. Rep. 605. See also § 14 *ante*.

25. Sandford v. American District Tel. Co., 6 Misc. Rep. (N. Y.) 534, 58 St. Rep. (N. Y.) 16, 27 N. Y. Supp. 142, 31 Abb. N. C. (N. Y.) 147; 13 Misc. Rep. (N. Y.) 88, 34 N. Y. Supp. 144.

23. Missouri Pac. R. Co. v. Wichita, etc., Grocery Co., 55 Kans. 225, 40 Pac. 898.

Where a messenger of such a company was called by a customer of a bank by means of a call-box fur-

24. Kentucky & I. Bridge Co. v.

whose business includes the delivery of parcels by its messengers, for those who choose to employ it, is liable for any loss sustained by the employer which resulted from a messenger's disregard of the instructions given to him.²⁶ As to messages sent by companies

nished by the company to the bank (but not under such circumstances as would indicate that the box was for the exclusive use of the bank), and a messenger answered such summons and undertook to perform the duty required of him by the caller in accordance with the company's instructions, without first returning to the company's office, it was held that such messenger was the agent of the company, and that it was bound by his acts. It was also held that in such a case, the fact that the company had a contract with the bank limiting the amount of its liability does not affect the rights of a third person using the bank's call-box, where his dealings with the company were not had with reference to such contract.

Id.

Liable for damages where horse in charge of messenger ran away.—The plaintiffs hired a buggy and horses, and, on returning, stopped at the office of the District Telegraph Company and asked for a boy who could drive the horses back to the livery stable. A boy was sent out who took charge of the horses, but owing to his negligence or incompetence, the horses ran away while he was driving them, and injured themselves and the vehicle. In an action to recover damages therefor, it was held that the company was liable for the damages thus occasioned, and that the plaintiffs, although they were merely bailees for hire as to the horses and buggy, could maintain the action to recover such damages. American Dist. Tel. Co. v. Walker, 72 Md. 454, 20 Am. St.

Rep. 479, 35 Am. & Eng. Corp. Cas. 91.

See also *Newton v. Pope*, 1 Cow. (N. Y.) 109, holding that one hired to drive horses, in whose hands they are injured, is only responsible for negligence, unskillfulness, or willful misconduct; the burden of proving which is on the hirer; *Harker v. Dement*, 9 Gill (Md.), 13, 52 Am. Dec. 670; *Brind v. Dale*, 2 M. & Rob. 80, 8 C. & P. 207, 34 E. C. L. 355; *Searle v. Laverick*, L. R. 9 Q. B. 122.

26. *Feiber v. Manhattan Dist. Tel. Co.*, 3 N. Y. Supp. 116, 20 St. Rep. (N. Y.) 95, 22 Abb. N. C. (N. Y.) 121, affg. 21 Abb. N. C. (N. Y.) 11. But see *Haskell v. Boston District Messenger Co.* (Mass.), 76 N. E. 215.

Where, however, a messenger was directed by one summoning him to deliver a parcel of clothes to one D., and get a certain sum, or bring back the clothing, and the messenger brought back a part of the clothing and a letter stating that the part returned did not fit, together with a check to pay for the part that was kept, all of which the employer refused to accept, it was held that the company could not be held as for a conversion of the whole parcel intrusted to its messenger's care; and in the absence of evidence that the employer sustained any loss from the disregard of his instructions, the company could not be held for any loss. *Id.* In this case the trial justice stated that in his view the controlling question in the case was, is or is not the defendant a common carrier, and held that the defendant

of this kind, they are under the same liability as telegraph companies, and are responsible, not as common carriers, but only for such losses as result from their negligence, or the negligence of their servants.²⁷

§ 45. An irrigation company.—An irrigation company which appropriates the water of a public stream, and supplies the same, under contracts, to landowners who had no prior rights in the waters of such stream, is not a common carrier. Such a company, appropriating the water of a natural stream and directing it to a beneficial use, becomes the proprietor of the water, and as such has the right to sell, transfer and deliver it; and such right can only be defeated by a subsequent failure to apply it to a beneficial use.²⁸ A canal company, contracting to furnish rice farmers a sufficient supply of water to irrigate their lands during the planting season, is not liable for damages resulting from an insufficient supply, where such insufficiency is attributable to the inadequacy of the fall of rain, from which source the canal is supplied.²⁹ A water company, being a public service corporation, and engaged in supplying for domestic, irrigating, and other purposes water appropriated under the laws of California, contracted to furnish a certain amount of water, "subject to such reasonable general rules and regulations" as it might adopt. The contract provided that if the company's supply of water was shortened by act of God, drought, etc., the lands to which the water was attached

was not responsible as a common carrier for the messenger's disregard of the sender's instructions, unless it knew of them before he went on the business. The appellate court, on the authority of *Tooker v. Gormer*, 2 Hilt. (N. Y.) 71, affirmed the judgment for the defendant on the ground that it matters not whether the defendant be a common carrier or not, it is bound to obey the instructions of its employer respecting the delivery of the packages that it undertakes to carry.

Upon an application for reargument on the ground that the trial justice having stated that the question of law above referred to was controlling in the case, and, plain-

tiff, confident of success on the point of law, failed to offer proof of the damages sustained, and the case was decided against him, it was held that a new trial was properly refused, and the motion for a reargument was denied. 4 N. Y. Supp. 555, 23 St. Rep. (N. Y.) 57.

27. See Telegraph Companies, § 36, *ante*. *White v. Postal Telegraph & Cable Co.*, 33 Wash. L. Rep. 295.

28. *Wyatt v. Larimer & W. Irrig. Co.*, 1 Colo. App. 480, 29 Pac. 906.

29. *Landers v. Garland Canal Co.*, 52 La. Ann. 1465, 27 So. 727. See also *Carr v. Miller-Morris Canal, Irrig., etc., Co.*, 105 La. 239, 29 So. 715. Compare *Canal Co. v. Jenkins*, 1 Colo. App. 415, 20 Pac. 381.

should be entitled "to only such water as can be supplied . . . after the full supply shall have been furnished to all cities and towns" dependent on the company for water, and the company "shall not be responsible for any deficiency of water occasioned by any of the above causes." It was held that the consumer was subject, in time of drought, to an apportionment of water among all consumers, and he was not entitled to his full quota as soon as cities and towns were supplied.³⁰ Under the Constitution of Idaho, which declares the use of all waters appropriated for sale, rental, or distribution to be a public use, and the right to collect compensation therefor a franchise, which cannot be exercised except by authority of, and in the manner prescribed by law, and which authorizes the legislature to provide, as it has done, for the fixing of maximum rates to be charged for water so sold, an irrigation company appropriating water for sale has no authority to make a distinction between its consumers, and, while supplying some with water under private contracts at low rates, attack the validity of maximum rates fixed by the county commissioners under the statute, on the ground that, as applied to its other consumers, they will not yield a reasonable return on its investment, but will amount to a taking of its property without compensation. In determining the reasonableness of such rates, they must be considered as applicable to all its consumers.³¹

§ 46. Transfer companies.—Transfer companies engaged in the business of transferring baggage or freight to and from railroad or steamship depots, or between different parts of towns and cities, are common carriers, and responsible for the safe keeping and delivery of such baggage and freight.³² A transfer company

30. Souther v. San Diego Flume Co., 121 Fed. 347, 57 C. C. A. 561, affg. San Diego Flume Co. v. Souther, 112 Fed. 228.

31. Boise City Irrig., etc., Co. v. Clark, 131 Fed. 415.

32. DaPonte v. New Orleans Transfer Co., 42 La. Ann. 696, 7 So. 608; Richards v. Westcott, 2 Bosw. (N. Y.) 589; Verner v. Sweitzer, 32 Pa. St. 208. The liability as a common carrier may be implied by the custom of the carrier, but may be

qualified by express contract or general notice, the onus of proving the qualification being on the party setting it up. Proof of general notice of limitation of liability must be such as amounts to actual notice. Embazoning the general object on a check, ticket, or notice, in large letters, but stating the restrictions in small ones, is insufficient. But the effect of such notice is no more than to render the bailees private carriers for hire. Verner v. Sweitzer, *supra*.

transferring freight from one connecting line to another, or from the depot of the last of several connecting carriers to the consignee, is not "a connecting carrier," but merely the agent of one of the connecting lines, or of the consignee.³³

§ 47. Owners of grain elevators.—The business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community analogous to that of common carriers, and may be controlled by public legislation for the common good.³⁴ The owners of grain elevators are subject to statutory regulation requiring them to receive and store grain offered at lawful prices when there is room for it although the main purpose in maintaining the elevator is to store their own grain in carrying on their business of buying and shipping grain, which may be obstructed by accepting the grain offered for storage.³⁵ Statutes regulating the fees for elevating, storing, and discharging grain by elevators and establishing the maximum charges which may be imposed, are not inconsistent with the constitution of the United States, either as infringing the power to regulate commerce, or as involving a preference of the ports of one state over another, or as depriving any person of the equal protection of the laws, or of his property without due process of law.³⁶

33. Nanson v. Jacob, 12 Mo. App. 125, affd. 93 Mo. 331, 32 Am. & Eng. R. Cas. 553.

cago, etc., R. Co. v. Iowa, 94 U. S. 155.

34. Budd v. New York, 143 U. S. 517, 36 L. Ed. 247, 45 Alb. J. L. 354, 36 Am. & Eng. Corp. Cas. 31, 12 Sup. Ct. Rep. 468, 5 Am. Ry. & Corp. Rep. 610.

The legislature can fix a maximum beyond which any charge would be unreasonable for the use of property in which the public has an interest, but cannot compel the doing of services without reward. Budd v. New York, 143 U. S. 517, 36 L. Ed. 247, 45 Alb. L. J. 354, 36 Am. & Eng. Corp. Cas. 31, 12 Sup. Ct. Rep. 468, 5 Am. Ry. & Corp. Rep. 610.

35. Brass v. North Dakota, 153 U. S. 391, 38 L. Ed. 757, 14 Sup. Ct. Rep. 857.

36. Budd v. New York, *supra*; Munn v. Illinois, 94 U. S. 113; Chi-

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CHAPTER III.

CARRIERS OF GOODS.—DUTIES AND LIABILITIES.

- SECTION**
- 1. Carriers of goods.
 - 2. Duty of carrier to receive and carry.
 - 3. Must haul cars and freight of other carriers.
 - 4. May be compelled by mandamus.
 - 5. When failure or refusal to carry is legally excusable.
 - 6. May demand prepayment of charges.
 - 7. When carrier may select mode of transportation.
 - 8. Facilities for transportation.
 - 9. Special contracts for means of transportation.
 - 10. Duty to furnish facilities declared by statute.
 - 11. Must furnish suitable and safe cars.
 - 12. Tender of goods by shipper.
 - 13. Illegal purpose of shipper as a defense.
 - 14. Proximate cause of loss or injury.
 - 15. Discrimination in charges or facilities.
 - 16. The rule does not require the same rates and facilities for all.
 - 17. The compensation of the carrier.
 - 18. Excessive charges and actions therefor.

§ 1. Carriers of goods.—Carriers of goods are common carriers¹ whose rights, duties, obligations, and liabilities in the transportation of property delivered to them for carriage will be the subject of consideration in this and the following chapters under this general heading or subdivision. As here used, the term, carriers of goods, includes all common carriers, except carriers of passengers and carriers of live stock. The rules and principles applicable to carriers of goods and carriers of live stock being practically the same, in so far as their duties and liabilities are concerned, except that such rules and principles are modified in their application as to carriers of live stock so as to relieve them from liability for losses resulting from the inherent nature of the property carried, are treated without distinction in this connection. The essentials wherein the difference in liability consists will be set forth under the heading or subdivision, Carriers of Live Stock.²

1. See the title Common Carriers. **2.** See the title Carriers of Live Stock.

§ 2. Duty of carrier to receive and carry.—It is the duty of a common carrier, on being tendered a reasonable compensation, to receive and carry all goods offered to it for transportation, within the line of its business.³ Having room or the facilities for

3. N. Y.—*Cole v. Goodwin*, 19 Wend. (N. Y.) 251; *Fish v. Clark*, 2 Lans. (N. Y.) 176.

U. S.—*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Southern Express Co. v. St. Louis, etc., R. Co.*, 5 Myers Fed. Dec. § 1511.

Cal.—*Pfister v. Central P. R. Co.*, 70 Cal. 169, 59 Am. Rep. 404.

Conn.—*Merriam v. Hartford, etc., R. Co.*, 20 Conn. 354, 52 Am. Dec. 344.

Ga.—*Atlanta, etc., R. Co. v. Holcombe*, 76 Ga. 590.

Ky.—*Bedford-Bowling Green Stone Co. v. Oman*, 24 Ky. Law Rep. 2274, 73 S. W. 1038; *Seasongood v. Tennessee & O. Transp. Co. (Ky.)*, 54 S. W. 193.

Ill.—*Peoria, etc., R. Co. v. Chicago, etc., R. Co.*, 109 Ill. 135, 50 Am. Rep. 605, 18 Am. & Eng. R. Cas. 506; *Galena R. Co. v. Rae*, 18 Ill. 488.

Ind.—*Louisville, etc., R. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. Rep. 674, 32 Am. & Eng. R. Cas. 532.

Iowa.—*Cobb v. Illinois Cent. R. Co.*, 38 Iowa, 601.

Me.—*New England Express Co. v. Maine Cent. R. R. Co.*, 57 Me. 188.

Mass.—*Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69.

Miss.—*Southern Express Co. v. Moon*, 39 Miss. 822.

N. J.—*Lanning v. Sussex R. Co.*, 1 N. J. L. J. 21, a refusal to accept goods tendered for shipment, because of a personal dispute with the shipper, renders the company liable; *Messenger v. Pennsylvania R. Co.*, 37 N. J. L. 531, 18 Am. Rep. 754.

N. C.—*Porter v. Raleigh & G. R. Co. (N. C.)*, 43 S. E. 547; *Harrell v. Owens*, 1 Dev. & B. (N. C.) 273; *Anon. v. Jackson*, 1 Hayw. (N. C.) 14.

S. C.—*Avenger v. South Carolina R. Co.*, 29 S. C. 265, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 519.

Tenn.—*East Tennessee, etc., R. Co. v. Nelson*, 1 Cold. (Tenn.) 272.

Wis.—*Doty v. Strong*, 1 Pin. (Wis.) 313, 40 Am. Dec. 773.

Can.—*Greene v. St. John & M. R. Co.*, 22 N. B. 252; *Thomas v. North Staffordshire R. Co.*, 3 Ry. & C. T. Cas. 1.

Eng.—*Johnson v. Midland R. Co.*, 4 Exch. 367; *Oxlade v. North Eastown R. Co.*, 15 C. B. N. S. 680, 109 E. C. L. 680, 9 Week. Rep. 272; *Garton v. Bristol, etc., R. Co.*, 1 B. & S. 112, 101 E. C. L. 112, 7 Jur. N. S. 1234, 9 W. R. 734; *Jackson v. Rogers*, 2 Show. 327; *Crouch v. Great Northern R. Co.*, 11 Exch. 742, 34 Eng. L. & Eq. 573; *Morton v. Tibbett*, 15 Q. B. 428, 69 E. C. L. 428, 15 A. & E. 428; *Lane v. Cotton*, 12 Mod. 472; *Crouch v. London, etc., R. Co.*, 14 C. B. 255, 78 E. C. L. 255, in this respect there is no difference between the liability of a common carrier whose business is entirely within the country and that of one who transports goods to a point outside the country.

Switch connection.—A railroad company cannot discontinue an established switch connection with a coal mine, merely because the cars of another company may be taken upon its line over such switch, thereby endangering its property and the lives of

transporting the goods, and holding itself out to the public as ready and willing to carry goods for all persons indifferently, the law imposes upon it the duty of receiving and carrying them over its established route, and holds it liable, in an action based on its breach of contract, for a refusal or failure to receive and carry such goods; and it is not necessary to allege or prove any special contract.⁴ A corporation which undertakes to operate a railroad franchise assumes all the duties which spring by law from the character of its business and from customs incident to it, and it tenders a continuing offer to the general public that it will perform those duties for the benefit of each of them, when demanded, which obligation is an enforceable contract.⁵ A common carrier cannot legally refuse to carry the goods of any person, or to accept them for carriage, except for just cause, nor can it lawfully discriminate in favor of any person as to facilities or price for transportation.⁶ Its duties in these respects cannot be avoided by the

its passengers and employes. Chicago & A. R. Co. v. Suffern, 27 Ill. App. 404, affd. 129 Ill. 274, 21 N. E. 824.

Exemplary damages may be recovered against a railroad company which refuses to carry goods through ill will or willful disregard of the rights of the shipper. Avenger v. South Carolina R. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 519.

4. Lamar v. New York S. Nav. Co., 16 Ga. 558; Galena R. Co. v. Rae, 18 Ill. 488. See cases cited in preceding note on main proposition.

Tender and refusal must be shown.—A party seeking to charge a railroad company with violation of a contract to transport coal for him, must show a tender and refusal. Northwestern Fuel Co. v. Burlington, etc., Ry. Co., 20 Fed. 712. Evidence of plaintiff's purchase of the goods, and the agreement of the vendor to ship them in a certain manner, is inadmissible to show delivery to defendant. New England Mfg. Co. v.

Starin, 60 Conn. 369, 22 Atl. 953. It is sufficient to show a proper tender. Central, etc., R. Co. v. Morris, 68 Tex. 49. See also St. Louis, etc., R. Co. v. Lee, 69 Ark. 584, 65 S. W. 99.

Special contract need not be shown.—Adams Express Co. v. Nock, 2 Duv. (Ky.) 562, 87 Am. Dec. 510; Doty v. Strong, 1 Pin. (Wis.) 313, 40 Am. Dec. 773; Fleming v. Mills, 5 Mich. 420.

A receipt implies an agreement to carry.—A receipt for goods in the ordinary form implies an agreement to transport them to their destination if it is on the carrier's line. Landes v. Pacific R. Co., 50 Mo. 346, 3 Am. Ry. Rep. 288.

5. Cumberland Teleph. & Teleg. Co. v. Morgan's L. & T. R. Co., 51 La. Ann. 29, 13 Am. & Eng. R. Cas. N. S. 71, 24 So. 803.

6. Great Western R. Co. v. Burns, 60 Ill. 284, 12 Am. Ry. Rep. 309; McDuffee v. Portland, etc., R. Co., 52 N. H. 430, 13 Am. Rep. 72, 2 Am. Ry. Rep. 261.

adoption of any rules or regulations; all rules and regulations of the carrier must be reasonable and made in good faith to properly protect the interests of the carrier, and unreasonable regulations will be held void and will not be enforced.⁷ A delivery of goods to a common carrier, and acceptance by it, to be conveyed, are a sufficient consideration for the contract to safely convey them.⁸ When the contract for the transportation of the goods is silent as to the time of shipment, the law imports an obligation to ship within a reasonable time after the goods have been delivered for that purpose.⁹ The carrier is liable as an insurer for whatever damages may be the proximate consequence of any unreasonable delay in shipment.¹⁰ The wrongful refusal or failure of the carrier to transport the goods must be shown to have been the proximate cause of the loss or injury sustained, in order to render the carrier liable, although it need not be shown to have been the sole cause.¹¹ Recovery may be had where other causes contributed in producing the loss or injury, if the refusal or failure to transport was the proximate cause.¹² The rule of the common law that

7. Garton v. Bristol, etc., R. Co., 1 B. & S. 112, 101 E. C. L. 112, 30 L. J. Q. B. 273, 7 Jur. N. S. 1234; Southern Express Co. v. Moon, 39 Miss. 822; Alsop v. Southern Express Co., 104 N. C. 278; Three Hundred, etc., Tons of Coal, 14 Blatchf. (U. S.) 453.

8. McCauley v. Davidson, 10 Minn. 418.

9. Pennsylvania Co. v. Clark, 2 Ind. App. 146.

Duty to forward promptly.— Stedman v. Western Transp. Co., 48 Barb. (N. Y.) 97; Rankin v. Pacific R. Co., 55 Mo. 167; Clarke v. Needles, 25 Pa. St. 338; Moses v. Boston, etc., R. Co., 24 N. H. 71, 55 Am. Dec. 222; Waite v. New York Cent., etc. R. Co., 110 N. Y. 635, 35 Am. & Eng. R. Cas. 576; Palmer v. Atchison, etc., R. Co., 101 Cal. 187; St. Louis, etc., R. Co. v. Heath, 41 Ark. 477, 18 Am. & Eng. R. Cas. 557; Thomas v. Wabash, etc., R. Co., 63 Fed. Rep. 200; Missouri Pac. R. Co. v. Hall, 66 Fed.

Rep. 868, 32 U. S. App. 60; Gates v. Chicago, etc., R. Co., 42 Neb. 379, 61 Am. & Eng. R. Cas. 218; Purcell v. Richmond, etc., R. Co., 108 N. C. 414; International, etc., R. Co. v. Ritchie (Tex. Civ. App.), 26 S. W. 840; Berje v. Texas, etc., R. Co., 37 La. Ann. 468; Louisville, etc., R. Co. v. Touart, 97 Ala. 514.

10. Lanning v. Sussex R. Co., 1 N. J. L. J. 21.

11. Pittsburgh, etc., R. Co. v. Morton, 61 Ind. 539; Jones v. New York, etc., R. Co., 29 Barb. (N. Y.) 633; St. Louis, etc., R. Co. v. Neel, 56 Ark. 279, 55 Am. & Eng. R. Cas. 428; Marine, etc., Ins. Co. v. St. Louis, etc., R. Co., 41 Fed. Rep. 643, 43 Am. & Eng. R. Cas. 79; Scott v. Baltimore, etc., R. Co., 19 Fed. Rep. 56; Thomas v. Lancaster Mills, 19 C. C. A. 88, 71 Fed. Rep. 481.

12. Missouri, etc., R. Co. v. McFadden, 89 Tex. 138, 33 S. W. 853; Hernsheim v. Newport News, etc., Co. (Ky.), 35 S. W. 1115; St. Clair

a person who holds himself out as a common carrier is obligated to take employment at the current price, which is the rule of the English courts, is not adhered to in the United States, unless the carrier has a particular route between fixed termini.¹³

§ 3. Must haul cars and freight of other carriers.—Railroad companies, invested with important powers and franchises by the State, become to a certain extent public agents, and in the exercise of their calling, they are held to strict performance of the public duties enjoined upon them as a consideration for the rights and powers thus granted.¹⁴ They are thus bound to transport or haul upon their roads the cars and freight of any other railroad company, when requested so to do, and hold the same relation as a common carrier to such cars and freight that they do to ordinary freight received by them for transportation; and in case of loss are held to the same measure and character of liability as would attach in respect to any other property.¹⁵ In some states, railroad companies are required by statute to receive and haul the

v. Chicago, etc., R. Co., 80 Iowa, 304; Pittsburgh, etc., R. Co. v. Morton, 61 Ind. 539; Ruppel v. Alleghany Valley R. Co., 167 Pa. St. 166.

13. Gordon v. Hutchinson, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464; Pittsburgh, etc. R. Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682.

14. People v. New York Cent., etc., R. Co., 28 Hun (N. Y.), 543, 3 Civ. Pro. Rep. (N. Y.) 11, 9 Am. & Eng. R. Cas. 1; Messenger v. Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754; Railroad Com'r v. Portland, etc., R. Co., 63 Me. 269; State v. Railroad Co., 29 Conn. 538; Com'r v. Eastern R. Co., 103 Mass. 258; Sandford v. Catawissa, etc., R. Co., 24 Pa. St. 378; McDuffee v. Portland & R. R. Co., 52 N. H. 430; Olcott v. Fond du Lac County, 16 Wall. (U. S.) 678; Burlington, etc., R. Co. v. Spearman, 12 Iowa, 117; Bradley v. New York, etc., R. Co., 21 Conn. 294; Worcester v. Western R. Corp., 4 Metc. (Mass.) 564; Wier v. St. Paul, etc.,

R. Co., 18 Minn. 155; Rogers Locomotive, etc., Works v. Erie R. Co., 20 N. J. Eq. 379; National Docks R. Co. v. Central R. Co., 32 N. J. Eq. 755; Peik v. Chicago, etc., R. Co., 94 U. S. 179; Winona, etc., R. Co. v. Blake, 94 U. S. 180.

15. Mallory v. Tioga R. Co., 39 Barb. (N. Y.) 488; Peoria, etc. R. Co. v. Chicago, etc., R. Co., 109 Ill. 135, 50 Am. Rep. 605, 18 Am. & Eng. R. Cas. 506; Peoria, etc., R. Co. v. United States Rolling Stock Co., 136 Ill. 643, 29 Am. St. Rep. 348; New Jersey R. Co. v. Pennsylvania R. Co., 27 N. J. L. 100; Vermont, etc., R. Co. v. Fitchburg R. Co., 14 Allen (Mass.), 462, 92 Am. Dec. 785; Atchison, etc., R. Co. v. Denver, etc., R. Co., 110 U. S. 667, 16 Am. & Eng. R. Cas. 57; Rogers Locomotive, etc., Works v. Erie R. Co., 20 N. J. Eq. 379; Greene v. St. John, etc., R. Co., 22 N. B. (Can.) 252; Beers v. Wabash, etc., R. Co., 34 Fed. Rep. 244, 35 Am. & Eng. R. Cas. 646; Chicago,

cars and freight of other carriers.¹⁶ Such statutes have been held to be constitutional,¹⁷ and must be complied with, except for just cause, as where the cars are so defectively constructed as to endanger the lives or limbs of employes.¹⁸ But a railroad company is not bound to transport freight in foreign cars, when its own cars are not in use but are free to be employed in the transportation desired, or where a transfer of the freight will not be injurious to it; and it is no proof of negligence to show that such transfer of the freight was made.¹⁹

§ 4. May be compelled by mandamus.—A railroad corporation is compellable by mandamus to exercise its duties as a common carrier of freight and passengers; and the power so to compel it rests equally firmly on the ground that the duty is a public trust which, having been conferred by the state and accepted by the corporation, may be enforced for the public benefit, and upon the contract between the corporation and the State, expressed in its charter or implied by the acceptance of the franchise; and also upon the ground that the common right of all people to travel and carry upon every public highway of the State has been changed by the legislature, for adequate reasons, into a corporate franchise to be exercised solely by a corporate body for the public benefit, to the exclusion of all other persons, whereby it has be-

etc., R. Co. v. Burlington, etc., R. Co., 34 Fed. Rep. 481, 35 Am. & Eng. R. Cas. 650, note.

16. Michigan Cent. R. Co. v. Smithson, 45 Mich. 212, 1 Am. & Eng. R. Cas. 101; Texas, etc., R. Co. v. Carlton, 60 Tex. 397, 15 Am. & Eng. R. Cas. 350.

17. Rae v. Grand Trunk R. Co., 14 Fed. Rep. 401, 9 Am. & Eng. R. Cas. 470.

18. Texas etc., R. Co. v. Carlton, 60 Tex. 397, 15 Am. & Eng. R. Cas. 350.

Not entitled to extra hauling charge.—A railroad company is not entitled to demand payment of a further charge for hauling the cars, where they are loaded with goods and a charge is made for the transporta-

tion of the goods. Harrison v. Midland R. Co., 62 L. J. Q. B. 225, 68 L. T. 268, 5 R. 445.

19. Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co., 61 Fed. 160, affg. 51 Fed. 465, 51 Am. & Eng. R. Cas. 145, wherein it was also held that a refusal to so transport freight originating east of a certain meridian was not an unreasonable discrimination against another railroad company, or a denial to it of reasonable and proper facilities under the Interstate Commerce Act, although it accepts in such cars freight originating west of such meridian. McAlister v. Chicago, etc., R. Co., 74 Mo. 351, 7 Am. & Eng. R. Cas. 373. See also Connecting Carriers, chap. 17.

come the duty of the State to see to it that the franchise so put in trust be faithfully administered by the trustee.²⁰ A mandatory injunction will issue to compel a railroad company to perform its duty to the public of hauling the cars of another company.²¹ If the remedy at law is not so plain, adequate, and complete as one obtainable in equity, in the case of a continuing trespass, the party may prevent the injury by injunction, rather than wait until it is done and then look for his damages in a court of law.²² Refusal or failure of a railroad company to perform its duties as a common carrier cannot be excused for the reason that a strike on one road will be extended to the other, if it hauls the cars,²³ nor by the fact that its skilled freight-handlers have refused to work for the wages theretofore paid, when no unlawful violence on their part is shown.²⁴ A proper and usual remedy, in the case of an individual, for a wrongful refusal to receive and transport property, is an action at law for damages, the measure of which

20. People v. New York Cent., etc., R. Co., 28 Hun (N. Y.) 543, 3 Civ. Pro. Rep. (N. Y.) 11, 9 Am. & Eng. R. Cas. 1, 2 McCarthy (N. Y.) 345; Abbott v. Johnstown, etc., H. R. Co., 80 N. Y. 31, 36 Am. Rep. 572; Union Pac. R. Co. v. Hall, 91 U. S. 343; People v. Colorado Cent. R. Co., 42 Fed. Rep. 638, 45 Am. & Eng. R. Cas. 599; Railroad Com'rs v. Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208; State v. Hartford, etc., R. Co., 29 Conn. 538; *Ex parte* Atty-Gen., 17 N. B. (Can.) 667.

Although it has no schedule of prices for certain goods, a railroad company may be compelled to transport as a common carrier such goods, for instance, telegraph poles, wires, and cross-arms, leaving it free to charge for its services upon a *quantum meruit*. Cumberland Teleph. & Teleg. Co. v. Morgan's L. & T. R. Co., 51 La. Ann. 29, 13 Am. & Eng. R. Cas. N. S. 71, 24 So. 803.

Although the shipper could recover damages for failure to receive and ship the goods, the com-

pany may be compelled to transport the freight offered for shipment, as the shipper is entitled to the transportation of his freight and not the payment of money, and the latter would not furnish an adequate remedy. *Id.*

21. Chicago, etc., Ry Co. v. Burlington, etc., Ry. Co., 34 Fed. Rep. 481, 35 Am. & Eng. R. Cas. 650.

22. Payne v. Kansas & A. V. R. Co. (C. C. W. D., Ark.), 46 Fed. Rep. 546, 47 Am. & Eng. R. Cas. 235; Rogers Locomotive, etc., Works v. Erie R. Co., 20 N. J. Eq. 379; Butchers', etc., Stock-Yards Co. v. Louisville, etc., R. Co., 67 Fed. Rep. 35; Baltimore, etc., R. Co. v. Pennsylvania R. Co., 18 Am. & Eng. R. Cas. 511.

23. Chicago, etc., Ry. Co. v. Burlington, etc., Ry. Co., 34 Fed. Rep. 481, 35 Am. & Eng. R. Cas. 650.

24. People v. New York Cent., etc., R. Co., 28 Hun (N. Y.), 543, 3 Civ. Pro. Rep. (N. Y.) 11, 9 Am. & Eng. R. Cas. 1, rev'd 63 How. Pr. (N. Y.) 291.

is the difference between the value thereof at the place where it was tendered to be transported, and its value at the place of destination, less the expenses of carriage.²⁵

§ 5. When failure or refusal to carry is legally excusable.—

A common carrier of goods is not under obligation to accept and carry all personal property that may be offered to it. Its duty is limited to accepting and carrying property of such kinds, to and from such places, as it publicly professes and undertakes, or is accustomed, to carry, and has the facilities for so doing.²⁶ If it has never assumed or offered to carry chattels of a certain class, except upon special terms exempting it from all the important duties and liabilities of a common carrier, it cannot be made amenable in the character of a common carrier as to such prop-

25. People v. New York, etc., R. Co., 22 Hun (N. Y.), 533.

26. Pfister v. Central Pac. R. Co., 70 Cal. 169, 59 Am. Rep. 404, 27 Am. & Eng. R. Cas. 246, holding that money to the amount of \$90,000 is not "luggage," which a railroad company is compelled to carry with or for a passenger, and that the company may insist that the money shall go *via* an express company, for which, under a special contract, the railroad company furnishes facilities. The court, in that case, said: "That class of carriers known as 'transfer companies,' engaged in receiving and transferring the baggage of passengers to and from public conveyances by land and water, are under no obligation to accept and carry ordinary merchandise. A parcel delivery express company need not receive and deliver hay, lumber, or other articles too bulky, heavy, or otherwise inconvenient to handle and transfer by its usual facilities. In other words, the duty of the carrier is confined, as is provided by our Code, to accepting and carrying property of a kind that he undertakes or is accustomed to carry."

"A person may profess to carry a particular description of goods only, for instance cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to and from intermediate points. Still, until he retracts, every individual (provided he tenders the money at the time and there is room in the conveyance) has a right to call upon him to receive and carry goods according to his public profession." Johnson v. Midland R. Co., 4 Exch. 367, 6 Railw. Cas. 61, 1 Ry. & C. T. Cas. 16.

Carrier may restrict or limit its traffic.—If a railroad company does not hold itself out as a common carrier of coal, it is not obliged to carry coal from station to station or for coal merchants, and may restrict its coal traffic to the carriage of coal for collier owners, from the pit's mouth to stations where such collier owners have their depots. Oxlade v. North Eastern R. Co., 1 C. B. N. S. 454, 87 E. C. L. 454, 15 C. B. N. S.

erty.²⁷ The carrier may determine by public announcement or profession the kind of goods it will carry, the conveyances to be used, and the manner and time for transportation, the conditions fixed being such as are just and reasonable, and treating all alike.²⁸ It may make reasonable rules and regulations for the reception, carriage, and delivery of freight, including the classification and suitable preparation of articles for shipment.²⁹ It may legally refuse to receive goods, if it does not carry to the place to which the shipper wishes to ship the goods;³⁰ or, if they are offered at a time unreasonably long before the accustomed or appointed time for departure of its conveyance.³¹ The carrier may require that freight be delivered to it at a prescribed time prior to the departure of a train, reasonably sufficient to enable it to make up its train and prepare the goods for shipment, and may refuse goods not offered at a reasonable time before the departure of the train.³² It may refuse to accept or carry goods not offered at a proper place or to a proper person, such as at its established office, or regular station or depot, or to its appointed or authorized agent.³³ It

680, 109 E. C. L. 680, 9 W. R. 272,
3 L. T. N. S. 671. See Thomas v.
North Staffordshire R. Co., 3 Ry. &
C. T. Cas. 1, 21 Sol. Jour. 183.

27. Lake Shore, etc., R. Co. v. Perkins, 25 Mich. 329, 12 Am. Rep. 275, so held, in a case for a refusal to carry live stock. See also Michigan Southern R. Co. v. McDonough, 21 Mich. 165. The general rule, however, as held elsewhere, is that the responsibility of a railroad company which receives live stock for transportation, unless limited by special contract, is that of a common carrier. Kansas Pac. R. Co. v. Nichols, 9 Kan. 235. See also cases cited under § 2, chap. 18.

28. Oxlade v. North Eastern R. Co., 1 C. B. N. S. 454, 87 E. C. L. 454, 15 C. B. N. S. 680, 109 E. C. L. 680, 9 W. R. 272; Garton v. Bristol, etc., R. Co., 28 L. J. C. P. 158, 5 C. B. N. S. 669; Bouker v. Long Island R. Co., 89 Hun (N. Y.), 202, 35 N. Y. Supp. 23, 25.

29. Chicago, R. I. & P. Ry. Co. v. Colby (Neb.), 96 N. W. 145.

30. Pitlock v. Wells, Fargo & Co., 109 Mass. 452.

31. Pickford v. Grand Junction R. Co., 12 M. & W. 766; Lane v. Cotton, 1 Ld. Raym. 652; Story, Bail. § 508.

32. Palmer v. London, etc., R. Co., L. R. 1, C. P. 588; Lane v. Cotton, 1 Ld. Raym. 652; Garten v. Bristol, etc., R. Co., 28 L. J. C. P. 306.

33. Cronkite v. Wells, 32 N. Y. 247; Louisville, etc., R. Co. v. Flanagan, 113 Ind. 488, 3 Am. St. Rep. 674, 32 Am. & Eng. R. Cas. 532; Kansas City etc., R. Co. v. Lilly (Miss.), 8 So. 644, 45 Am. & Eng. R. Cas. 379; Kellogg v. Suffolk, etc., R. Co., 100 N. C. 158, 35 Am. & Eng. R. Cas. 529; Land v. Wilmington, etc., R. Co., 104 N. C. 48, 40 Am. & Eng. R. Cas. 18; Chicago, etc., R. Co. v. Flagg, 43 Ill. 364, 92 Am. Dec. 133; State v. New Haven, etc., R. Co., 41 Conn. 134; St. Louis etc., R. Co. v. Lee, 69 Ark. 584, 65 S. W. 99.

may lawfully refuse to receive goods if they are improperly or defectively packed, insufficiently secured or addressed, in a damaged state, or otherwise not properly prepared for shipment, or in an unfit condition for carriage, or in a condition necessarily involving extra care and risk in their shipment.³⁴ It may lawfully refuse to receive or carry goods of an explosive or dangerous character such as dynamite, nitro-glycerine, vitriol, etc.;³⁵ or goods which the law prohibits it from carrying, such as intoxicating liquors.³⁶ It has a right to demand an examination and to be made acquainted with the contents of packages, where there is reasonable ground for believing that they are of a dangerous character; but, in the absence of reasonable grounds for suspecting them to be of a dangerous character, it cannot compel the owner or person offering them for shipment to disclose their nature.³⁷ The fact that its route is exposed to extraordinary danger at the time of shipment and the goods would be liable to exposure to the fury of a mob, destruction by a popular outbreak, or capture by hostile military forces, will sufficiently excuse a refusal to receive and carry goods.³⁸ A road so under military control of the government, transporting troops and munitions of war, as not to be in free exercise of its franchise, is not liable as a common carrier for refusing to receive freights for transportation.³⁹ But the car-

34. Elgin, etc., Ry. Co. v. Bates Mach. Co., 98 Ill. App. 311; Union Express Co. v. Graham, 26 Ohio St. 595; Fitzgerald v. Adams Express Co., 24 Ind. 447, 87 Am. Dec. 341; Missouri Pac. R. Co. v. Weissman, 2 Tex. Civ. App. 86; Hart v. Baxendale, 16 L. T. N. S. 390, 6 Exch. 769, 16 Jur. 126; Munster v. South Eastern R. Co., 4 C. B. N. S. 676, 93 E. C. L. 676, 27 L. J. C. P. 308.

35. Nitro-glycerine Case, 15 Wall. (U. S.) 524; Boston, etc., R. Co. v. Shanly, 107 Mass. 568, 12 Am. L. Reg. N. S. 500; Farrant v. Barnes, 11 C. B. N. S. 553, 103 E. C. L. 553; Williams v. East India Co., 3 East, 192; Brass v. Maitland, 6 El. & Bl. 471, 88 E. C. L. 471. The carrier has a right of action against a shipper for any damage resulting from the

explosion of such articles shipped without notice of their character. Id.

36. State v. Goss, 59 Vt. 266, 59 Am. Rep. 706, 30 Am. & Eng. R. Cas. 118; Milwaukee Malt Ext. Co. v. Chicago, etc., R. Co., 73 Iowa, 98.

37. Nitro-glycerine Case, 15 Wall. (U. S.) 524; Norfolk, etc., R. Co. v. Irvine, 84 Va. 553, 85 Va. 217, 37 Am. & Eng. R. Cas. 227.

38. Edwards v. Sherratt, 1 East 604; Pearson v. Duane, 4 Wall. (U. S.) 605, holding that the master of a vessel would be justified in refusing passage to a passenger proceeding to a place under a revolutionary government, by which he has been sentenced to death in case of his return. Compare Illinois Cent. R. Co. v. Schwartz, 13 Ill. App. 490.

39. Phelps v. Illinois Cent. R. Co.,

rier is liable for delay in forwarding goods accepted for shipment, although the road was under military control, the probability of delay on account of blockades on the side tracks and other hindrances being known to the officers of the company at the time of accepting the goods.⁴⁰ While the corporation might have limited its liability, yet as it had not done so plaintiff was entitled to recover.⁴¹ When the goods offered for shipment are perishable, if the carrier has not the means for immediate transportation, he may refuse to receive the goods;⁴² but, as to other goods, this rule does not apply, and where the carrier has not the facilities for immediate transportation, owing to unexpected accumulation of business or otherwise, it must receive the goods to be forwarded as soon as its facilities will permit; and it is excusable only for reasonable delay in transportation.⁴³ The carrier may also require prepayment of its freight charges and may refuse to carry the goods unless they are paid, when demanded.⁴⁴ The rule, however, may be otherwise, where a different usage, long established, has prevailed.⁴⁵ Generally, it may be said that if a common carrier has reasonable grounds for not receiving goods offered to it for transportation, it may do so; but if it once receives them, it will be considered as waiving its right to refuse them and as accepting them in the usual way, and becomes an insurer and subject to all the liabilities of a common carrier, in the absence of special limitation of its liability in the contract of carriage.⁴⁶

§ 6. May demand prepayment of charges.—A carrier may require prepayment of freight charges from any shipper, at its

94 Ill. 548; Illinois Cent. R. Co. v. Phelps, 4 Ill. App. 238. See also Illinois Cent. R. Co. v. Homberger, 77 Ill. 457, where the delivery was held not to have been completed so as to make the company liable.

40. Illinois Cent. R. Co. v. Cobb, 64 Ill. 128.

41. Illinois Cent. R. Co. v. Schwartz, 13 Ill. App. 490.

42. Tierney v. New York Cent., etc., R. Co., 76 N. Y. 305, affg. 10 Hun (N. Y.), 569, 67 Barb. (N. Y.) 538.

43. See Facilities for transportation, § 8, *post*.

44. See May demand prepayment of charges, § 6, *post*.

45. See May demand prepayment of charges, § 6, *post*.

46. Porcher v. North Eastern R. Co., 14 Rich. L. (S. C.) 181; The David & Caroline, 5 Blatchf. (U. S.) 266; Hannibal, etc., R. Co. v. Swift, 12 Wall. (U. S.) 262; Pickford v. Grand Junction R. Co., 12 M. & W. 766; Great Northern R. Co. v. Shepherd, 8 Exch. 30, 14 Eng. L. & Eq. 367.

choice, and may lawfully refuse to receive freight from a receiving carrier without such prepayment, although it does not require it from others; but notice of such requirement should be given to the shipper or receiving carrier.⁴⁷ Whether a railroad company can excuse a refusal to accept and carry freight on the ground that the charges were not prepaid may depend upon its custom as to collecting charges, which is ordinarily a question for the jury.⁴⁸ Where a carrier, in an action against it for failure to carry goods delivered to it, claims that its refusal was because the freight had not been paid, plaintiff may show the value of the goods, for the purpose of showing that defendant had ample security, and that there was no reason for stopping them in transit.⁴⁹ In an action against a carrier for a failure or refusal to carry it is not necessary to allege that a compensation was paid, or agreed to be paid, for carrying the goods;⁵⁰ an averment that the plaintiff was ready and willing to pay is sufficient;⁵¹ but in New York it is held that the complaint must state facts necessary to show a complete cause of action, or it is demurrable,⁵² and in Texas it is held that plaintiff need not aver a tender of freight charges.⁵³ In order to maintain an action against a carrier for refusing to receive and carry, the plaintiff must, however, prove a tender of the customary freight charges, or a readiness and willingness to pay according to the course and usage of the company, whether that required them to be paid in advance or not.⁵⁴ An excessive demand by the carrier for freight charges relieves the consignee of the necessity of tendering any sum for such charges before bringing suit.⁵⁵ A railroad employe does not waive prepayment of freight charges

47. Randall v. Richmond & D. R. Co., 108 N. C. 612, 13 S. E. 137, 49 Am. & Eng. R. Cas. 75; Missouri Pac. R. Co. v. Weissman, 2 Tex. Civ. App. 86; Fitch v. Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 33; Batson v. Donovan, 4 B. & Ald. 28, 6 E. C. L. 376; Barnes v. Marshall, 18 Q. B. 785, 83 E. C. L. 785; Wyld v. Pickford, 8 M. & W. 443; Bastard v. Bastard, 2 Show. 81.

48. Reed v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 176.

49. Leach v. New York, etc., R.

Co., 89 Hun (N. Y.), 377, 35 N. Y. Supp. 305.

50. Hall v. Cheney, 36 N. H. 26.

51. Pickford v. Grand Junction R. Co., 8 M. & W. 372, 5 Jur. 731, 2 Ry. Cas. 592.

52. Bristol v. Rensselaer, etc., R. Co., 9 Barb. (N. Y.) 158.

53. Central, etc., R. Co. v. Morris, 68 Tex. 49, 28 Am. & Eng. R. Cas. 50.

54. Galena, etc., R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574; Pickford v. Grand Junction R. Co., *supra*.

55. Moran Bros. Co. v. Northern P. R. Co., 19 Wash. 266, 53 Pac. 49.

before delivery of the cars by responding "all right" to a statement by the consignee that he would give a disposal order for the cars and would send the amount of the freight whenever he got the expense notices and knew the amount.⁵⁶ Failure to tender or pay freight charges, where they are not demanded, will not prevent a recovery for failure to provide a car for shipment at the time agreed upon.⁵⁷ If a railroad company receives freight and undertakes to carry it without exacting prepayment of the freight charges, it is bound to exercise the same care in carrying, storing, and holding it as if the charges had been prepaid.⁵⁸ And where a carrier has informed the owner that goods would be held until the freight charges are prepaid, but afterwards ships the goods without prepayment, and without notice to the owner, it is liable for any loss that may occur by reason of its manner of shipping.⁵⁹ If a carrier does not demand prepayment, it cannot sue for the freight charges until delivery of or an offer to deliver the goods.⁶⁰

§ 7. When carrier may select mode of transportation.—A common carrier who takes an article for transportation is liable for the exercise of its judgment as to the manner of carrying it, and cannot rely, in avoidance of its liability, on misrepresentations, unless they relate to matters not apparent to observation.⁶¹ A railroad company may carry on a platform car a box so large that it cannot be got into a box car, due precaution being taken to keep it from getting wet.⁶² In the absence of an express contract, it is the duty of the carrier to transport goods received for transportation by the usual or customary route; and for any loss caused by a departure from such route, it is liable.⁶³ When there are two customary or usual routes, as, for example, one an inside

56. *McEachran v. Grand Trunk R. Co.*, 115 Mich. 318, 73 N. W. 231, 4 Det. L. N. 879.

57. *Cleveland, etc., R. Co. v. Perishow*, 61 Ill. App. 179.

58. *St. Louis, etc., R. Co. v. Flanagan*, 23 Ill. App. 489.

59. *Campion v. Canadian Pac. R. Co.*, 43 Fed. Rep. 775.

60. *Barnes v. Marshall*, 18 Q. B. 785, 83 E. C. L. 785, 21 L. J. Q. B. 388.

61. *New Jersey R. Co. v. Pennsyl-*

vania R. Co., 27 N. J. L. (3 Dutch.) 100.

62. *Burwell v. Raleigh, etc., R. Co.*, 94 N. C. 451, 25 Am. & Eng. R. Cas. 410.

63. *Merchants' Despatch Transp. Co. v. Kahn*, 76 Ill. 520, where the company was held liable for the loss of goods by fire while being transported by another route than the most usual and direct one; *Express Co. v. Kountze*, 8 Wall. (U. S.) 342, where the company selected the most

or canal route, the other an outside or ocean route, the carrier may choose the route, without incurring increased liability.⁶⁴ But the carrier is liable for a loss of goods proved to have been occasioned by a want of due care, or by disobedience to instructions, notwithstanding exceptions in the bill of lading or receipt.⁶⁵ Where the contract gives the carrier an option between two modes of transportation, the option must be exercised with a view to the owner's interest.⁶⁶ Ordinarily the contract for transportation is presumed to be by the carrier's usual or customary route.⁶⁷

§ 8. Facilities for transportation.—The rule of the common law was that a carrier, having the room and means of carrying the goods, in the absence of special contract, was obliged to receive them, and not otherwise; and, applying this rule, it has been held that press of business would excuse failure to carry goods in ordinary time, even when such press had existed for a long time and was known by the carrier when it received the goods, even though the carrier did not notify the shipper.⁶⁸ But as regards railway companies and similar companies, which perform under their

hazardous route of two; Crosby v. Fitch, 12 Conn. 410; Smith v. Whitman, 13 Mo. 352; Powers v. Davenport, 7 Blackf. (Ind.) 497; Hand v. Baynes, 4 Whart. (Pa.) 204; Davis v. Garrett, 6 Bing. 716.

Not bound to send goods on because of temporarily obstructed route.—A carrier whose established route was by rail to Philadelphia and by water to Boston, was held not bound to send goods on by rail from Philadelphia when there was an obstruction in the water communication temporarily. Empire Transportation Co. v. Wallace, 68 Pa. St. 302, 8 Am. Rep. 178, 1 Am. Ry. Rep. 443.

In order to constitute constructive delivery of goods sold, they must be forwarded through the usual channels, and channels supposed to be in contemplation of the purchaser. Comstock v. Affoelter, 50 Mo. 411.

64. White v. Ashton, 51 N. Y. 280; Hinckley v. New York Cent., etc., R. Co., 56 N. Y. 429; Simkins v. Steamboat Co., 11 Cush. (Mass.) 102.

65. Express Co. v. Kountze, 8 Wall. (U. S.) 342; Simon v. The Fung Shuey, 21 La. Ann. 363; Lamb v. Camden, etc., R. Co., 2 Daly (N. Y.), 454.

66. Blitz v. Union Steamboat Co., 51 Mich. 558.

67. Hales v. London, etc., R. Co., 4 B. & S. 66, 116 E. C. L. 66, 11 W. R. 856; Empire Transp. Co. v. Wallace, 68 Pa. St. 302, 8 Am. Rep. 178.

68. Lovett v. Hobbs, 2 Show. 127; Riley v. Horne, 5 Bing. 217; Johnson v. Midland R. Co., 4 Exch. 367, 6 Ry. Cas. 61, 18 L. J. Exch. 366, "a common carrier is not bound to supply more carts than he is in the habit of supplying because more goods are tendered than usual;" Peet v. Chicago, etc., R. Co., 20 Wis. 594.

charters and franchises certain public functions, the rule is qualified, and they are held bound to have all reasonable and necessary facilities and appliances for conducting and carrying on in a prompt, skillful and careful manner the business in which they are engaged, and for transporting without unreasonable delay the usual and ordinary quantity of freight offered them for transportation, or which might reasonably and ordinarily be expected; and are liable in damages for unreasonable delay in carrying due to a want of such facilities.⁶⁹ This rule has been held to apply to furnishing refrigerator cars, although the company did not own any such cars, but had an arrangement with the owners of such cars whereby it could secure them for the use of shippers when needed;⁷⁰ and, under a statute, to granting facilities for the erection of an elevator at one of the stations of a railroad to persons engaged in the business of receiving, handling and shipping grain over the railroad;⁷¹ and to furnishing facilities for loading and unloading live stock;⁷² and to providing additional tracks and warehouses to accommodate increased business.⁷³ But railroad companies are not bound to be prepared for unusual and extraordinary contingencies which no ordinary prudence or foresight could reasonably anticipate, nor for an unusual influx of business which is not reasonably to be expected, nor for an accidental or extraordinary increase in the public demand for transportation which occurs without the fault of the company; they are, however, bound to provide ample facilities for transportation under all ordinary circumstances and conditions, and such as are adequate to business reasonably to be expected.⁷⁴ But it is no de-

69. Michigan Cent. R. Co. v. Burrows, 33 Mich. 6; Branch v. Wilmington, etc., R. Co., 77 N. C. 347; Chicago, etc., R. Co. v. Thrapp, 5 Ill. App. 502; Illinois Cent. R. Co. v. Cobb, 64 Ill. 128; Redman Rys. (2nd ed.) 14; Wallace v. Great Southern, etc., R. Co., 17 W. R. 464.

70. International, etc., R. Co. v. Young, (Tex. Civ. App.), 28 S. W. 819.

71. State v. Missouri Pac. R. Co., 29 Neb. 550, 42 Am. & Eng. R. Cas. 261; State v. Republican Valley R. Co., 17 Neb. 647, 52 Am. Rep. 424,

22 Am. & Eng. R. Cas. 500. But see State v. Chicago, etc., R. Co., 36 Minn. 402, wherein such a statute was held unconstitutional.

72. Stock Yards Co. v. Louisville, etc., R. Co., 67 Fed. Rep. 35, 31 U. S. App. 232.

73. Cobb. v. Illinois Cent. R. Co., 38 Iowa, 601, whether the company has done all that is reasonable to accommodate its increased business, by increasing the number of its tracks and warehouses, is a question for the jury in a given case.

74. N. Y.—Wibert v. New York,

fense to an action against a railway company, for its breach of an express contract to furnish cars for transportation of cattle at a given date, that the shipment of cattle over its line at the agreed time was so great that it did not have enough cars to enable it to comply with the contract;⁷⁵ and in the absence of contract, when the property consists of live stock, which are peculiarly liable to suffer injury by being delayed, an unusual pressure of business will not excuse the carrier unless a very strong case is made out, it being its duty to give such property the preference in transportation.⁷⁶ That press of business or other similar causes prevent the carrier from furnishing proper facilities is a matter of affirmative defense.⁷⁷ In the absence of special contract there is no absolute duty resting upon a railroad carrier to deliver the goods intrusted

etc., R. Co., 12 N. Y. 245, affg. 19 Barb. (N. Y.) 36, 29 Barb. (N. Y.) 635, cited 2 Sweeny (N. Y.), wherein it is held that the rule is true, notwithstanding the general railroad act of 1850, c. 140, § 36, requiring such companies to furnish sufficient facilities for the transportation of all freight offered; Scoville v. Griffith, 12 N. Y. 509; Blackstock v. New York, etc., R. Co., 20 N. Y. 50, 1 Bosw. (N. Y.) 77, 75 Am. Dec. 372.

Del.—Truax v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 233.

Ill.—Cobb v. Illinois Cent. R. Co., 88 Ill. 394; Galena, etc., R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574.

Ind.—Pittsburgh, etc., R. Co. v. Racer, 5 Ind. App. 209.

Mich.—Michigan Cent. R. Co. v. Burrows, 33 Mich. 6.

Mass.—Thayer v. Burchard, 99 Mass. 508.

Miss.—Vicksburg, etc., R. Co. v. Ragsdale, 46 Miss. 458, 1 Am. Ry. Rep. 407.

Mo.—Faulkner v. South. Pac. R. Co., 51 Mo. 311, 3 Am. Ry. Rep. 293; Dawson v. Chicago, etc., R. Co., 79 Mo. 296, 18 Am. & Eng. R. Cas. 521; Ballentine v. North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315.

Tenn.—East Tennessee, etc., R. Co. v. Nelson, 1 Coldw. (Tenn.) 276.

Tex.—Houston, etc., R. Co. v. Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421.

U. S.—Helliwell v. Grand Trunk R. Co., 10 Biss. (U. S.) 170, 7 Fed. Rep. 68; Bussey v. Memphis, etc., R. Co., 4 McCrary (U. S.), 405, 13 Fed. Rep. 330; Thomas v. Wabash, etc., R. Co., 63 Fed. Rep. 200; Marine Ins. Co. v. St. Louis, etc., R. Co., 41 Fed. Rep. 643, 43 Am. & Eng. R. Cas. 79.

Compare Louisville, etc., R. Co. v. Touart, 97 Ala. 514, 55 Am. & Eng. R. Cas. 600.

75. Gulf City, etc., R. Co. v. Hodge (Tex. Civ. App.), 30 S. W. 829; Gulf, etc., R. Co. v. Hume, 6 Tex. Civ. App. 653, 87 Tex. 211, 27 S. W. 110; Cross v. McFadden, 1 Tex. Civ. App. 461; International, etc., R. Co. v. Anderson, 3 Tex. Civ. App. 8. See Liability for delay, chap. 8, § 1.

76. Gulf, etc., R. Co. v. McAuley (Tex. Civ. App.), 26 S. W. 475; International, etc., R. Co. v. Lewis (Tex. Civ. App.), 23 S. W. 323. See Liability for delay, Perishable freights, chap. 8, § 5.

77. Chicago, etc., R. Co. v. Wolcott, 141 Ind. 267.

to it within what, under ordinary circumstances, would be a reasonable time. Not only storms and floods and other natural causes may excuse delay, but also the conduct of men may do so. An incendiary may burn down a bridge, a mob may tear up the tracks, or disable the rolling stock, or interpose irresistible force or overpowering intimidation, or the unlawful and violent conduct of strikers, after they have left the employ of the company, may cause delay in the transportation of property, and in such cases the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles thus interposed, and to forward the goods to their destination.⁷⁸ So, when the road is under military control,⁷⁹ or when the carrier is without fault,⁸⁰ or there is a wreck on the track.⁸¹ It is the duty of the carrier, when unable in any case, from any cause, to transport goods offered for carriage, to give notice to the consignor before accepting the goods, so that the latter may take a different course if he desire to,⁸² but whether such an obligation arises, where the difficulty or obstacle occurs on a connecting line, instead of on the carrier's own line, has been questioned.⁸³ If its inability to transport goods is known to the carrier or its agents at the time it accepts the goods, it is liable and is not excusable for delay, unless the shipper was notified or consented to the delay;⁸⁴ but the rule is held otherwise in some

78. Geismar v. Lake Shore, etc., R. Co., 102 N. Y. 563, 55 Am. Rep. 837, revg. 34 Hun (N. Y.), 50; Louisville, etc., R. Co. v. Queen City Coal Co. (Ky.), 35 S. W. 626. See cases cited Liability for delay, Strikes by employes, chap. 8, § 12.

79. Illinois Cent. R. Co. v. McClellan, 54 Ill. 58, 5 Am. Rep. 83; Illinois Cent. R. Co. v. Phelps, 4 Ill. App. 238. See also Excuses for delay generally, chap. 8, § 8.

80. Michigan Cent. R. Co. v. Burrows, 33 Mich. 6; International, etc., R. Co. v. Hynes, 3 Tex. Civ. App. 20; Taylor v. Great Northern R. Co., L. R. 1 C. P. 385.

81. Newport News, etc., R. Co. v. Mercer, 96 Ky. 475.

82. Quinn v. Wabash, etc., R. Co., 20 Mo. App. 453; Faulkner v. Southern Pac. R. Co., 51 Mo. 311; Illinois Cent. R. Co. v. Cobb, 64 Ill. 140; Great Western R. Co. v. Burns, 60 Ill. 284; Helliwell v. Grand Trunk R. Co., 10 Biss. (U. S.) 170, 7 Fed. Rep. 68; Bussey v. Memphis, etc., R. Co., 13 Fed. Rep. 330.

83. Peet v. Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446; McCarthy v. Terre Haute, etc., R. Co., 9 Mo. App. 159. See also cases cited in note 84 following.

84. International, etc., R. Co. v. Anderson, 3 Tex. Civ. App. 8, and other cases cited, *supra*. Tierney v. New York Cent., etc., R. Co., 76 N. Y. 305, affg. 10 Hun (N. Y.), 569,

jurisdictions.⁸⁵ A railroad company has no right to discriminate and store freight received for transportation from one person, on the ground that it has not facilities to forward it, and in the meantime forward new and subsequent freight received from another,⁸⁶ but it may discriminate in favor of perishable goods, when there is an unusual press of business.⁸⁷

§ 9. Special contracts for means of transportation.—A common carrier is bound, by reason of its general relation to the public, to furnish suitable cars on reasonable notice whenever it can do so with reasonable diligence, without jeopardizing its other business. And, when sued for a failure to furnish cars on request, on it is the burden of excusing itself.⁸⁸ But a carrier is relieved from liability for a failure to furnish cars, when it has sufficient cars to meet all ordinary demands, and an unusual demand has put all its cars in use, rendering it unable to furnish those demanded, and it furnishes them as soon as it can with due regard to the rights of other shippers, who had previously or at the same time demanded transportation.⁸⁹ Damages may be recovered for the breach of a special verbal contract to furnish cars for transportation at a specified time;⁹⁰ and when a carrier is informed of the special circumstances making it advantageous to

67 Barb. (N. Y.) 538. See also Wibert v. New York, etc., R. Co., 12 N. Y. 245, 19 Barb. (N. Y.) 36.

85. Peet v. Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446, "if the shipper has not all the information he desires as to the causes or circumstances which will expedite or delay the delivery of the goods, it would be more reasonable that he should make inquiry than to impose on the company or its agents the duty of giving unasked a statement of such circumstances." Galena, etc., R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574; Thayer v. Burchard, 99 Mass. 508.

86. Great Western R. Co. v. Burns, 60 Ill. 284; Truax v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 233. See also Discrimination in charges or facilities, § 15, *post*. Acheson v. New

York Cent., etc., R. Co., 61 N. Y. 652, where the goods were not sent forth in their regular order the question was one of fact for the jury.

87. Tierney v. New York Cent., etc., R. Co., 76 N. Y. 305; Peet v. Chicago, etc., R. Co., 20 Wis. 594. See Swetland v. Boston & Albany R. Co., 102 Mass. 276, holding that the carrier is not bound to give such preference. See also Liability for delay, Perishable freights, chap. 8, § 5.

88. Ayers v. Chicago, etc., Ry. Co., 71 Wis. 372, 5 Am. St. Rep. 226, 35 Am. & Eng. R. Cas. 679.

89. Pittsburgh, etc., R. Co. v. Racer, 5 Ind. App. 209, 31 N. E. 853.

90. Missouri, etc., R. Co. v. Graves (Tex. Civ. App.), 16 S. W. 102; Cross v. Graves, 4 Tex. Civ. App. Cas. § 99.

the plaintiff to get his produce to market on a certain day, and agrees to furnish cars to be loaded in time to be forwarded to such market on that day, which contract he fails to perform, the plaintiff is entitled to recover such special damages as actually result from the failure to get the produce to market on that day.⁹¹ Where there is a special contract, the obligations of the carrier are determined by the provisions of the contract itself, and when the carrier is not required by the contract or order to furnish the cars at any certain hour of the day named, it may furnish them at any hour of the day it sees fit.⁹² A station agent for a railroad company has authority to make a special contract binding on the company, to furnish cars at the station for shipment on a specified day.⁹³ Where there is a special contract and an absolute engagement to furnish cars or deliver goods at a certain time, the carrier is held to a strict performance of the contract, and unusual pressure of business, temporary obstruction or other causes, or even unavoidable accident or absolute impossibility by reason of an act of God or otherwise, will not be a defense to an action for failure or breach of the contract, unless allowable expressly or by implication from the terms of the contract itself.⁹⁴ Where a railroad company contracted to furnish a shipper a certain number of cars of a certain kind at a specified time, but it was understood that such order was merely an expression of preference, and that the shipper would accept any variety of cars he could get, if the

91. *Hamilton v. Western North Carolina R. Co.*, 96 N. C. 398, 30 Am. & Eng. R. Cas. 1. revg. 24 S. W. 915, 6 Tex. Civ. App. 653. See also *Authority of Carrier's agents*, chap. 11.

92. *McGrew v. Missouri Pac. R. Co.*, 109 Mo. 582; *Morehouse v. Texas Trunk R. Co.*, 4 Tex. Civ. App. Cas. § 266, also holding that the date of the contract is immaterial, and although the declaration may allege a contract made on a particular day, it is error to exclude proof of a contract made on a different day.

93. *Easton v. Dudley*, 78 Tex. 236, 45 Am. & Eng. R. Cas. 340, 14 S. W. 583; *McCarthy v. Gulf, etc., R. Co.*, 79 Tex. 33, 15 S. W. 164; *Missouri, etc., R. Co. v. Graves* (Tex. Civ. App.), 16 S. W. 102; *Gulf, etc., R. Co. v. Hume* (Tex.), 27 S. W. 110,

kind he ordered were not obtainable, the company was not absolved from the duty to furnish cars at the required time by inability to obtain the precise kind ordered.⁹⁵ A carrier is not relieved from liability for breach of its contract to furnish cars, though at the date of and during the time covered by the contract it did not have or own any cars.⁹⁶ In order to make a contract binding on the carrier there must be a corresponding obligation on the part of the shipper to perform the contract on his part, a mutuality of agreement, a consideration for the carrier's agreement in the payment of money, or the expenditure of labor, or the performance of some service, on the faith of the contract.⁹⁷ So, of a contract or option to transport goods within the time and quantity and to whatever place desired by the shipper, the shipper having his election not to require the transportation of any, or the privilege of determining the place.⁹⁸ Whether or not a special contract exists must often be determined from the circumstances of a given case, and the evidence must be sufficient to establish all the essential elements of such an agreement.⁹⁹ There is a contract of carriage, on a sufficient consideration, where defendant railroad company, to induce plaintiff to buy ice, promised him to transport it from where it was to a certain point for a certain amount per ton, and on the faith of that promise he bought it.¹ An oral contract to provide transportation on a certain day is not,

95. Nichols v. Oregon Short Line R. Co. (Utah), 66 Pac. 768.

96. Baxley v. Tallassee, etc., R. Co. (Ala.), 29 So. 451.

97. Chicago, etc., R. Co. v. Dane, 43 N. Y. 240; Riggins v. Missouri River, etc., R. Co., 73 Mo. 598, 9 Am. & Eng. R. Cas. 242; Tilley v. Cook County, 103 U. S. 155; Louisville, etc., R. Co. v. Flanagan, 113 Ind. 488, 3 Am. St. Rep. 674, 32 Am. & Eng. R. Cas. 535; Laboyteaux v. Swigart, 103 Ind. 596; Pittsburgh, etc., R. Co. v. Hollowell, 65 Ind. 188; Missouri Pac. R. Co. v. Texas, etc., R. Co., 31 Fed. Rep. 864.

The mere promise by a carrier to ship certain freight at a certain rate does not constitute a contract on which an action can be based,

unless the shipper accepts the offer by agreeing to ship the goods at such rate. Southern Ry. Co. v. Wilcox, 99 Va. 394, 3 Va. Sup. Ct. Rep. 321, 39 S. E. 144.

98. Chicago, etc., R. Co. v. Dane, 43 N. Y. 240; Cleveland, etc., R. Co. v. Clossar, 126 Ind. 348, 22 Am. St. Rep. 593, 45 Am. & Eng. R. Cas. 275; White v. Missouri Pac. R. Co., 19 Mo. App. 400.

99. Toledo, etc., R. Co. v. Roberts, 71 Ill. 540; Reed v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 176; Truax v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 233; Baker v. Kansas City, etc., R. Co., 91 Mo. 152, 28 Am. & Eng. R. Cas. 61.

1. Bigelow v. Chicago, etc., R. Co., 104 Wis. 109, 80 N. W. 95.

after breach and damages, abrogated by the terms of a bill of lading issued when the freight was subsequently shipped, or merged in a subsequent written contract of shipment duly performed, so as to deprive the shipper of his right to recover damages for the breach.² The mere receipt of a bill of lading does not affect a prior contract, under which goods have been actually shipped and are in course of transit, without an actual consent to the change.³

§ 10. Duty to furnish facilities declared by statute.—Where a statute provides that in case of refusal by a common carrier “to take and transport any passenger or property, or to deliver the same, or either of them, at the regular or appointed time, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit,” the carrier is liable for receiving the goods of one shipper after rejecting those of a prior applicant. It is held that such a provision is “merely declaratory of the common law;” that, aside from the statute, “it would be the duty of the carrier to provide all necessary facilities and means for transporting such property as might be offered, at least to the extent that would ordinarily be expected to seek transportation by the particular line.”⁴ Under such a statute, it is sufficient to allege the refusal to furnish cars for the transportation whereby plaintiff sustained a loss, but under a statute imposing a penalty for a railway company’s refusal to transport and deliver freight, upon a written demand for the cars and the tendering of freight charges, a petition is insufficient which does not allege such facts bringing the case clearly within the terms of the statute.⁵ But a statute, which provides for treble damages for the failure of a railroad company to furnish cars for transporta-

2. Hamilton v. Western North Carolina R. Co., 96 N. C. 398, 10 Am. & Eng. R. Cas. 1; **McAbsher v. Richmond, etc., R. Co.,** 108 N. C. 344, 55 Am. & Eng. R. Cas. 324. See also **San Antonio, etc., R. Co. v. Avery,** 19 Tex. Civ. App. 235, 46 S. W. 897; **San Antonio, etc., R. Co. v. Wright,** 20 Tex. Civ. App. 136, 49 S. W. 147.

3. Farmers’ Loan & Trust Co. v. Northern Pac. R. Co. (U. S. C. C. A.

N. Y.) 120 Fed. 873, 57 C. C. A. 533, revg. 112 Fed. 829.

4. Houston, etc., R. Co. v. Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 452.

5. Galveston, etc., R. Co. v. Schmidt (Tex. Civ. App.), 25 S. W. 452.

Payment or tender of freight
when goods are offered for shipment
and cars demanded is not a condition
precedent to recovery from a carrier

tion of such property as shall within a reasonable time previous thereto be ready or be offered for transportation, was held not to apply to a failure to furnish cars at a mine for coal to be dug and hoisted after the cars are furnished.⁶ A statute requiring every railroad corporation to provide facilities for receiving and handling freight, under a penalty imposed for refusal, was held to apply, where a railroad corporation required all grain to be delivered to a particular warehouseman to store and handle, and refused to furnish cars at any other warehouse.⁷ A right of action against a carrier under a statute for refusal to furnish cars to a shipper, constituting discrimination in favor of other shippers, being for damages to property and not to person, is assignable.⁸ Under the Wisconsin statute relating to railroad companies as carriers, requiring them to furnish suitable cars, on reasonable notice, when within their power, it has been held that the complaint must aver reasonable notice, and that it was within the power of the company at any time to furnish suitable cars.⁹ A statute imposing a penalty upon railroad companies for failure to furnish freight cars, after demand therefor in writing, does not abrogate the common law right to recover from a company damages caused by its breach of a verbal contract to furnish cars.¹⁰ A railroad

for refusal to furnish cars, and for increased freights demanded after such offer of goods, where the carrier requires payment only before delivery to the consignee. Chicago, etc., R. Co. v. Wolcott, 141 Ind. 267, 61 Am. & Eng. R. Cas. 135, 39 N. E. 451.

6. Illinois, etc., R. Co. v. People, 19 Ill. App. 141; People v. Illinois, etc., R. Co., 122 Ill. 506.

7. Rhodes v. Northern Pac. R. Co., 34 Minn. 87, 21 Am. & Eng. R. Cas. 31.

8. Chicago, etc., R. Co. v. Wolcott, 141 Ind. 267, 61 Am. & Eng. R. Cas. 135, 39 N. E. 451.

9. Richardson v. Chicago, etc., R. Co., 61 Wis. 596, 18 Am. & Eng. R. Cas. 530; Ayres v. Chicago, etc., R. Co., 71 Wis. 372, 5 Am. St. Rep. 226, 35 Am. & Eng. R. Cas. 679.

10. Missouri Pac. R. Co. v. Harmonson, 4 Tex. Civ. App. Cas. § 91, 16 S. W. 539; Missouri, etc., R. Co. v. Graves (Tex. App.), 16 S. W. 102; Cross v. Graves, 4 Tex. Civ. App. Cas. § 99; Texas Pac. R. Co. v. Nicholson, 61 Tex. 491, 21 Am. & Eng. R. Cas. 133; Texas, etc., R. Co. v. Hamm, 2 Tex. Civ. App. Cas. § 490; San Antonio, etc., R. Co. v. Bailey, 4 Tex. Civ. App. Cas. § 67.

An application to a station agent for cars, under a statute requiring the application to be made to the superintendent or person in charge of transportation, is sufficient. Easton v. Dudley, 78 Tex. 239, 45 Am. & Eng. R. Cas. 340; Austin, etc., R. Co. v. Slator, 7 Tex. Civ. App. 344; McCarty v. Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164; Missouri,

company which fails to furnish sufficient accommodations, within a reasonable time, for the shipment of cattle offered to it for transportation by one who pays or satisfies the company for the freight, is liable to the shipper for all damages sustained thereby, with costs of suit, under a statute requiring such facilities to be so furnished; and the mere fact that an unusually large number of cattle are being transported over the railroad at the time the cattle are offered for shipment does not, as matter of law, excuse the company for failure to furnish a sufficient number of cars for the shipment of those offered.¹¹ The English Railway and Canal Traffic Act, which declares the duties and obligations of all public carriers and provides for the appointment of a board of commissioners to secure their enforcement, requires all railway and canal companies, according to their respective powers, to afford all reasonable facilities for receiving, forwarding, and delivering traffic, and to give no undue preference or advantage to or in favor of any person or company. This statute has been held to give power to compel a railroad company to so use and manage its stations and works, and so conduct its business, as to afford accommodations reasonably expected of it with the means at its disposal for receiving, forwarding and delivering traffic, and possibly even to the extent of determining the number of trains to be run, or the time of departure or the like, but not to compel the company to execute new or improved structural works;¹² and further that in order to induce the interference of the court on a question of "reasonable facilities" it is necessary to show a public inconvenience, and not merely an individual grievance.¹³ The statute was designed mainly to afford a remedy against undue preferences in respect to traffic and was not intended to apply to the case of a breach or neglect by the company of a public duty, which was already susceptible of redress by mandamus or indictment, and hence does not effect the common law remedies of shippers.¹⁴ It

etc., R. Co. v. Graves (Tex. App.), 16 S. W. 102. R. 464; Caterham R. Co. v. London, etc., R. Co., 26 L. J. C. P. 161, 87 E. C. L. 410.

11. Davis v. Texas & P. R. Co., 91 Tex. 505, 10 Am. & Eng. R. Cas. N. S. 301, 44 S. W. 822, revg. 42 S. W. 1008.

12. South Eastern R. Co. v. Railway Com'rs, 5 Q. B. Div. 217, 28 W.

13. Barrett v. Great Northern R. Co., 87 E. C. L. 423, 26 L. J. C. P. 83.

14. Bennett v. Manchester, etc., R. Co., 95 E. C. L. 707, 6 C. B. N. S. 707.

has been held not to apply to special contracts entered into by a railroad covering traffic beyond the limits of its own line.¹⁵

§ 11. Must furnish suitable and safe cars.—A common carrier is bound to furnish shippers suitable, safe, and secure cars in which to carry property delivered to it for transportation, and it is liable for any damages resulting from its failure to do so.¹⁶ It has been held liable, in such cases, where cattle were injured from breaking out of a door defectively fastened;¹⁷ for the death of a horse caused by falling from a car, one of the doors of which could not be closed;¹⁸ where it furnished an unsuitable car for the shipment of meal, although the shipper examined the car and failed to discover anything uncleanly;¹⁹ where a car furnished for the shipment of cattle was infected with germs of Texas fever;²⁰ for damages due to defects in a car specially adapted for the preservation of perishable property which it undertook to carry;²¹ for grain injured by its failure to provide suitable cars, though the injury occurred on the road of a connecting carrier;²² for the death of a shipper caused, while he was loading stock, by defect in a car and its appliances for loading;²³ for the damages plaintiffs were compelled to pay for the death of one of their employes, killed through the failure of defendant company to furnish a safe and proper car for plaintiff's use.²⁴ It has been held that a railway carrier is not, as a matter of law, bound to furnish refrigerator cars to carry perishable goods, and that whether it is

15. Zunz v. South Eastern R. Co., L. R. 4 Q. B. 539, 10 B. & S. 594.

16. Terre Haute, etc., R. Co. v. Crews, 53 Ill. App. 50; Lyon v. Mells, 5 East. 428; Shaw v. York, etc., R. Co., 13 Q. B. 347, 66 E. C. L. 347; The Caledonia, 43 Fed. Rep. 681, exceptions in a bill of lading do not affect the warranty of seaworthiness at the time of leaving port. See also cases cited in following notes under this section and Carriers of Live Stock.

17. Terre Haute, etc., R. Co. v. Crews, 53 Ill. App. 50.

18. Root v. New York, etc., R. Co., 83 Hun (N. Y.), 111, 63 N. Y. St. Rep. 841, 31 N. Y. Supp. 357.

19. Hunt v. Nutt (Tex. Civ. App.), 27 S. W. 1031.

20. St. Louis, etc., R. Co. v. Henderson, 57 Ark. 402, 21 S. W. 878.

21. Chicago, etc., R. Co. v. Davis, 54 Ill. App. 130, aff'd. 159 Ill. 53, 2 Am. & Eng. R. Cas. N. S. 581, 42 N. E. 382.

22. Alabama, etc., R. Co. v. Searles, 71 Miss. 744, 16 So. 255.

23. White v. Cincinnati, etc., R. Co., 89 Ky. 478, 42 Am. & Eng. R. Cas. 547.

24. Hoosier Stone Co. v. Louisville, etc., R. Co., 131 Ind. 575, 55 Am. & Eng. R. Cas. 643.

negligence not to do so is a question for the jury;²⁵ and that a common carrier not bound to ship fruit in a special car, is not chargeable with negligence in forwarding it in an ordinary car while the temperature is so low that the fruit is frozen.²⁶ To the contrary, it has been held that, where no specific agreement is shown for any specific class of cars, and nothing was said about the character of the cars to be used in the transportation of butter shipped, the railroad company is bound to provide refrigerator or other cars in which ice can be used to protect the butter when necessary, although the rate of charges named was the rate for common cars.²⁷ A common carrier which accepts and uses cars selected by the shipper assumes all risks of their defects, where there is no fraud in their selection;²⁸ and the fact that a person who delivered goods to a railroad corporation for transportation accepted a defective car for their conveyance, knowing it to be defective, does not exempt the corporation from liability as common carriers for the destruction of the goods, through the defect in the car, while in course of transportation, without proof of a distinct agreement on his part to assume the risk arising from that cause.²⁹ A special contract providing that plaintiff "shall accept the cars provided by the company," does not exempt from liability for injuries to the goods shipped resulting from defective cars.³⁰ A stipulation in the bill of lading that the shipper accepts the cars as suitable and safe is no defense, in so far as it operates to relieve the carrier from liability for failure to provide proper cars due to its negligence;³¹ nor does an agreement by a shipper of live stock

25. Udell v. Illinois Cent. R. Co., 13 Mo. App. 254.

26. Tucker v. Pennsylvania R. Co., 11 Misc. Rep. (N.Y.) 366, 65 N. Y. St. Rep. 124, 32 N. Y. Supp. 1, revg. 10 Misc. Rep. (N.Y.) 35, 62 N. Y. St. Rep. 771, 30 N. Y. Supp. 811, rehearing denied 12 Misc. Rep. (N.Y.) 117, 66 N. Y. St. Rep. 694, 33 N. Y. Supp. 93. See also Ruppel v. Alleghany Valley R. Co., 167 Pa. 166, 36 W. N. C. 210, 31 Atl. 478, 25 Pitts. L. J. N. S. 403; Spann v. Erie Boatman's Transp. Co., 11 Misc. Rep. (N.Y.) 680, 67 N. Y. St. Rep. 354, 33 N. Y. Supp. 566.

27. Beard v. St. Louis, etc., R. Co., 79 Iowa, 527, 42 Am. & Eng. R. Cas. 509, 44 N. W. 803; Beard v. Illinois C. R. Co., 79 Iowa, 518, 42 Am. & Eng. R. Cas. 445, 44 N. W. 800, 7 L. R. A. 280.

28. Chesapeake & O. R. Co. v. Radbourne, 52 Ill. App. 203.

29. Pratt v. Ogdensburg, etc., R. Co., 102 Mass. 557.

30. Wallingford v. Columbia, etc., R. Co., 26 S. C. 258, 2 S. E. 19.

31. Galveston, etc., R. Co. v. Silegman (Tex. Civ. App.), 23 S. W. 298.

whereby he assumed all risk of injury to the animals "in consequence of heat or suffocation or other ill effects of being crowded in the cars," relieve a railroad company from liability for injury in consequence of insufficient ventilation in the car furnished and used.³² A carrier cannot escape liability for injuries caused by a defect in the car by carrying its freight in cars furnished or owned by another carrier.³³ The carrier is, in the first instance, the judge of the sufficiency of his carriages; and, where there was no special contract, a railroad company was held not liable in an action by a shipper of hay to recover for standards voluntarily erected by him upon flat cars, for safety of transportation.³⁴ A different rule to that applied to railroads has been held where the carriage is by wagons, and where a shipper of perishable goods by a freighter, who examined and selected as suitable for the work the wagons before entering into the contract, he was held to be estopped from claiming that they were not suited to the business of transporting the goods.³⁵ A railroad company which adopts an unsafe method in transporting cattle cannot defend by setting up its own usage.³⁶

§ 12. Tender of goods by shipper.—Where a duty to furnish facilities for transportation rests upon the carrier, either by law or contract, the shipper must show a tender of the goods to be transported at a proper place for receiving such freight; and when goods are placed at a proper place along a line of railroad to be carried, and the company, on demand, refuses to furnish cars, a sufficient delivery has been made to give a right of action against the company.³⁷ But a carrier's announcement through its agent that it will not ship at the time contracted for is a waiver of the tender of the freight;³⁸ and where it notified the shipper that

32. Kansas City, etc., R. Co. v. Holland, 68 Miss. 351, 8 So. 516.

33. Louisville, etc., R. Co. v. Dies, 91 Tenn. 177, 18 S. W. 266; Combe v. London, etc., R. Co., 31 L. T. N. S. 613.

34. Sloan v. St. Louis, etc., R. Co., 58 Mo. 220.

35. Carr v. Schafer, 15 Colo. 48, 24 Pac. 873.

36. Leonard v. Fitchburg R. Co., 143 Mass. 307.

37. Louisville, etc., R. Co. v. Flanagan, 113 Ind. 488, 32 Am. & Eng. R. Cas. 532, 3 Am. St. Rep. 674. Compare Doty v. Strong, 1 Pin. (Wis.) 313, 40 Am. Dec. 773. See also When failure or refusal to carry is legally excusable, § 5, *ante*.

38. Texas, etc., R. Co. v. Nicholson, 61 Tex. 491, 21 Am. & Eng. R. Cas. 133.

it could not furnish cars and take the goods from a certain place from which it had agreed to transport them, it was unnecessary to make further demands, which both parties knew could not be complied with.³⁹ And where it appears that more of a tender than that made for transportation would be a mere waste of time and money, a useless expenditure of either is not required.⁴⁰ A common carrier does not become liable for refusal to transport goods for a former shipper, at a time when he has no goods for shipment, unless a tender is subsequently made;⁴¹ but the fact that the shipper does not own or have the stock when the contract is made does not affect the liability of the carrier for failure to provide cars, on the ground that its promise to do so was without consideration.⁴² To hold a carrier liable for damages from its failure to ship specified property, it must be shown that the contractual relation of shipper and carrier existed, or was sought to be established, with reference to the specific property, and proof of the company's failure to ship other property of the same kind when offered is not sufficient.⁴³ Where, in an action against a carrier, it appears from the petition that the refusal to carry was for a reason other than the non-payment of freight, a tender of freight money need not be averred.⁴⁴ An allegation that the goods were delivered according to agreement is to be construed as a delivery within a reasonable time, and an allegation of an offer and acceptance is an allegation of an acceptance before the offer was withdrawn.⁴⁵

§ 13. Illegal purpose of shipper as a defense.—A railroad company with knowledge of the fact is not exempt from liability for damages for failure to deliver freight, for the reason that the freight is to be used for an illegal purpose at the point of destination, unless that illegal purpose was the consideration of the con-

39. Bigelow v. Chicago, etc., R. Co., 104 Wis. 109, 80 N. W. 95. See Texas, etc., R. Co. v. Avery, 19 Tex. Civ. App. 235.

40. State ex rel. Cumberland Teleph. & Teleg. Co. v. Texas, etc., R. Co., 52 La. Ann. 1850, 28 So. 284.

41. Wilder v. St. Johnsbury, etc., R. Co., 66 Vt. 636, 30 Atl. 41.

42. Pittsburgh, etc., R. Co. v. Racer, 5 Ind. App. 209.

43. Little Rock, etc., R. Co. v. Conatser, 61 Ark. 560, 33 S. W. 1057.

44. Central, etc., R. Co. v. Morris, 68 Tex. 49, 28 Am. & Eng. R. Cas. 50.

45. Southern Ry. Co. v. Wilcox, 99 Va. 394, 3 Va. Sup. Ct. Rep. 321, 39 S. E. 144.

tract.⁴⁶ A person seeking to recover against a carrier on the theory that the latter's breach of contract prevented him from shipping his cattle to a certain point in time for the Sunday market cannot show any sale or market price on Sunday, or recover any damages, or the difference between the market price on Sunday and any other day, unless, by a custom of the place, payment and delivery was to be made on Monday, the statute prohibiting Sunday sales.⁴⁷ It is no excuse for the delay of a railroad company in forwarding stock that it received the stock on Sunday;⁴⁸ nor will the fact that the contract was entered into on Sunday render it invalid, where it is to be performed on Monday.⁴⁹ A carrier is not relieved from liability for loss of freight by its negligence by the fact that the freight was shipped under a contract for a special rate and rebate in violation of the Interstate Commerce Law;⁵⁰ but when an interstate railroad is sued for the breach of a contract to carry goods at a reduced rate, evidence that the contract is illegal as a violation of the Interstate Commerce Law is admissible under the general issue.⁵¹ No damages were recoverable for the breach of a contract to transport gold into a state in insurrection during the civil war, such contract being unlawful.⁵²

§ 14. Proximate cause of loss or injury.—Where a railway company agreed with a compress company to receive and transport all cotton brought by its owners to the compress company, the railway company is not liable to the owners or insurers of such cotton for its destruction by fire, during its delay to furnish transportation, such delay not being the direct and proximate cause of the loss by fire.⁵³ A railroad company is not liable for injuries

46. Waters v. Richmond & D. R. Co., 110 N. C. 338, 14 S. E. 802, 55 Am. & Eng. R. Cas. 344.

47. McAbsher v. Richmond & D. R. Co., 108 N. C. 344, 12 S. E. 892, 55 Am. & Eng. R. Cas. 345.

48. Guinn v. Wabash, etc., R. Co., 20 Mo. App. 453.

49. Baker v. Louisville, etc., R. Co., 10 Lea (Tenn.), 308.

50. Insurance Co. of North America v. Delaware Mut. Safety Ins. Co., 91 Tenn. 537, 19 S. W. 755.

51. Southern Ry. Co. v. Wilcox, 99 Va. 394, 3 Va. Sup. Ct. Rep. 321, 39 S. E. 144.

52. Gay's gold, 13 Wall. (U. S.) 358; Cantu v. Bennett, 39 Tex. 303.

53. St. Louis, etc., R. Co. v. Commercial U. Ins. Co., 139 U. S. 223, 49 Am. & Eng. R. Cas. 137, 35 L. ed. 154, 11 Sup. Ct. Rep. 554, revg. Marine Ins. Co. v. St. Louis, etc., R. Co., 41 Fed. Rep. 643, 43 Am. & Eng. R. Cas. 79, 19 Ins. L. J. 379, 695; Martin v. St. Louis, etc., R. Co., 55 Ark.

to freight resulting from exposure to mud and rain in consequence of the company's violation of its contract with the road over which the freight was shipped, to maintain a narrow guage track for the benefit of that road, as the exposure and not the failure to maintain the track is the proximate cause of the injury.⁵⁴ Loss of goods by fire while waiting for a car at a mere switch is not the proximate result of a breach of contract to furnish the car at a certain time.⁵⁵ An action against a railroad company founded on an exclusion from freight facilities can not be maintained on evidence showing that plaintiff was crowded out by those with whom the evidence does not connect the company.⁵⁶

§ 15. Discrimination in charges or facilities.—By the common law a common carrier is obliged to carry for all, without unreasonable discrimination, either in charges or the facilities of actual transportation, and equity has for a long time granted injunctions against extortionate charges and unjust discriminations in the business of common carriers.⁵⁷ A shipper has, by the common law, a right of action for unjust discrimination in freight charges.⁵⁸ It is the duty of a common carrier not to make or give any undue or unreasonable preference or advantage to or in favor of any person, and not to subject any person to undue or unreasonable prejudice

510, 19 S. W. 314, 56 Am. & Eng. R. Cas. 112.

54. St. Louis, etc., R. Co. v. Neel, 56 Ark. 279, 19 S. W. 963, 12 Ry. & Corp. L. J. 110, 55 Am. & Eng. R. Cas. 428.

55. Kansas City, etc., R. Co. v. Lilly (Miss.), 8 So. 644, 45 Am. & Eng. R. Cas. 379.

56. Spurlock v. Missouri Pac. R. Co., 93 Mo. 530, 32 Am. & Eng. R. Cas. 538.

57. Tift v. Southern Ry. Co., 123 Fed. 789; Wheeler v. San Francisco, etc., R. Co., 31 Cal. 46, 89 Am. Dec. 147, when a railroad company makes contracts beyond the limits of its own road, and holds itself out ready to do so with all, it becomes a common carrier beyond its own limits, and is bound to receive passengers

when the proper fare is paid. See Central Iron Works v. Pennsylvania R. Co., 2 Dauph. Co. Rep. 308, overruling a demurrer, interposed on the ground that equity had no jurisdiction of the matter complained of in the bill, and that the plaintiff's remedy, if any, was at law.

58. Murray v. Chicago, etc., R. Co., 92 Fed. 868, 35 C. C. A. 62, 13 Am. & Eng. R. Cas. N. S. 278, affg. 62 Fed. 24; State v. Cincinnati, etc., R. Co., 47 Ohio St. 130, 7 L. R. A. 319; Louisville, etc., R. Co. v. Wilson, 132 Ind. 517, 18 L. R. A. 105; Fitzgerald v. Grand Trunk R. Co., 63 Vt. 169, 13 L. R. A. 70, 3 Inters. Com. Rep. 633; Cook v. Chicago, etc., R. Co., 81 Iowa 551, 9 L. R. A. 764, 3 Inters. Com. Rep. 383.

or disadvantage in respect to terms, facilities, or accommodations; and the carrier will be liable for any damage arising from violation of this duty.⁵⁹ Railroad companies enjoy their franchises, which embrace much of the sovereign power of the State, in consideration of their promoting commercial intercourse, and serving the public as common carriers. They are under obligation to receive and transport, impartially, all merchandise and passengers offered to them on the terms prescribed by the grant through which they hold their franchises.⁶⁰ They must receive and transport property in the order in which it is offered, and they cannot exercise partiality in accepting the property tendered by some and rejecting that offered by others. If this rule is violated, the company is liable for all damages resulting therefrom.⁶¹ Statutes providing against any discrimination in favor of or against any shipper, either as to charges or facilities, are in force in England, and in the United States, through federal and state legislation. The provisions of the Interstate Commerce Act are considered

59. McDuffee v. Portland, etc., R. Co., 52 N. H. 430, 13 Am. Rep. 72, 2 Am. Ry. Rep. 261; Keeney v. Grand Trunk R. Co., 47 N. Y. 525, where it was shown that an illegal preference had been given to other freight, by means of which cattle were detained and injured, this was held to be a breach of the contract of transportation.

60. Rogers Locomotive, etc., Works v. Erie R. Co., 20 N. J. Eq. 379, an agreement between the directors and an express company, which transfers the whole business of carriage of merchandise over the route to the latter, and under which the railroad company refuse to carry for the general public, while the express company decline to carry subject to the liabilities of common carriers, and are at liberty to charge excessive freight, is a violation of the railroad company's obligations to the State, and may be relieved against, upon a proper bill in equity; New England Exp. Co. v. Maine Cent. R.

Co., 57 Me. 188, 2 Am. Rep. 31; Sandford v. Catawissa, etc., R. Co., 24 Pa. St. 378, 64 Am. Dec. 667, a railroad company, required by its charter to transport in the order of their reception all goods, etc., offered, "so that equal and impartial justice shall be done to all owners of property who shall pay or tender" the proper freight, has no right to grant to one individual an exclusive right of carrying "express matter" in its passenger trains; Messenger v. Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754, in the grant of a franchise of building and using a public railway, there is an implied condition that it is held as a *quasi* public trust for the benefit of the public, and the company possessed of the grant must exercise a perfect impartiality to all who seek the benefit of the trust.

61. Houston, etc., R. Co. v. Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421.

elsewhere.⁶² Under the English act, providing that no company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic in any respect whatever, it has been held to be unlawful discrimination to require a consignor to sign conditions affixed to a bill of lading which others of the same class are not required to sign;⁶³ to receive goods of certain consignors after the closing of its offices and refusing those of others offering at the same time, no unusual fact appearing as the reason for the discrimination;⁶⁴ to admit into the station the vans of certain shippers at a later hour than those of others are allowed to enter.⁶⁵ Under state statutes, which follow in their main features the English statutes, it has been held that the power of the legislature is by implication of the constitution restrained to a prohibition of those discriminations which are unjust;⁶⁶ that overcharges made in violation of a statute, prohibiting increase of freight rates over the rate charged at the time freight is tendered to a railroad, may be recovered;⁶⁷ that a railroad company

62. See *Interstate Transportation*, chap. 27.

63. *Baxendale v. Bristol, etc.*, R. Co., 11 C. B. N. S. 787, 103 E. C. L. 787. See *Davis v. Taft Vale R. Co.* (H. L.), 64 L. J. Q. B. N. S. 488, App. 542, 11 R. 189; *South Eastern R. Co. v. Railway Com'rs*, 41 L. T. N. S. 760, 28 W. R. 464, as to questions arising under the statute.

64. *Garton v. Bristol, etc.*, R. Co., 1 B. & S. 112, 101 E. C. L. 112, 30 L. J. Q. B. 273, 6 C. B. N. S. 639, 95 E. C. L. 639, 28 L. J. C. P. 306.

65. *Palmer v. London, etc.*, R. Co., L. R. 1 C. P. 588, 35 L. J. C. P. 289; *Palmer v. London, etc.*, R. Co., L. R. 6 C. P. 194, 40 L. J. C. P. 133; *Mariott v. London, etc.*, R. Co., 1 C. B. N. S. 499, 87 E. C. L. 499. See also cases cited in notes 63 and 64.

66. *Chicago, etc., R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599. The establishment permanently of less rates of freight at points of competition with other roads than is fixed

at other places for the same distance cannot be justified by showing that the rates charged at such other places are reasonably low, and that the rates charged at competing points are unreasonably low. Even if the higher rates are reasonably low, when regarded with reference to the profit on the capital invested in the road, they are not reasonable in the true sense of the term, if no satisfactory reason can be given for charging less rates for the same or greater services to persons at other stations. Such corporations should not use their power to benefit particular individuals or build up particular localities by arbitrary discriminations in their favor that may cause injury to other persons or places engaged in rival pursuits, or occupying rival positions. *Id.*

67. *Chicago, etc., R. Co. v. Wollcott*, 141 Ind. 267, 39 N. E. 451, 61 Am. & Eng. R. Cas. 135.

which charges more for a short than for a long haul, in violation of a constitutional provision, is liable to the shipper for the excess charged, as he whose money is taken from him illegally is to that extent damaged.⁶⁸ Reference must be had to the statutes of the different states to determine the effect of such decisions.⁶⁹ Actions to recover damages for discriminations in rates must be governed, as to limitations, by the statutes of the state wherein they are brought.⁷⁰ An action cannot be maintained against a carrier to enforce a payment of rebates on goods shipped, under a contract which is void as a discrimination in rates.⁷¹

§ 16. The rule does not require the same rates and facilities for all.—Independently of the statutes it is unlawful to discrimi-

68. Louisville, etc., R. Co. v. Walker, 23 Ky. Law Rep. 453, 63 S. W. 20. Under a provision that all railroad companies shall "haul freight of the same class for all persons, associations, or corporations from and to the same points and upon the same conditions, in the same manner and for the same charges, and for the same method of payment," a railroad company may charge less for hauling coal used for manufacturing purposes than it charges for hauling coal for domestic purposes, as the fact that the company receives the manufactured product for return shipment in the one case and not in the other constitutes a difference in conditions which authorizes a difference in charges. Louisville, etc., R. Co. v. Commonwealth (Ky.), 57 S. W. 508.

Under a provision that it shall be unlawful for any person or corporation owning or operating a railroad, or any common carrier, to charge or receive a greater compensation for transportation under substantially similar circumstances and conditions for a shorter than a longer distance over the same line in the same direction, the shorter being included within the longer distance, except under

permission of the railroad commission duly granted on application, the fact that competition exists at the point to which the short haul is made does not authorize the carrier to charge more for the short haul than for the long haul without permission of the commission. Hutcheson v. Louisville, etc., R. Co. (Ky.), 57 S. W. 251.

69. After defendant railroad company had given plaintiff freight rates over its road between G. and another point, plaintiff contracted for a number of cars, making a shipment therein, and purchased the cargoes of a mill in G., situated on another railroad line, and defendant was compelled to pay switching charges for each car in order to get the cars transferred to its own line. It was held that defendant was not liable to plaintiff, under a statute permitting a person damaged by an overcharge or discrimination to recover twice the amount of the injury. Gilliland v. Illinois Cent. R. Co. (Miss.) 32 So. 916.

70. Ratican v. Terminal R. Ass'n of St. Louis, 114 Fed. 666.

71. Baltimore, etc., R. Co. v. Diamond Coal Co., 61 Ohio St. 242, 55 N. E. 616.

nate in favor of or against any shipper.⁷² A majority of the recent cases hold that at common law a carrier cannot justly discriminate in rates between persons in the same circumstances.⁷³ But the rule does not require that every shipper shall be charged exactly the same rates or allowed the same facilities; it requires that the carrier shall not unreasonably or unjustly discriminate in favor of or against any shipper where the circumstances and conditions are the same. What is reasonable and just in a common carrier in a given case is a complex question into which enters many elements for consideration. The questions of time, place, distance, facilities, quantity and character of the goods, and many other matters must be considered; regard must be had not only to the convenience of the public but also to that of the carrier; and the character of their shipments may justify a difference in rates or facilities. The carrier can afford to carry 10,000 tons of coal or other property, for instance, to a given place for less compensation per ton than he could carry fifty, and where the business of a shipper is of great magnitude a rebate from the standard rate might be just and reasonable while it could not fairly be granted to another who desired to have a trifling amount of goods carried to the same point. So long as the regular standard rates maintained by the carrier and offered to all are reasonable one shipper cannot complain because his neighbor, by reason of special circumstances and conditions, can make it an object for the carrier to give him reduced rates.⁷⁴ When the conditions and circumstances are identical the charges to all shippers for the same

72. Kansas, etc., R. Co. v. Bayles, 36 N. J. L. 407, 13 Am. Rep. 543; 19 Colo. 348, 61 Am. & Eng. R. Cas. 128; Bayles v. Kansas, etc., R. Co., 13 Colo. 181, 40 Am. & Eng. R. Cas. 42.

73. Root v. Long Island R. Co., 114 N. Y. 300, 4 L. R. A. 331, 2 Inters. Com. Rep. 576; Cleveland, etc., R. Co. v. Closser, 126 Ind. 348, 3 Inters. Com. Rep. 387, 9 L. R. A. 757; Cook v. Chicago, etc., R. Co., 81 Iowa, 551, 9 L. R. A. 764, 3 Inters. Com. Rep. 383; Fitzgerald v. Grand Trunk R. Co., 63 Vt. 169, 13 L. R. A. 70; Messenger v. Pennsylvania R. Co., 37 N. J. L. 531; 18 Am. Rep. 754, affg.

State ex rel. Atwater v. Delaware, etc., R. Co., 48 N. J. L. 55; Hays v. Pennsylvania R. Co., 12 Fed. 309.

74. Lough v. Outerbridge, 143 N. Y. 271, 42 Am. St. Rep. 712; Butchers', etc., Stock Yards Co. v. Louisville, etc., R. Co., 67 Fed. 35, 31 U. S. App. 252; West v. London, etc., R. Co., L. R. 5 C. P. 622; Lees v. Lancashire, etc., R. Co., 18 Sol. Jour. 628; Cooper v. London, etc., R. Co., 4 C. B. N. S. 738, 93 E. C. L. 738; Nicholson v. Great Western R. Co., 5 C. B. N. S. 366, 94 E. C. L. 366, 4 Jur. N. S. 1187.

service must be equal; but if the general rates are reasonable a deviation therefrom by the carrier in favor of particular customers, for special reasons, not applicable to the whole public, does not furnish parties not similarly situated any just ground for complaint.⁷⁵ A recovery by a shipper from a carrier because of partiality and favoritism to other shippers cannot be had, in the absence of statute, provided the complaining shipper has not been charged more than a reasonable rate.⁷⁶ So there can be no unjust discrimination of which commissions and courts can take cognizance unless it is unlawful.⁷⁷ In determining the reasonableness of rates to be charged for railroad transportation, the original cost of construction, the amount expended in permanent improvements, the amount and market value of bonds and stock, the present, as compared with the original, cost of construction, the probable earning capacity of the property under the rates prescribed, and the sum required to meet operating expenses, and possibly other matters, must be considered.⁷⁸ It is the duty of the carrier to send forward goods in the order of time in which they were received for transportation, whenever there is necessary delay in forwarding goods received for shipment as, for example, by reason of a heavy blockade of freight, and the carrier is liable for receiving the goods of one shipper after rejecting those of a

75. Fitchburg R. Co. v. Gage, 12 Am. St. Rep. 393; DeMenacho v. Ward, 23 Blatchf. (U. S.) 505; Johnson v. Pensacola, etc., R. Co., 16 Fla. 623, 26 Am. Rep. 731; Concord, etc., R. Co. v. Forsaith, 59 N. H. 122, 47 Am. Rep. 181; Avinger v. South Carolina R. Co., 29 S. C. 265, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 519; State v. Cincinnati, etc., R. Co., 47 Ohio St. 130, 42 Am. & Eng. R. Cas. 330; Ragan v. Aiken, 9 Lea. (Tenn.), 609, 42 Am. Rep. 684, 9 Am. & Eng. R. Cas. 201; Sargent v. B. & L. R. Corp., 115 Mass. 422; Mogul S. S. Co. v. McGregor, Gow & Co., L. R. 21 Q. B. 544, affd. L. R. 23 Q. B. 598; Evershed v. London, etc., R. Co., L. R. 3 Q. B. 135; Canada Southern R. Co. v. International

Bridge Co., L. R. 8 App. 723; Ransome v. Eastern Counties R. Co., 1 C. B. N. S. 437, 87 E. C. L. 437; Baxendale v. Eastern Counties R. Co., 4 C. B. N. S. 78, 93 E. C. L. 78; Branley v. South Eastern R. Co., 12 C. B. N. S. 74, 104 E. C. L. 74.

76. Parsons v. Chicago, etc., R. Co., 167 U. S. 447, 17 Sup. Ct. Rep. 887; Johnson v. Dominion Express Co., 28 Ont. Rep. 203.

77. Brewer v. Central of Ga. R. Co., 84 Fed. 258.

78. Smyth v. Ames, 169 U. S. 466, Adv. S. U. S. 438, 42 L. Ed. 819, 30 Chic. Leg. News 243, 18 Sup. Ct. Rep. 418, modified on rehearing in 171 U. S. 361, Adv. S. U. S. 967, 18 Sup. Ct. Rep. 488.

prior applicant on the ground of such a blockade.⁷⁹ This rule against discrimination in the order of shipment of goods tendered is not applied in the case of perishable freights, which have a preference owing to the dangers to which they are subject by delay;⁸⁰ and it has been held not to apply to exceptional cases where it was necessary to forward relief for sufferers from fire or flood.⁸¹ Carriers like express companies are not bound to go beyond the limits in a city, established by themselves and other companies, to receive goods for transportation, or to deliver goods beyond such limits, to one having knowledge of them.⁸² It has been held that a common carrier may require prepayment from one shipper though it may not require it from others, since demanding prepayment is but the exercise of a right to demand of every one that the charges upon all freight shall be paid in advance.⁸³

§ 17. The compensation of the carrier.—The reward which the carrier receives for the carriage or transportation of property is one of the grounds on which the carrier's responsibility is based. It is not necessary that the compensation should be agreed upon at a fixed sum; the law implies an undertaking or promise on the part of the shipper to pay a reasonable reward for the carriage of goods delivered by him to the carrier for that purpose.⁸⁴ He may demand prepayment of charges,⁸⁵ or, after he has performed the service, recover the amount agreed upon, or, in the absence of an agreement, a reasonable compensation from the shipper or consignor. The person liable for the freight charges, when action is brought, may offset or counterclaim any damages arising from breach of the carrier's contract, or for loss or damage to the goods,⁸⁶

79. Acheson v. New York Cent., etc., R. Co., 61 N. Y. 653, 17 N. Y. St. Rep. 278; Houston, etc., R. Co. v. Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421; Page v. Great Northern R. Co., 2 Ir. Rep. (C. L.) 288.

80. See Liability for delay, perishable freights, § 5, chap. 8.

81. Michigan Cent. R. Co. v. Burrows, 33 Mich. 6.

82. Bullard v. American Express Co., 107 Mich. 695, 65 N. W. 551, 61

Am. St. Rep. 358, 33 L. R. A. 66, 2 Det. L. N. 735.

83. Randall v. Richmond, etc., R. Co., 108 N. C. 612, 49 Am. & Eng. R. Cas. 75; Allen v. Cape Fear, etc., R. Co., 100 N. C. 397, 35 Am. & Eng. R. Cas. 532.

84. Merritt v. Earle, 29 N. Y. 115; Allen v. Sewall, 2 Wend. (N. Y.) 327.

85. See § 6, *ante*.

86. Gleadell v. Thomson, 56 N. Y.

or damage caused by unreasonable delay.⁸⁷ In England a different rule prevails and, if the carrier has carried and is ready to deliver the goods, he is entitled to recover his freight charges in full, and the owner or consignee must resort to a separate action to recover any loss sustained.⁸⁸ As a general rule the carrier can only recover compensation for the carrying of the goods actually delivered to the consignee. If the goods have been lost through leakage or other causes without the negligence of the carrier, or if perishable goods have decayed and been cast away, or if goods have been necessarily jettisoned in a storm, or lost from causes against which the carrier has protected himself by contract, he will still be entitled to recover freight charges upon the goods which he safely delivers, but not for the freight charges on those which were lost and could not be delivered.⁸⁹ If part of the property be lost, and the consignee accepts the residue, he is liable for freight *pro rata*, but may recoup the value of that not delivered.⁹⁰ But if the carrier is ready to deliver the goods to the consignee and offers to do so, but the latter is not prepared to receive them, and the goods are subsequently lost without fault of the carrier, full freight is nevertheless recoverable.⁹¹ Where the carrier is prevented from delivering the freight because of inevitable accident, he can recover freight charges for only that portion which is delivered. As to the freight destroyed, the owner must lose the goods and the carrier the freight.⁹² The obligation of the carrier continues after arrival at the point or place of delivery until a reasonable time after such arrival in order to allow the consignee to take possession of the goods, and freight charges are not earned or recoverable where the goods are lost without the

194; *Hinsdall v. Weed*, 5 Denio (N. Y.), 172; *Hill v. Leadbetter*, 42 Me. 572; *Kaskaskia Bridge Co. v. Shannon*, 1 Gilman (Ill.), 15; *Leech v. Baldwin*, 5 Watts (Pa.), 446; *Humphreys v. Read*, 6 Whart. (Pa.) 435; *Bartram v. McKee*, 1 Watts (Pa.), 39; *Edwards v. Todd*, 1 Scam. (Ill.) 462; *Dyer v. Railway Co.*, 42 Vt. 441; *Ewart v. Kerr*, 1 Rice (S. C.), 203; *Snow v. Carruth*, 1 Spr. (U. S.) 324.

87. *Page v. Munro*, 1 Holmes (U. S.), 232; *The Success*, 7 Blatchf. (U. S.) 551.

88. *Dakin v. Oxley*, 15 Com. B. N. S. 646.

89. *Steelman v. Taylor*, 3 Ware (U. S.), 52; *The Brig Collenberg*, 1 Black (U. S.), 170; *The Cuba*, 3 Ware (U. S.), 260.

90. *Hinsdell v. Weed*, 5 Denio (N. Y.), 172.

91. *Clendaniel v. Tuckerman*, 17 Barb. (N. Y.) 184.

92. *Price v. Hartshorn*, 44 N. Y. 94, 4 Am. Rep. 645, affg. 45 Barb. (N. Y.) 655, 668; *Harris v. Rand*, 4 N. H. 259.

fault of the carrier, after the arrival at the place of delivery and notice thereof, but before a reasonable time for removing the goods has elapsed.⁹³ And when by contract the shipper assumed all risks and loss of its property by fire, when in the charge or custody of the carrier, the carrier was not entitled to recover freight, nor back charges paid by it to a co-contractor, when the property was destroyed by an accidental fire while in the custody of the carrier.⁹⁴

§ 18. Excessive charges and actions therefor.—The common law puts no restrictions upon the carrier in respect to his demand for compensation except that his charges shall be reasonable. There is no common law requiring the carrier to charge equal rates. The rates must merely not be excessive. The commonness of the duty to carry for all does not involve a commonness or equality of compensation. The tariff of rates, or what is charged to one party, is but a matter of evidence from which it may be determined whether a charge to another is reasonable.⁹⁵ Moneys illegally exacted as a condition of the transportation or delivery of goods, beyond the amount to which the party demanding is justly entitled, when paid under protest, in order to secure the transportation or to obtain possession of the goods, are not paid voluntarily but under compulsion, and may be recovered.⁹⁶

93. Russell Mig. Co. v. New Haven Steamboat Co., 52 N. Y. 657, 50 N. Y. 121; McKee v. Hecksher, 10 Daly (N. Y.), 393.

94. New York Cent., etc., R. Co. v. Standard Oil Co., 87 N. Y. 486, affg. 20 Hun (N. Y.), 39.

95. Louisville, etc., R. Co. v. Wilson, 119 Ind. 352, 4 L. R. A. 244, 21 N. E. 341, 6 R. & Corp., L. J. 11; Johnson v. Pensacola R. Co., 16 Fla. 623, 26 Am. Rep. 731; Harris v. Packard, 3 Taunt. 264, “a carrier is bound by law to carry everything which is brought to him for a reasonable sum to be paid to him for the same carriage and not to extort what he will; we cannot say that the carrier is bound to carry anything beyond articles of such class as he is

under a legal obligation to carry, but it is unquestionably true that his charge be ‘reasonable.’” See also Pickford v. Grand Junction R. Co., 8 M. & W. 378.

“**It may be in the nature of a quantum meruit,**” says Mr. Justice Story, speaking of the hire or recompence of common carriers, in *Citizens’ Bank v. Nantucket S. Co.*, 2 Story (U. S.), 35. The same view is announced in *Van Bokkelin v. Ingersoll*, 5 Wend. (N. Y.) 340, and *Bridge v. Johnson*, 5 Wend. (N. Y.) 350. See also *Fitchburg R. Co. v. Gage*, 12 Gray (Mass.), 393.

96. *Harmony v. Bingham*, 12 N. Y. 99, 1 Duer (N. Y.), 209; *Parker v. The Railway Co.*, 6 Exch. 702, 6 El. & B. 77; *Ashmole v. Wainwright*,

Where a consignee paid an excess of freight charged over the rate specified in the bill of lading under protest, such additional payment was not voluntary, so as to preclude him from maintaining an action to recover the same.⁹⁷ Where a shipper in order to obtain cars to ship his grain, is compelled to pay an additional charge, or suffer the alternative of paying damages arising from a failure to deliver the grain as agreed, such payment is not voluntary, and will not preclude an action to recover back the money so paid for cars.⁹⁸ In an action by the shipper against the receiving carrier to recover the difference between the amount alleged to have been stated by the agent as the rate over the lines of the connecting carrier, and that actually charged, a general denial by defendant raised an issue as to whether the agent's statements bound the receiving carrier, and the burden of proof to show that

2 Q. B. 837; *Snowdon v. Davis*, 1 *Taunt.* 359; *Louisville, etc., R. Co. v. Walker*, 23 *Ky. Law Rep.* 453, 63 *So. 20*; *Virginia Coal & Iron Cb. v. Louisville, etc., R. Co.*, 98 *Va.* 776, 37 *S. E.* 310, 2 *Vir. Sup. Ct. Rep.* 631.

Where, by a traffic arrangement between a standard guage railroad and a connecting narrow guage line, shipments of goods over the narrow guage line and then over the standard guage were charged for by the standard guage at the rate of three narrow guage cars to two standard guage ones, and a shipper of cattle over the lines (the carriage commencing on the narrow guage road) knew of such agreement, he was not charged in excess of the tariff rates, though, owing to the manner in which the cattle were loaded in the narrow guage cars the broad guage railroad found that it could and did place the cattle in a less number of standard guage cars than he had received for. *Carlisle v. Missouri Pac. R. Co.*, 97 *Mo. App.* 571, 71 *S. W.* 475.

97. *Southern Ry. Co. v. Anniston Foundry & Mach. Co.*, 135 *Ala.* 315, 38 *So.* 274, and the fact that the rate

specified in the bill of lading was fixed by the agent by mistake did not authorize the carrier to exact an increased rate.

98. *Galesburg, etc., R. Co. v. West*, 108 *Ill. App.* 504, holding also that after a common carrier has established a schedule rate for hauling grain between two stations, it cannot charge one shipper an additional sum for switching cars between his elevator and the carrier's tracks.

Where in an action against a railroad company to recover an alleged overcharge of freight, it appeared that defendant had contracted to transport the goods for a certain sum, but that, when the goods arrived at their point of destination, the connecting carrier refused to deliver them, except on the payment of additional freight, but there was no showing that the defendant received any part of the sum so collected, it was held, that a judgment against the defendant for the over charge exacted by the connecting carrier was unauthorized. *Chicago, etc., R. Co. v. Henderson* (*Tex. Civ. App.*), 73 *S. W.* 36.

the station agent had authority to bind his company was on plaintiff.⁹⁹ A letter from one of the railroad commissioners is not proper evidence to show the commission rates on goods shipped by a common carrier in an action against the carrier for over-charges.¹

99. McLagan v. Chicago, etc., R. **1.** Wells, Fargo Express Co. v. Co. (Iowa), 89 N. W. 233. Williams (Tex. Civ. App.), 71 S. W. 314.

CHAPTER IV.

COMMENCEMENT OF CARRIER'S LIABILITY.—DELIVERY TO CARRIER.

- SECTION
- 1. Commencement of carrier's liability.
 - 2. Acts constituting delivery to and acceptance by carrier.
 - 3. Acceptance may be implied from proper tender.
 - 4. Deposit of goods elsewhere than at regular office or depot.
 - 5. Delivery to agent of carrier.
 - 6. Bill of lading not essential to constitute delivery.
 - 7. Bill of lading as evidence of delivery.
 - 8. Loading goods on cars.
 - 9. Proof of delivery to the carrier.

§ 1. **Commencement of carrier's liability.**—The liability of a common carrier for goods received by him begins as soon as they are delivered to him, his agents or servants, at the place appointed or provided for their reception when they are in fit and proper condition and ready for immediate transportation. If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage and for the purpose of facilitating it, his liability as a carrier will commence with the receipt of the goods. But on the contrary, if the goods when so deposited are not ready for immediate transportation, and the carrier cannot make arrangements for their carriage to the place of destination until something further is done, or some further direction is given or communication made concerning them by the owner, or consignor, the deposit must be considered to be in the meantime for his convenience and accommodation, and the receiver until some change takes place will be responsible only as a warehouseman. The party bringing the goods must first do whatever is essential to enable the carrier to commence, or to make needful preparations for commencing, the service required of him, before he can be made liable or subjected to responsibility in that capacity. Where goods are delivered to a common carrier to await further orders from the shipper before shipment, the former while they

are in his custody is only liable as warehouseman, and his only responsibility as a carrier is where goods are delivered to and accepted by him in the usual course of business for immediate transportation. The duties and the obligations of the common carrier with respect to the goods commences with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety.¹ When a consignor

1. London, etc., Fire Ins. Co. v. Rome, etc., R. Co., 144 N. Y. 200, 61 Am. & Eng. R. Cas. 225; Blossom v. Griffin, 13 N. Y. 569, 67 Am. Dec. 75; Wade v. Wheeler, 47 N. Y. 658; St. Louis, etc., R. Co. v. Knight, 122 U. S. 79, 30 Am. & Eng. R. Cas. 88; St. Louis, etc., R. Co. v. Murphy, 60 Ark. 333; Little Rock, etc., R. Co. v. Hunter, 42 Ark. 200, 18 Am. & Eng. R. Cas. 527; Merriam v. Hartford, etc., R. Co., 20 Conn. 354, 52 Am. Dec. 344; Michigan Southern, etc., R. Co. v. Shurtz, 7 Mich. 515; Clarke v. Needles, 25 Pa. St. 338; Gulf, etc., R. Co. v. Trawick, 80 Tex. 270; East Line, etc., R. Co. v. Hall, 64 Tex. 615; Grand Tower Mfg., etc., R. Co. v. Ullman, 89 Ill. 244; Lawrence v. Winona, etc., R. Co., 15 Minn. 390, 2 Am. Rep. 130.

If the shipper orders the transportation to be delayed, after the goods have been delivered for immediate transportation, the carrier is liable only as warehouseman. St. Louis, etc., R. Co. v. Montgomery, 39 Ill. 335.

Unless the habitual course of dealing between the parties has been otherwise, a delivery to the carrier of goods marked with the name and address of the consignee, without directions otherwise, and the receipt of goods under such conditions by the carrier, imposes on the carrier, immediately, the obligation to forward them at once to the consignee and the responsibility of a

common carrier. *Shelton v. Merchants' Dispatch Transp. Co.*, 59 N. Y. 258; *Whitbeck v. Holland*, 45 N. Y. 13; *White v. Goodrich Transp. Co.*, 46 Wis. 493, 21 Am. Ry. Rep. 398.

The liability of the master or owner of a ship or other vessel commences from the moment of the acceptance of the goods. The delivery is complete as soon as the master, mate, or any agent of the owner receives the goods; they may be received upon the ship, on the wharf, on the beach, or at a warehouse, or any other place at which an agent duly authorized may agree to receive them. *Greenwood v. Cooper*, 10 La. Ann. 796; *Story Bailm.* (9th ed.) 534; *Hutch. Carr.* (2d ed.) § 95.

The liability of a ferryman as a common carrier commences when the custody and control of the goods have been turned over to him; there is no delivery to him until this is done. *Wyckoff v. Queens Co. Ferry Co.*, 52 N. Y. 32, 11 Am. Rep. 650; *White v. Winnisimmet Co.*, 7 Cush. (Mass.) 155.

Compare *Blakeley v. Le Duc*, 19 Minn. 187; *Miles v. James*, 1 McCord L. (S. C.) 157; *Cohen v. Hume*, 1 McCord L. (S. C.) 439; *Cook v. Gourdin*, 2 Nott & M. (S. C.) 19.

A statutory provision that the transportation of goods by a common carrier shall be considered as commenced from the time the bill of lading is signed, does not preclude the liability from commencing before,

of goods delivers them to a railroad company, relinquishing all control over them, the railroad becomes immediately liable as a common carrier, but if the goods are merely placed in the company's depot for the consignor's convenience, and are not ready for shipment until the consignor has done something further to them, the railroad company is not so liable.² The rule is well settled that the liability of the carrier as such commences when the duty to transport has completely arisen by the delivery and acceptance of the goods for immediate transportation in the usual course of business, although they may not be actually loaded upon the cars or vessels of the carrier and put immediately *in itinere*; for the obligation to carry safely on delivery carries with it a promise to keep safely before the goods are put *in itinere*.³ The delivery of the property must be established to have been actually made to the carrier or to some person authorized to act in its behalf.⁴ It is not enough that the property is delivered upon the premises, unless the delivery is accompanied by notice to the proper person.⁵ The liability of the carrier attaches only from the time of acceptance of the goods by him.⁶ A railroad company is liable for the loss by fire of goods placed by it on a wharf, with notice to a steamship company to remove them, where the latter

viz., from the time of the delivery of the goods. East Line, etc., R. Co. v. Hall, 64 Tex. 615.

2. Stapleton v. Grand Trunk Ry. Co., (Mich.) 94 N. W. 739, 10 Det. Leg. N. 133; Judson v. Western R. Corp., 4 Allen (Mass.) 520, 81 Am. Dec. 718; Dixon v. Central of Georgia Ry. Co., 110 Ga. 173, 35 S. E. 369.

3. O'Neill v. New York Cent., etc., R. Co., 60 N. Y. 141; Rogers v. Wheeler, 52 N. Y. 262; Barron v. Eldridge, 100 Mass. 455; Reed v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 176; Otis Co. v. Missouri Pac. R. Co., 112 Mo. 622, 55 Am. & Eng. R. Cas. 637.

4. Edwards v. Sherratt, 1 East 604; Angell Carr., § 129; Story Bailm. § 532.

5. Grosvenor v. New York Cent. R. Co., 39 N. Y. 34; Packard v. Get-

man, 6 Cow. (N. Y.) 757; Trevor v. U. & S. R. Co., 7 Hill (N. Y.) 47; Blanchard v. Isaacs, 3 Barb. (N. Y.) 388; 2 Kent's Com. 604; 1 Parsons Cont. 654.

A delivery to a railroad warehouse about dark, and after it was closed and locked for the night, by plaintiff's agent, by opening the upper door and thereby putting the goods in, there being no one in charge, does not show such delivery as will charge defendant as a common carrier, or as a warehouseman, without affirmative proof of some act of negligence on the part of defendant. Spofford v. Pennsylvania R. Co., 11 Pa. Super. Ct., 97. See Meloche v. Chicago, etc., Co., 116 Mich. 69.

6. Packard v. Getman, 6 Cow. (N. Y.) 757; Story Bailm. § 533.

had not yet taken custody of them, and the bill of lading provided that the loss should fall upon that carrier alone which had actual custody at the time of the loss.⁷

§ 2. Acts constituting delivery to and acceptance by carrier.—

To complete the delivery of the property within the rules laid down in the authorities it is also essential that the property should be placed in such a position that it may be taken care of by the agent or person having charge of the business, and under his immediate control. It must be accepted and received by the agent.⁸ A delivery by the shipper or his agent and an actual or implied acceptance by the carrier must be shown.⁹ There is no delivery and acceptance so as to create the relation of shipper and carrier so long as the owner retains control of the goods; there must be a change of possession from the shipper to the carrier, and the former must relinquish all custody and control of the property for the time being, leaving the exclusive possession in the carrier, so as to put upon the carrier the exclusive duty of looking after the safety of the goods.¹⁰ Cotton placed for shipment on a platform kept by a carrier so that cotton to be shipped from that point may be weighed and placed thereon preparatory to being loaded on its cars is in possession of the company, although it has not yet given a bill of lading therefor.¹¹ But where cotton is still in the possession of a compress company, and the railroad company has not

7. Texas, etc., R. Co. v. Clayton, 173 U. S. 348, 43 L. ed. 725, Adv. S. U. S. 475, 19 Sup. Ct. Rep. 421, 13 Am. & Eng. R. Cas. N. S. 236, affg. 51 U. S. App. 676, 28 C. C. A. 142, 9 Am. & Eng. R. Cas. N. S. 821, 84 Fed. 305. Distinguishing Pratt v. Grand Trunk R. Co., 95 U. S. 43, 46, 24 L. ed. 336, 339; Merriam v. Hartford, etc., R. Co., 20 Conn. 354, 52 Am. Dec. 344; Converse v. Norwich, etc., Transp. Co., 33 Conn. 166.

8. Grosvenor v. New York Cent. R. Co., 39 N. Y. 34.

9. Illinois Cent. R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301; South-

ern Express Co. v. McVeigh, 20 Gratt. (Va.) 264.

10. London, etc., Fire Ins. Co. v. Rome, etc., R. Co., 144 N. Y. 200, 61 Am. & Eng. R. Cas. 225; Grosvenor v. New York Cent. R. Co., 39 N. Y. 34, 5 Abb. Pr. N. S. (N. Y.) 345; Missouri Pac. R. Co. v. McFadden, 154 U. S. 155; Truax v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 233; Lake Shore, etc., R. Co. v. Foster, 104 Ind. 293, 54 Am. Rep. 319; Wilson v. Atlanta, etc., R. Co., 82 Ga. 386, 40 Am. & Eng. R. Cas. 25; Frazier v. Kansas City, etc., R. Co., 48 Iowa 571.

11. St. Louis, etc., R. Co. v. Martin, (Tex. Civ. App.) 37 S. W. 234.

received the actual custody and control of it, the company cannot be considered as having received it;¹² and the rule is true, although the carrier may have issued bills of lading for the cotton.¹³ So, where cotton was loaded on a car, left on a siding for that purpose by a railroad company, at a place where it had no station or agent, the car being loaded in the evening after the local freight train for the day had passed, and there would be no other until the evening of the next day,¹⁴ and where cotton was placed on a platform built and owned by a municipality and being alongside of a side track of the railroad company, the cotton not having been received or receipted for by the company or taken under its control, there was no delivery to and acceptance by the railroad company so as to make them liable for the value of the cotton, destroyed by fire under such circumstances.¹⁵ If goods are delivered to a carrier and received by it for shipment, they may be transmitted without the issuance of a bill of lading, and may be regarded as in the possession of the carrier from the time received, though there was no instruction nor intention that the carrier should immediately make the shipment.¹⁶ A railroad company becomes immediately liable as a common carrier, where goods properly marked for shipment are placed inside its freight depot for immediate shipment, with the agreement by its agent that they will be shipped the following morning, although no shipping bill or written contract is given.¹⁷ But, goods delivered to a common carrier by a cartman, and accepted by the agent of the company on the understanding that shipment is to be delayed until one of the articles can be properly crated, are held by the company in the capacity of warehouseman.¹⁸ The mere delivery by the shipper to the carrier of warehouse receipts together with an order on the warehouseman does not constitute a delivery to the

12. St. Louis, etc., R. Co. v. Commercial Union Ins. Co., 139 U. S. 223; St. Louis, etc., R. Co. v. Knight, 122 U. S. 79, 30 Am. & Eng. R. Cas. 88.

13. Martin v. St. Louis, etc., R. Co., 55 Ark. 510, 56 Am. & Eng. R. Cas. 112.

14. Tate v. Yazoo, etc., R. Co., 78 Miss. 842, 29 So. 392.

15. Brown v. Atlanta, etc., R. Co.,

19 S. C. 39, 13 Am. & Eng. R. Cas. 479.

16. Missouri, etc., R. Co. v. Beard, (Tex. Civ. App.) 78 S. W. 253.

17. Meloche v. Chicago, etc., R. Co., 116 Mich. 69, 74 N. W. 301, 4 Det. L. N. 1066, 10 Am. & Eng. R. Cas. N. S. 182.

18. Fisher v. Lake Shore, etc., R. Co., 17 Ohio C. C. 491, 9 Ohio C. D. 413.

carrier which will render it liable for a loss of the goods.¹⁹ Where the facts are all admitted, the question whether or not the goods were delivered to the carrier is one purely of law;²⁰ but where the evidence is conflicting, the question is one for the jury.²¹

§ 3. Acceptance may be implied from proper tender.—It is the duty of a common carrier to accept for transportation all goods tendered to it for shipment upon a compliance by the shipper with all reasonable regulations, the prepayment of freight charges, if demanded, etc., as we have already shown.²² An acceptance will therefore be implied upon proof of a proper tender of the goods, as, for example, where the goods are delivered at the warehouse of a railroad corporation, with directions to forward them presently, but they remain in the warehouse for the convenience of the railroad company;²³ where the goods have been placed in its depot or warehouse for shipment at its earliest convenience, and

19. *Stewart v. Gracy*, 93 Tenn. 314. See, also, *Deming v. Merchants' Cotton-Press, etc., Co.*, 90 Tenn. 306.

Permitting the shipper to put his cattle in the station yard, no bill of lading being given by the station agent, does not constitute such delivery as to render the company liable for cattle escaping. *Fort Worth, etc., R. Co. v. Riley*, (Tex. App.) 1 S. W. 446.

20. *Gass v. New York, etc., R. Co.*, 99 Mass. 220, 96 Am. Dec. 742.

21. *Houston, etc., R. Co. v. Hodde*, 42 Tex. 467, and it is error for the court, in charging the jury, to call attention to certain testimony not disputed and say that the facts stated in it prove a delivery. See, also, *Great Western Despatch, etc., Line v. Glenny*, 41 Ohio St. 166.

Liability for error in shipment.—The consignor of a car load of eggs notified a railroad station agent that it desired to ship them in one of the defendant transportation company's cars. The railroad station agent thereupon procured a car of defend-

ant's, in which the eggs were shipped to Chicago over the agent's road, to be there forwarded to the state of New York; the agent notifying defendant's general agent at Chicago of the shipment. Defendant's Chicago agent issued a receipt to the consignor, showing the proper destination of the eggs; but, through the mistake of an employe of the railroad in instructing a connecting railroad, the eggs were sent to a wrong destination. Held, that defendant transportation company was liable for the error; the shipment coming into its custody at least on arrival at Chicago. *Richer v. Fargo*, 77 App. Div. (N. Y.) 550, 78 N. Y. Supp. 1007. It was also held in this case that the question of defendant's liability for the railroad company's error was one of law, and was improperly submitted to the jury.

22. See *Duty to receive and carry*, § 2, chap. 3, *ante*.

23. *Moses v. Boston, etc., R. Co.*, 24 N. H. 71, 55 Am. Dec. 222; *Nichols v. Smith*, 115 Mass. 332.

when nothing remains for the owners to do before shipment;²⁴ where goods designed for immediate transportation, in a condition to be carried in pursuance of the usage of the parties, which the local agent had permitted, were deposited at the usual place of loading, although the superintendent of the railroad did not know of such usage and it was contrary to the positive order of the management;²⁵ where goods have been delivered on the platform of a railroad company's depot, which is their usual place for receiving freight preparatory to shipment, under an agreement previously made for their transportation;²⁶ where cotton is deposited in cars left on a switch by the company for the purpose of being loaded.²⁷ But such tender or deposit of goods for shipment must have been at a time when and place where the carrier is accustomed to receive freight for transportation, and a tender or deposit elsewhere, for example, placing them where the carrier might easily have taken them in charge, is not a sufficient delivery to charge the carrier with responsibility for their safety other than as a warehouseman, if the carrier did not know that it was intended that it should receive and ship them. If it refuses to accept the goods when tendered at a time and place other than where it is accustomed to receive freight, no liability of any kind will be incurred.²⁸

24. Grand Tower Mfg., etc., Co. v. Ullman, 89 Ill. 244. Co., 51 Ala. 481; Houston, etc., R. Co. v. Hodde, 42 Tex. 467; Lovett v. Hobbs, 2 Show. 127; Leigh v. Smith, 1 C. & P. 640, 11 E. C. L. 507; Selway v. Holloway, 1 Ld. Raym. 46; Buckman v. Levi, 3 Campb. 414, wherein the deposit of goods in the yard of an inn from which the carrier started was held not to be a delivery.

25. Evansville, etc., R. Co. v. Keith, 8 Ind. App. 57, 35 N. E. 296.

26. Bowie v. Baltimore, etc., R. Co., 1 McArthur (D. C.) 94.

27. Illinois Cent. R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301.

Where goods to be shipped are situated upon a spur track of a railroad company, and the owner has no track scales, thus rendering it necessary to move the loaded cars to the company's depot for the purpose of weighing the same, so as to ascertain the proper amount of freight charges, the delivery of such cars will be treated as having been made to the company at such depot. Dixon v. Central of Georgia Ry. Co., 110 Ga. 173, 35 S. E. 369.

28. O'Bannon v. Southern Express

A liability will attach if the tender or deposit at an unaccustomed place was made in pursuance of an agreement with the carrier. Bowie v. Baltimore, etc., R. Co., 1 McArthur (D. C.) 94.

The carrier also becomes responsible, if it consents to receive goods delivered at a time when it might object to receiving them, as during a storm which ultimately results in their injury. New Brunswick Steam-

§ 4. Deposit of goods elsewhere than at regular office or depot.—The deposit of goods in the vicinity of the depot or regular station of the carrier, or along or near the roadbed of the railway company, wayside deposits made to save the trouble of hauling to a regular station, or deposits anywhere except at the regular offices, stations, depots or other places fixed by the carrier for the reception of freight, are at the risk of the owners and do not constitute such a delivery as will render the company liable for the safety of the goods while there and before being received into the actual custody and control of the carrier.²⁹ But custom or usage

boat, etc., Transp. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394.

As to what is a "regular depot or station," within the meaning of a statute imposing a penalty on railroads for refusing to accept freight when tendered there, see Land v. Wilmington, etc., R. Co., 104 N. C. 48, 40 Am. & Eng. R. Cas. 18.

29. Spade v. Hudson River R. Co., 16 Barb. (N. Y.) 383; Wilson v. Atlanta, etc., R. Co., 82 Ga. 386, 40 Am. & Eng. R. Cas. 25; Wells v. Wilmington, etc., R. Co., 6 Jones L. (N. C.) 47, 72 Am. Dec. 556; Brown v. Atlanta, etc., Air Line R. Co., 19 S. C. 39, 13 Am. & Eng. R. Cas. 479; Houston, etc., R. Co. v. Hodde, 42 Tex. 467; O'Bannon v. Southern Express Co., 51 Ala. 481; Truax v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 233, placing of fruit, by its owner in a store house, belonging to a railroad company at a station, by permission of the company, for the shipper's own convenience, or placing it on the ground near the station without its being taken in charge by the company's agent, unless placed there by his direction, is not a sufficient delivery to charge the company as a common carrier; Fort Worth, etc., R. Co. v. Riley (Tex. Civ. App.) 1 S. W. 446, 27 Am. & Eng. R. Cas. 49; Frazier v. Kansas City, etc., R. Co., 48 Iowa 571, placing cattle in

the yards of the railroad company, under permission of the station agent, where no bill of lading or receipt has been signed by the company, does not constitute a delivery of them to the company; Yoakum v. Dryden, (Tex. Civ. App.) 26 S. W. 312, loading goods on a car standing on a side track at the carrier's depot, without the knowledge of its agent, and when the agent on being informed of it, declined to ship the goods, does not constitute a delivery to the carrier, there being no custom under which such loading constituted a delivery; Louisville, etc., R. Co. v. Echols, 97 Ala. 556, where cotton was left on a station platform over night in violation of the rules of the company, the latter was held not liable.

A deposit at a place on the line of a railroad where there is a switch, but neither agent, station, nor platform, and where shipments are made only by loading directly upon the cars, and where freight is delivered when the parties are ready to receive it, is not a depot or station, and a deposit near such switch does not constitute a delivery. Kansas City, etc., R. Co. v. Lilly, (Miss.) 8 So. 644, 45 Am. & Eng. R. Cas. 379; Louisville, etc., R. Co. v. Flanagan, 113 Ind. 488, 3 Am. St. Rep. 674.

may have established a constructive delivery which will bind the carrier, as where proof is made of a constant and habitual practice and usage of a carrier to accept goods for shipment when deposited at a particular place, without express notice to the carrier of such deposit. This is held to be sufficient to show a public offer by the carrier to receive in that way and to constitute an agreement between the parties by which the goods, when so deposited, shall be considered as delivered to the carrier without further notice.³⁰ So a special place for receipt of freight may be fixed by custom and a tender of delivery there is sufficient to charge the carrier with liability.³¹ But actual notice of the deposit of goods for shipment at such places must be given to the carrier, except where there is an agreement or usage by which goods deposited at a particular place are to be taken charge of by the carrier without any special notice of such deposit.³² Upon a proper delivery and acceptance of goods the common law liability of a common carrier immediately attaches and the carrier is liable to the same extent as if the goods were in transit, unless its liability has been modified, limited, or restricted by special contract or agreement with the shipper or owner of the goods.³³

30. Montgomery, etc., R. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54, 18 Am. & Eng. R. Cas. 512; Merriam v. Hartford, etc., R. Co., 20 Conn. 354; Meyer v. Vicksburg, etc., R. Co., 41 La. Ann. 639, 17 Am. St. Rep. 408; Fort Worth, etc., R. Co. v. Martin, (Tex. Civ. App.) 35 S. W. 21; (in the two cases last cited the deposit of cotton on a railway platform was held a delivery); Converse v. Norwich, etc., Transp. Co., 33 Conn. 166; Green v. Milwaukee, etc., R. Co., 38 Iowa 100, 41 Iowa 410; Evansville, etc., R. Co. v. Keith, 8 Ind. App. 57.

31. Galena, etc., R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574. But usage or custom may be limited, and a custom as to the delivery of a trunk as baggage will not extend to its delivery as freight. Wright v. Caldwell, 3 Mich. 51.

32. Grosvenor v. New York Cent.

R. Co., 39 N. Y. 34; Packard v. Getman, 6 Cow. (N. Y.) 758, 16 Am. Dec. 475, 4 Wend. (N. Y.) 615; Salinger v. Simmons, 57 Barb. (N. Y.) 513; Illinois Cent. R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301; Buckman v. Levi, 3 Campb. 414; Merriam v. Hartford, etc., R. Co., 20 Conn. 354, 52 Am. Dec. 344; Montgomery, etc., R. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54, 18 Am. & Eng. R. Cas. 512; Converse v. Norwich, etc., Transp. Co., 33 Conn. 166 (the last two cases involved delivery as between connecting carriers).

33. Pittsburgh, etc., R. Co. v. Barrett, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 259; Grosvenor v. New York Cent. R. Co., 39 N. Y. 34; Gleason v. Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716; Ford v. Mitchell, 21 Ind. 54; Trowbridge v. Chapin, 23 Conn. 595.

§ 5. Delivery to agent of carrier.—A delivery of goods for shipment to an agent of the carrier or a person duly authorized to act in its behalf,³⁴ or who is clothed with apparent authority and has been accustomed to receive goods tendered for transportation,³⁵ is a sufficient delivery to bind the carrier and render it liable as a common carrier. A delivery may also be sufficient when made to an employe in pursuance of some special contract or usage.³⁶ But a delivery to a person working around the freight house of a railroad company;³⁷ to the driver of a stage coach who promised to deliver it to the next stage agent;³⁸ to the ticket master of a passenger train who had no authority to receive freight;³⁹ to a waggeron to carry for his own gain, and not for the profit of his mas-

34. Grosvenor v. New York Cent. R. Co., 39 N. Y. 34; Rogers v. Wheeler, 52 N. Y. 262, 4 Am. Ry. Rep. 411; Nichols v. Smith, 115 Mass. 332; Cobb v. Illinois Cent. R. Co., 38 Iowa 601; Harrell v. Wilmington, etc., R. Co., 160 N. C. 258, 42 Am. & Eng. R. Cas. 421; Truax v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 233; Minter v. Pacific R. Co., 41 Mo. 508, 97 Am. Dec. 288; Waldron v. Chicago, etc., R. Co., 1 Dak. 336; Gleason v. Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716; Winkfield v. Packington, 2 C. & P. 599, 12 E. C. L. 281; Giles v. Taff Vale R. Co., 2 El. & Bl. 823, 75 E. C. L. 823.

35. Quarrier v. Baltimore, etc., R. Co., 20 W. Va. 424, 18 Am. & Eng. R. Cas. 536 (a porter at a railway station); Pickford v. Grand Junction R. Co., 12 M. & W. 766; Wilson v. York, etc., R. Co., 17 L. T. 223 (officials of a railroad company at its station); Cobban v. Downe, 5 Esp. N. P. 41 (the mate of a ship); McCourt v. London, etc., R. Co., 3 Ir. R. C. L. 107; Machu v. London, etc., R. Co., 2 Exch. 415, 17 L. J. Exch. 271 (person accustomed to book for the company); Davey v. Mason, 41 E. C. L. 30; Hart v. Baxendale, 6 Exch. 769 (draymen of a railroad company

collecting goods and packages at the houses of consignors); Witbeck v. Schuyler, 44 Barb. (N. Y.) 469 (the captain of a steamboat, although there may have been a freight agent of the boat in the same town, where it appears that the consignor did not know of the agent); Phillips v. Earle, 8 Pick. (Mass.) 182 (the agent of a stage company, although the delivery is made to him at a place other than the company's office); Pacific Express Co. v. Black, 8 Tex. Civ. App. 363 (a person in charge of the depot of a railroad company, for the express company); Coyle v. Western R. Corp., 47 Barb. (N. Y.) 152 (employees of a railroad company, when the receiving clerk is present and directs disposition of the goods).

36. Trowbridge v. Chapin, 23 Conn. 595.

37. Young v. Canadian Pac. R. Co., 1 Manitoba L. Rep. 205. See also Butler v. Hudson River R. Co., 3 E. D. Sm. (N. Y.) 571.

38. Blanchard v. Isaacs, 3 Barb. (N. Y.) 388; See also Fisher v. Geddes, 15 La. Ann. 14.

39. Elkins v. Boston, etc., R. Co., 23 N. H. 275. See also Porter v. Chicago, etc., R. Co., 41 Iowa 358.

ter;⁴⁰ is not a sufficient delivery to render the carrier liable as a common carrier for the loss of the goods. A carrier is liable for the negligence of his servants or agents in taking goods on board his vessel in his absence, although he may have specifically directed them not to receive goods, it appearing that the shipper had no notice of such directions.⁴¹ Where the carrier sends an agent to receive the goods, instructions given to him by the shipper form a part of the contract of affreightment.⁴² The carrier is responsible for the acts of its agent, where authority is vested in him to act for the carrier, or where the acts are performed within the scope of an apparent authority which the carrier allows him to assume, and it will be bound by a delivery made to him under such circumstances, and notice to such agent is notice to the principal.⁴³ The station agent of a railroad company, or the agent of an express company, is presumed to have authority to receive goods offered for transportation when the goods are tendered at the station or office of the company, or regular place for the reception of goods for shipment; but where the tender of freight for shipment is not made at the station or office but at a point remote therefrom the authority of the agent must be clearly proved.⁴⁴ So persons dealing with railroad corporations and parties engaged in the transportation of freight have a right to consider that those usually employed in the business of receiving and forwarding it have ample authority to deal with them. It is enough to establish a delivery in the first instance, to prove that a person thus acting

40. Butler v. Basing, 2 C. & P. 613, 12 E. C. L. 287. See also Williams v. Cranston, 2 Stark, 82, 3 E. C. L. 326.

41. Street v. Morrison, 10 New Bruns. 296.

42. Uptegrove v. Central R. Co., 16 Misc. Rep. (N. Y.) 14, 37 N. Y. Supp. 659.

43. Rogers v. Long Island R. Co., 2 Lans. (N. Y.) 269, affd. 56 N. Y. 620; Witbeck v. Schuyler, 44 Barb. (N. Y.) 469; Harrell v. Wilmington, etc., R. Co., 160 N. C. 258, 42 Am. & Eng. R. Cas. 417; Montgomery, etc., R. Co. v. Kolb, 73 Ala. 396, 40 Am. Rep. 54, 18 Am. & Eng. R. Cas. 518; Minter v. Pacific R. Co., 41 Mo.

508, 97 Am. Dec. 288; Ouimit v. Henshaw, 35 Vt. 605, 84 Am. Dec. 646; Gelvin v. Kansas City, etc., R. Co., 21 Mo. App. 273.

44. Cronkite v. Wells, 32 N. Y. 247, a delivery to the clerk of an express company's agent for transportation, outside the agent's office, will not render the company liable for loss of the goods before they come into the actual possession of its agent; Missouri Coal, etc., Co. v. Hannibal, etc., R. Co., 35 Mo. 84; Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Southern Express Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783.

received and accepted the property for the purpose of transportation, and even though it subsequently appears that another employe was actually the agent having charge of this department of the business, yet the company who sanction the performance of this duty by other persons in their employ, and thus hold out to the world that they are authorized agents, are not at liberty to relieve themselves from responsibility by repudiating their acts.⁴⁵

§ 6. Bill of lading not essential to constitute delivery.—Under the common law the obligation to safely carry and deliver goods received for transportation is implied from the acceptance of the goods by the carrier for that purpose, without any written contract of carriage, and it is not necessary that the carrier shall have made out and delivered to the shipper a receipt or bill of lading for the goods in order to constitute a complete delivery to the carrier; and this rule prevails in the absence of a statutory rule otherwise.⁴⁶ The obligation of a common carrier is fixed by law, and is as much a part of the contract of shipment as though written therein.⁴⁷ And the mere receipt of a bill of lading does not alter or affect a prior contract, under which goods have been actually shipped and are in course of transit, without an actual consent to the change.⁴⁸ In the absence of evidence to the contrary, it is to be assumed that goods accepted by a carrier for transportation are taken under the responsibility cast upon the carrier by the common law, save as modified by the statute, and the carrier's liability, therefore, begins at the time of its accept-

45. Grosvenor v. New York Cent. R. Co., 39 N. Y. 34.

46. Grosvenor v. New York Cent. R. Co., 39 N. Y. 34, 5 Abb. Pr. N. S. (N. Y.) 345; *Salinger v. Simmons*, 57 Barb. (N. Y.) 513, 8 Abb. Pr. N. S. (N. Y.) 409; *Packard v. Getman*, 6 Cow. (N. Y.) 757, 16 Am. Dec. 475; *Shelton v. Merchant's Despatch Transp. Co.*, 36 N. Y. Super. Ct. 527; *St. Louis, etc., R. Co. v. Neel*, 56 Ark. 279, 55 Am. & Eng. R. Cas. 428; *Montgomery, etc., R. Co. v. Kolb*, 73 Ala. 396, 49 Am. Rep. 54, 18 Am. & Eng. R. Cas. 512, and the rule prevails even where there is a statute making it compulsory on common

carriers to give receipts and bills of lading for goods; *Illinois Cent. R. Co. v. Smyser*, 38 Ill. 354, 87 Am. Dec. 301; *Toledo, etc., R. Co. v. Gilvin*, 81 Ill. 511; *Louisville, etc., R. Co. v. McGuire*, 79 Ala. 395, and the carrier's receipt of the goods may be proven without the production of the bill of lading or accounting for its absence; *Gulf, etc., R. Co. v. Compton*, (Tex. Civ. App.) 38 S. W. 220.

47. Evansville, etc., R. Co. v. Kevekordes, (Ind. App.) 69 N. E. 1022.

48. Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 120 Fed. 873, 57 C. C. A. 533.

ance of the complete control and possession of the goods, with no restrictions by the shipper as to the time of transportation, and not at the time of the bill of lading.⁴⁹ But the bills of lading will displace the common law relation and control the rights of the parties, when subsequently obtained in the usual or customary course of business and expressing the intentions or engagements of the parties, or when they have otherwise been assented to in fact or law by the shipper or owner of the goods.⁵⁰ A statutory provision that the transportation of goods by a common carrier shall be considered as commenced from the time the bill of lading is signed, does not preclude the liability from commencing from the time of the delivery of the goods.⁵¹

§ 7. Bill of lading as an evidence of delivery.—The issuance of a bill of lading is *prima facie* evidence of a delivery to the carrier, when issued by its agent having actual or apparent authority to issue it, except where there is an express understanding that the carrier shall not be liable until actual delivery is made.⁵² But the fact that a bill of lading has been issued by the carrier is not conclusive proof that the goods for which it was issued had been delivered to the carrier.⁵³ A bill of lading is both a receipt

49. Park v. Preston, 108 N. Y. 434, 15 N. E. 705; Cragin v. New York Cent. R. Co., 51 N. Y. 63, 10 Am. Rep. 559; Rubens v. Ludgate Hill Steamship Co., 20 N. Y. Supp. 481; Aiken v. Chicago, etc., R. Co., 68 Iowa 363, 25 Am. & Eng. R. Cas. 377; St. Louis, etc., R. Co. v. Neel, 56 Ark. 279, 55 Am. & Eng. R. Cas. 428; Meloche v. Chicago, etc., R. Co., 116 Mich. 69, 74 N. W. 301, 10 Am. & Eng. R. Cas. N. S. 182.

50. Shelton v. Merchants' Dispatch Transp. Co., 59 N. Y. 258, revg. 36 N. Y. Super. 527; Mills v. Michigan Cent. R. Co., 45 N. Y. 622, 6 Am. Rep. 152.

51. East Line, etc., R. Co. v. Hall, 64 Tex. 620; Gulf, etc., R. Co. v. Trawick, 80 Tex. 270; International, etc., R. Co. v. Dimmit County Pasture Co., 5 Tex. Civ. App. 186; Texas Pac. R. Co. v. Nicholson, 61 Tex.

491; Martin v. Fort Worth, etc., R. Co., 3 Tex. Civ. App. 556. *Contra:* Missouri Pac. R. Co. v. Douglass, 2 Tex. Civ. App. Cas., 27, 16 Am. & Eng. R. Cas. 98; Texas, etc., R. Co. v. Wheat, 2 Tex. Civ. App. Cas., § 164. As to statute compelling carrier to issue bill of lading describing the goods, see Texas, etc., R. Co. v. Cuteman, (Tex. App.) 14 S. W. 1069; Schloss v. Atchison, etc., R. Co., 85 Tex. 601.

52. Burwell v. Raleigh, etc., R. Co., 94 N. C. 451, 25 Am. & Eng. R. Cas. 410; Capehart v. Granite Mills, 97 Ala. 353.

53. Martin v. St. Louis, etc., R. Co., 55 Ark. 510, 56 Am. & Eng. R. Cas. 112, so held, although the issuing of bills of lading except for goods actually in the possession of the carrier was forbidden by statute; St. Louis, etc., R. Co. v. Commercial

and a contract of carriage. As proof of the actual taking of possession by the carrier the bill stands as a mere receipt, subject to rebuttal or explanation, by showing that it was not the intention of the parties to make any change in the actual or legal custody of the goods,⁵⁴ or by showing that the goods actually delivered were different from those stated in the bill of lading.⁵⁵ When actual delivery has not been made to the carrier, but the goods remain in the possession of the shipper or his agent, although a bill of lading has been issued and has passed into the hands of an innocent purchaser for value, the carrier is not liable for a loss of the goods.⁵⁶ The general rules as to what constitute a delivery to the carrier are not changed by statutes providing that bills of lading shall not be issued unless the goods have already been actually delivered to the carrier. A delivery at the point of shipment, to a car not under the control or in possession of the carrier issuing the bill of lading, is not such a delivery as to authorize the issuance of the bill, and a bill of lading issued under such circumstances is void and a transfer of it passes no title to the goods.⁵⁷

§ 8. Loading goods on cars.—It is the duty, generally, of a railroad company to load the freight delivered to it for transportation into its cars, and it cannot, generally, devolve this duty by any regulation upon the shipper; it cannot legally, as a condition of transportation generally, exact from the shipper a contract to place the freight into its cars.⁵⁸ Where, by the contract of carriage, the shipper undertakes to load the freight into the cars, or vessel, this does not constitute such an interference by the shipper

Union Ins. Co. 139 U. S. 223, 49 Am. & Eng. R. Cas. 137; California Ins. Co. v. Union Compress Co., 133 U. S. 387; St. Louis, etc., R. Co. v. Knight, 122 U. S. 79, 30 Am. & Eng. R. Cas. 88; Marine Ins. Co. v. St. Louis, etc., R. Co., 41 Fed. 643, 43, Am. & Eng. R. Cas. 79. But see Deming v. Merchants' Cotton-Press, etc., Co., 90 Tenn. 306; Otis Co. v. Missouri Pac. R. Co., 112 Mo. 622, 55 Am. & Eng. R. Cas. 636.

54. Cunard S. S. Co. v. Kelley, (U. S. C. C. A. Mass.) 115 Fed. 678.

55. Southern Ry. Co. v. Allison, 115 Ga. 635, 42 S. E. 15.

56. Missouri Pac. R. Co. v. McFadden, 154 U. S. 155, 61 Am. & Eng. R. Cas. 163. Compare Otis Co. v. Missouri Pac. R. Co., 112 Mo. 622, 55 Am. & Eng. R. Cas. 636. See also The Lady Franklin, 8 Wall. (U. S.) 325; Hubbersty v. Ward, 8 Exch. 330; Grant v. Norway, 10 C. B. 665, 70 E. C. L. 665.

57. Martin v. St. Louis, etc., R. Co., 55 Ark. 510, 56 Am. & Eng. R. Cas. 112; Aetna Nat. Bank v. Water Power Co., 58 Mo. App. 532.

with the carrier's exclusive possession and control as to postpone the time when the carrier takes on the character of a common carrier, and the carrier's liability attaches at the time the freight is offered for carriage and accepted, although the loading of the freight remains to be done by the shipper.⁵⁹ The carrier is responsible for an injury to the goods occurring while they are being loaded into the cars, where the shipper has not undertaken or contracted to load them for himself.⁶⁰ A shipper who, to save charges or for his own convenience, or any other reason, loads the property himself is not the agent of the carrier in so doing and the latter is not responsible for his negligence in loading the car.⁶¹ But the carrier is liable if it undertakes to load the goods and allows them to be injured through a want of care on its part, even where it is the shipper's duty to load them.⁶²

§ 9. Proof of delivery to the carrier.—In an action against a carrier to recover for the loss of goods or an injury to them by delay in transportation or otherwise, the first essential to establish the liability of the carrier is proof of the delivery of the goods to the carrier and the acceptance thereof by the carrier for

58. London, etc., Fire Ins. Co. v. Rome, etc., R. Co., 144 N. Y. 200,

61 Am. & Eng. R. Cas. 225, affg. 68 Hun. (N. Y.) 598; Doan v. St. Louis, etc., R. Co., 38 Mo. App. 408; St. Louis, etc., R. Co. v. Martin, (Tex. Civ. App.) 35 S. W. 28.

59. London, etc., Fire Ins. Co. v. Rome, etc., R. Co., *supra*; Fitchburg, etc., R. Co. v. Hanna, 6 Gray (Mass.) 541, 66 Am. Dec. 427; Merritt v. Old Colony, etc., R. Co., 11 Allen (Mass.) 82; Bulkley v. Naumkeag Steam Cotton Co., 24 How. (U. S.) 386; The Bark Edwin, 1 Sprague (U. S.) 477; The Oregon, Deady (U. S.) 179; Grant v. Norway, 2 Eng. L. & Eq. 337, 10 C. B. 665, 70 E. C. L. 665, 15 Jur. 296; Greenwood v. Cooper, 10 La. Ann. 796.

The carrier's liability is not necessarily affected by the fact that the shipper loaded his own goods. Han-

nibal, etc., R. Co. v. Swift, 12 Wall. (U. S.) 262.

The shipper is not entitled to recover of the carrier the cost of employing hands for the purpose of loading goods for transportation, where it is the custom for the shipper to furnish the hands for such purpose and the custom has been acquiesced in. Reed v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 176.

60. Merritt v. Old Colony, etc., R. Co., 11 Allen (Mass.) 82; Gilbert v. New York Cent., etc., R. Co., 4 Hun. (N. Y.) 378, 6 Thomp. & C. (N. Y.) 662; Whitman v. Western Counties R. Co., 17 Nova Scotia 405; Thomas v. Day, 4 Esp. N. P. 262.

61. Pennsylvania Co. v. Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 215, 9 Am. & Eng. R. Cas. N. S. 556, affg. 65 Ill. App. 145.

62. Kimball v. Western R. Corp., 6 Gray (Mass.) 542.

immediate transportation.⁶³ Such proof is furnished by testimony showing the facts necessary to constitute a delivery and acceptance by the carrier, as set forth in preceding sections of this chapter.⁶⁴ As has already been shown, the bill of lading is *prima facie* evidence of a delivery, but is not conclusive evidence.⁶⁵ Shipping receipts, bills for freight charges, and other writings evidencing an exercise of possession and control of the goods by the carrier, are *prima facie* evidence of the facts recited therein; but the carrier may show the true facts by oral testimony.⁶⁶ The burden of proof to establish a delivery is on the plaintiff in an action against the carrier for the loss of or injury to the goods.⁶⁷ Where the delivery of the goods for transportation is denied by the carrier, it is sufficient for the plaintiff to show that the goods were delivered to a person and at a place where goods were accustomed to be left by the carrier, and whether such person was paid anything or not is immaterial.⁶⁸

63. See § 1, *ante*.

Atchison, etc., R. Co., 85 Tex. 601;

64. See §§ 2 to 6, *ante*.

Horseman v. Grand Trunk R. Co., 31

65. See § 7, *ante*.

U. C. Q. B. 535.

66. Union Pac. R. Co. v. Hepner,

67. See Burden of proof, chap. 14.

3 Colo. App. 313; Seller v. Steamship Pacific, 1 Or. 409; Schloss v.

68. Burrell v. North, 2 C. & K. 681, 61 E. C. L. 681.

CHAPTER V.

TERMINATION OF LIABILITY.—DELIVERY BY CARRIER.

- SECTION
- 1. Termination of carrier's liability.
 - 2. Unloading and storing goods.
 - 3. Liability for injury while goods are being unloaded.
 - 4. Delivery must be made to the consignee or his agent.
 - 5. Delivery may always be made to the true owner of the goods.
 - 6. Delivery to fraudulent purchaser.
 - 7. Delivery of goods sent in care of carrier's local agent.
 - 8. Consignor's right to change of consignee.
 - 9. Delivery to holder of bill of lading.
 - 10. Carrier entitled to demand bill of lading.
 - 11. Carrier's liability to innocent purchaser of bill of lading.
 - 12. Laches of holder of bill of lading.
 - 13. Goods received from connecting carrier.
 - 14. Stoppage in transitu as a defense.
 - 15. Holder of bill of lading has priority over creditors.
 - 16. Effect of the word "notify" in a bill of lading.
 - 17. Bill of lading attached to draft.
 - 18. Effect of bill of lading as estoppel.
 - 19. Duplicate bills of lading.
 - 20. Necessity of endorsement of bill of lading.
 - 21. Carrier's liability for misdelivery.
 - 22. Delivery to one of two persons of the same name.
 - 23. Place of delivery.
 - 24. Right of owner or consignee to change place of delivery.
 - 25. Statutory requirements as to delivery of grain.
 - 26. When place of destination is not on carrier's line.
 - 27. Time of delivery.
 - 28. When personal delivery is required.
 - 29. Delivery by carriers by water.
 - 30. Delivery where consignee refuses to receive.
 - 31. Delivery of goods sent C. O. D.
 - 32. Confusion of goods.
 - 33. Statutory penalties for refusing to deliver promptly.
 - 34. Demand of goods by consignee.
 - 35. Waiver of right of action for wrongful delivery.
 - 36. Right of carrier to demand receipts upon delivery.

§ 1. **Termination of carrier's liability.**—The carrier's ~~undertaking~~ is to deliver the goods transported by it in safety as well
(146)

as to carry safely, and its responsibility ceases when the delivery of the goods is completed either by an actual, or a constructive or legal, delivery to the owner or consignee, or his agent, or by a deposit in a reasonably safe warehouse, after the consignee has had reasonable time in which to call for and remove the goods. The carrier's liability cannot end until that of the owner, consignee or warehouseman begins.¹ The warranty of the carrier as an insurer is broken by non-delivery, and the question of negligence in the performance of its duty to deliver safely is, therefore, immaterial.² The carrier's liability as a common carrier terminates in respect to particular goods when its liability as warehouseman commences.³ When goods are safely conveyed to the place of destination and it is impossible for the carrier to deliver the goods because the con-

1. Vaughn v. New York, etc., R. Co., (R. I.) 61 Atl. 695; Schumacher v. Chicago, etc., Ry. Co., 108 Ill. App. 520, affd. 207 Ill. 199, 69 N. E. 825; DeMott v. Laraway, 14 Wend. (N. Y.) 225, 28 Am. Dec. 523; Georgia Ry. Co. v. Pound, 111 Ga. 6, 36 S. E. 312; Michigan Southern, etc., R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278; Chicago, etc., R. Co. v. Warren, 16 Ill. 502, 63 Am. Dec. 317; Stone v. Waitt, 31 Me. 409, 52 Am. Dec. 621; McGregor v. Kilgore, 6 Ohio 358, 27 Am. Dec. 260; Erskine v. Thames, 6 Miss. 371; Smith v. Nashua, etc., R. Co., 7 Fost. (N. H.) 86; Parker v. Flagg, 26 Me. 181; Groff v. Bloomer, 9 Pa. St. 114; American Express Co. v. Baldwin, 26 Ill. 504; South & North Alabama R. v. Wood, 66 Ala. 167, 9 Am. & Eng. R. Cas. 419; Moffat v. Great Western, etc., R. Co., 15 L. T. N. S. 630; Fowler v. Great Western, etc., R. Co., 22 L. J. Exch. 76, 7 Exch. 699; Wilson Sewing M. Co. v. Louisville, etc., R. Co., 71 Mo. 203; Bodenham v. Bennett, 4 Price, 31; Duff v. Budd, 3 B. & D. 177; Richards v. London, etc., R. Co., 18 L. J. C. P. 251, 7 C. B. 839; The Titania, 124 Fed. 975; Missouri Pac.

Ry. Co. v. L. Newburger & Bro., (Kan.) 73 Pac. 57.

A subsequent acquiescence by the consignee in a wrong delivery exempts the carrier from liability therefor. O'Dougherty v. Boston, etc., R. Co., 1 Sup. Ct. (N. Y.) 477. There is no liability on the part of a railroad company as a common carrier for car loads of grain delivered by it in pursuance of a contract, and standing on spur tracks on the premises of an elevator company, laid to store grain until it could be unloaded in the elevator, notwithstanding it had the further duty of switching such cars into the elevator when demanded by those in charge, and switching the empty cars away, as such liability terminates on delivering the cars on such tracks. Paddock v. Toledo, etc., Ry. Co., 11 O. C. D. 789, 21 Ohio Cir. Ct. R. 626.

2. Hall v. Boston, etc., R. Co., 12 Allen (Mass.) 439; Forbes v. Boston, etc., R. Co., 13 Mass. 154, 9 Am. & Eng. R. Cas. 76; Richards v. London, etc., R. C., 18 L. J. C. P. 251, 7 C. B. 839.

3. See Carrier's liability as warehouseman, chap. 9.

signee is dead, absent, or neglects or refuses⁴ to receive the goods, or is not known, or cannot after reasonable diligence be found, the carrier may be discharged from further responsibility as a carrier by storing the goods in its freight depot, or placing them in a proper warehouse for or on account of the owner, if it has made all reasonable effort to effect a delivery and has done all that could be reasonably required of it. If the carrier under such circumstances store the goods in its own warehouse, after keeping them for a reasonable time, if the consignee does not call for them, its liability as a common carrier ceases and from that time it becomes liable only as a warehouseman.⁵ In some instances it has been held that notice to the consignor is necessary, upon the refusal of the consignee to receive the goods, in order to relieve the carrier of its responsibility as a carrier.⁶ The degree of care which it is the duty of the carrier to use in delivering the goods entrusted to it depends upon and varies with the nature and condition of the goods and the circumstances under which the delivery takes place. What is proper and reasonable diligence to effect a delivery, and

4. Levy v. Weir, 38 Misc. Rep. (N. Y.) 361, 77 N. Y. Supp. 917; Byrne v. Fargo, 36 Misc. Rep. (N. Y.) 543, 73 N. Y. Supp. 943. See Delivery where consignee refuses to receive, § 30, *post*.

5. N. Y.—Fenner v. Buffalo, etc., R. Co., 44 N. Y. 505; Powell v. Myers, 26 Wend. (N. Y.) 591; Fisk v. Newton, 1 Den. (N. Y.) 45, 43 Am. Dec. 649; Jones v. Norwich, etc., Transp. Co., 50 Barb. (N. Y.) 193, crit'd, 49 N. Y. 303; Roth v. Buffalo, etc., R. Co., 34 N. Y. 548, 90 Am. Dec. 736; Northrop v. Syracuse, etc., R. Co., 2 Trans. App. (N. Y.) 183, 3 Abb. Dec. (N. Y.) 386; Mayell v. Potter, 2 Johns. Cas. (N. Y.) 371; Clendaniel v. Tuckerman, 17 Barb. (N. Y.) 184.

Ala.—Kennedy v. Mobile, etc., R. Co., 74 Ala. 430, 21 Am. & Eng. R. Cas. 145; Alabama, etc., R. Co. v. Kidd, 35 Ala. 209.

Conn.—Hurd v. Hartford, etc., S. Co., 40 Conn. 49.

Ill.—Illinois Cent. R. Co. v. Friend,

64 Ill 303; Bartholomew v. St. Louis, etc., R. Co., 53 Ill. 227, 5 Am. Rep. 45.

Ind.—Adams Express Co. v. Darnell, 31 Ind. 20, 99 Am. Dec. 582.

Ohio.—Hirsch v. Steamboat Quaker City, 2 Disney (Ohio) 144.

Pa.—Cope v. Cordova, 1 Rawle (Pa.) 203.

Tenn.—Rankin v. Memphis, etc., Packet Co., 9 Heisk. (Tenn.) 564, 24 Am. Rep. 339; Dean v. Vaccaro, 2 Head (Tenn.) 490, 75 Am. Dec. 744; Southern Express Co. v. Kaufman, 12 Heisk. (Tenn.) 161.

Wis.—Marshall v. American Express Co., 7 Wis. 1, 73 Am. Dec. 381.

Eng.—White v. Humphrey, 11 Q. B. 43, 63 E. C. L. 43; Cairus v. Robbins, 8 M. & W. 258; Heugh v. London, etc., R. Co., L. R. 5 Exch. 51, 39 L. J. Exch. 48; Stephenson v. Hart, 4 Bing. 476, 15 E. C. L. 47; Garside v. Trent Nav. Co., 4 T. R. 581.

6. See Notice to consignor, § 11, chap. 9.

what constitutes a delivery cannot be regulated or prescribed by any fixed standard but must depend upon the varying circumstances of each case.⁷ In the case of carriers by sea or on inland waters, a delivery on the usual wharf is such a delivery as will discharge the carrier when due and reasonable notice thereof has been given to the consignee; but the carrier cannot leave or abandon the goods upon the wharf, in an unprotected state, even though there be an inability or refusal of the consignee to receive them.⁸ As between the carrier and the vendor of the goods, so long as the goods remain in the possession of the carrier the right of stoppage in transitu exists in favor of the vendor;⁹ but when the goods have come under the actual control of the vendee, the right of stoppage ceases;¹⁰ so that an actual change of possession from the carrier to the consignee must have taken place in order to constitute such a delivery as would bar the vendor's right of stoppage.

§ 2. Unloading and storing goods.—In some jurisdictions the rule prevails that the unloading of the goods by the carrier and their safe deposit in a place usually convenient for being taken away by the consignee, such as the platform or warehouse of the company, or a storehouse from which the consignee may obtain them upon demand, although the carrier does not notify the consignee of the arrival of the goods, constitutes a delivery and the carrier's liability as an insurer ceases, in the absence of any special circumstances or agreement affecting the case.¹¹ In other

7. Westchester, etc., R. Co. v. McElwee, 67 Pa. St. 211; Gill v. Manchester, etc., R. Co., 42 L. J. Q. B. 89, L. R. 8 Q. B. 186; Redman's Law Ry. Carr. (2nd Ed.) p. 103; Cope v. Cordova, 1 Rawle (Pa.) 203.

8. McAndrew v. Whitlock, 52 N. Y. 40, 11 Am. Rep. 657; Rowland v. Miln, 2 Hilt. (N. Y.) 150; Gulliver v. Adams Express Co., 38 Ill. 502; Bartholomew v. St. Louis, etc., R. Co., 53 Ill. 227; Chicago, etc., R. Co. v. Fairclough, 51 Ill. 106. See also Mote v. Chicago, etc., R. Co., 27 Iowa 22; Mattison v. New York, etc., R. Co., 57 N. Y. 552; Chickering v. Fowler, 4 Pick. (Mass.) 371.

It has been held that the responsi-

bility of a common carrier on the Ohio River does not cease by the delivery of the goods on the wharf and notice given to the consignee, but that the duty of the carrier is to attend to the actual delivery. Hemp-hill v. Chenie, 6 W. & S. (Pa.) 62. And see Blin v. Mayo, 10 Vt. 56; Galloway v. Hughes, 1 Bailey (S. C.) 553.

9. Harris v. Pratt, 17 N. Y. 249; Farrell v. Richmond, etc., R. Co., 102 N. C. 390, 37 Am. & Eng. R. Cas. 704, 11 Am. St. Rep. 760.

10. Becker v. Hallgarten, 86 N. Y. 167.

11. Thomas v. Boston, etc., R. Corp., 10 Metc. (Mass.) 477, 43 Am.

jurisdictions the rule is that the carrier's liability as insurer continues after the arrival of the goods at their destination and their deposit there in a warehouse, until the lapse of a reasonable time for the removal of the goods by the consignee, after notice of their arrival. But when such reasonable time has elapsed, a constructive delivery is effected and the company becomes liable as warehouseman merely.¹² Where it is expressly provided in the contract of shipment, or the consignee accepts such delivery, a complete delivery may be effected before the goods are unloaded.¹³ A delivery of part of a consignment of goods ordinarily establishes a presumptive delivery of the entire consignment,¹⁴ but where the

Dec. 444; *Rice v. Hart*, 118 Mass. 201, 19 Am. Rep. 433. This rule is maintained in Massachusetts, Georgia, Illinois, Indiana, Iowa, Missouri, Pennsylvania, North Carolina, and Tennessee. See Carrier's liability as warehouseman as to goods awaiting delivery, § 3, chap. 9.

Payment of freight charges by the consignee after notice of arrival, without any arrangement as to the further custody of the goods by the company, amounts to a delivery so far as to throw the risk of loss upon the consignee. *New Albany, etc., R. Co. v. Campbell*, 12 Ind. 55; *Chalk v. Charlotte, etc., R. Co.*, 85 N. C. 423, 9 Am. & Eng. R. Cas., 106. See also *Baldwin v. American Express Co.*, 23 Ill. 197, 74 Am. Dec. 190, as to what constitutes a delivery where consignee was absent, and the goods were stored.

A carrier transporting freight on platform cars to a station where it maintains a freight house, but no agent, is held, in *Normile v. Northern P. R. Co.*, (Wash.) 67 L. R. A. 271, to be obliged to place the freight in the house in order to relieve itself from liability for freight lost through theft, unless it shows that it is not able to do so.

12. Pennsylvania R. Co. v. Naive, (Tenn.) 79 S. W. 124; Herf & Fre-

ricks *Chemical Co. v. Lackawanna Line*, (Mo. App.) 73 S. W. 346; *King v. New Brunswick, etc., Steamboat Co.*, 36 Misc. Rep. (N. Y.) 555, 73 N. Y. Supp. 999; *Missouri Pac. R. Co. v. Haynes*, 72 Tex. 175, 37 Am. & Eng. R. Cas. 645; *Bradshaw v. Irish North Western R. Co.*, 7 Ir. R. C. L. 252, 3 Ry. & C. T. Cas. XI. This rule is held in New Hampshire, New York and many of the other states and is the English rule. See Carrier's liability as warehouseman as to goods awaiting delivery, § 4, chap. 9.

13. Whitney Mfg. Co. v. Richmond, etc., R. Co., 38 S. C. 365, 37 Am. St. Rep. 767, 55 Am. & Eng. R. Cas. 611; *Armistead Lumber Co. v. Louisville, etc., R. Co.*, (Miss.) 11 So. 472, 55 Am. & Eng. R. Cas. 600. Compare *Pindell v. St. Louis, etc., R. Co.*, 34 Mo. App. 675.

14. Stapleton v. Grand Trunk Ry. Co., (Mich.) 94 N. W. 739, 10 Det. Leg. N. 133; *Tallahassee Falls Mfg. Co. v. Western Ry. of Alabama*, (Ala.) 29 So. 203; *Whitney Mfg. Co. v. Richmond, etc., R. Co.*, *supra*; *Culbreth v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 392. Compare *Cox v. Peterson*, 30 Ala. 608, 68 Am. Dec. 145, where the acceptance of a portion of the goods by the consignee at a different place from that specified in the contract, though held admissi-

evidence is conflicting the question whether the delivery of a part was intended for a delivery of the whole, or only of the part taken, is properly one for the jury.¹⁵ What constitutes a sufficient delivery by a carrier is ordinarily a question of fact to be determined by the jury, but when there is no conflict in the testimony it may be settled by the court.¹⁶

§ 3. Liability for injury while goods are being unloaded.—Ordinarily it is the carrier's duty to unload goods with due care at the termination of their transit, and it is responsible for injuries to the goods while being unloaded.¹⁷ In unloading and delivering goods transported by it, the carrier is liable in all cases for the want of ordinary care on the part of its servants.¹⁸ But if

ble in mitigation of damages, was held not to discharge the carrier from liability as to the remainder.

15. Sessions v. Western R. Corp., 16 Gray (Mass.) 132; Cook v. Erie R. Co., 58 Barb. (N. Y.) 312.

16. Alabama G. S. R. Co. v. Eichoffer, 100 Ala. 224; Whitney Mfg. Co. v. Richmond, etc., R. Co., *supra*.

17. Russell v. Livingston, 19 Barb. (N. Y.) 346; Chicago, etc., R. Co. v. Bensley, 69 Ill. 630; Porter v. Railroad, 20 Ill. 407; Alabama, etc., R. Co. v. Kidd, 35 Ala. 209.

Where it was the duty of the defendant to transfer a load to a steamer from a lighter and the negligent manner of unloading was the cause of the lighter's listing and a portion of the goods being lost, the defendant was liable for the damage. *McAllister v. Southern Pac. Co.*, (U. S. D. C. N. Y.) 111 Fed. 938.

18. DeMott v. Laraway, 14 Wend. (N. Y.) 225, 28 Am. Dec. 523, where a hogshead of molasses is allowed to fall while it is being unloaded from the vessel to the wharf, and its contents thereby lost, it is no defense that the hoisting tackle belongs to some third person, since the tackle

must be regarded as the carrier's *pro hac vice*.

The rule stated in the text is true, although the consignee, knowing it to be the rule of the company that he must unload, and that if he failed to do so within a certain time the company would, has neglected to unload, *Kimball v. Western R. Corp.*, 6 Gray (Mass.) 542.

"The precise degree of care which it is the duty of the carrier to use in delivering the goods intrusted to him must depend upon and vary with the nature and condition of the thing carried, and the ever varying circumstances under which the delivery takes place. Some goods require much more tender handling than others; some animals much more care and management than others, according to their nature, habits, and conditions; and the line of conduct which the carrier should propose to himself is that which a prudent owner would adopt if he were in the carrier's place under the circumstances and subject to the conditions in which the carrier is placed, and under which he is called on to act." *Gill v. Manchester, etc., R. Co.*, 42 L. J. Q. B. 89, L. R. 8 Q. B. 186.

the delivery has been completed by the acceptance by the owner or consignee of the goods before they are unloaded and the owner or consignee voluntarily undertakes to unload them or has previously agreed to unload them, the owner or consignee of the goods becomes responsible for any loss or injury incurred during the work of unloading, even though he has the assistance of the carrier's servants.¹⁹ But where by the provisions of a bill of lading merchandise is to be delivered "from the ship's tackles where the ship's responsibility shall cease," her liability, after the goods are discharged, is that of a bailee, charged with the duty to take ordinary care of the property for a reasonable length of time, and not to abandon it, or negligently expose it to injury.²⁰

§ 4. Delivery must be made to the consignee or his agent.—No obligation of the carrier is more rigorously enforced than that which requires delivery to the proper person, and the law allows of no excuse to a common carrier for a wrong delivery of goods entrusted to him for transportation, except the fault of the shipper himself. Unless there are special circumstances which

19. Lewis v. Western R. Corp., 11 Metc. (Mass.) 509.

A consignee, or his authorized agent, may receive goods addressed to him in the hands of a carrier at any place, either before or after their arrival at their place of destination, and such acceptance operates as a discharge of the carrier from his liability to the consignor. Sweet v. Barney, 23 N. Y. 337.

Where the owner furnished skids for unloading a hogshead of molasses from the carrier's wagon, and, through a latent defect in the skids, the hogshead fell to the ground and its contents were lost, the carrier was not liable. Loveland v. Burke, 120 Mass. 139, 21 Am. Rep. 507.

20. Smith v. Britain S. S. Co., (U. S. D. C. N. Y.), 123 Fed. 176; Chelsea Jute Mills v. Britain S. S. Co., 123 Fed. 176, where the owners of a consignment of jute were notified of the arrival of the ship and the time of

discharging, but did not remove a part of the goods because it was more convenient to load it upon lighters after the ship had left her berth, the ship was held not liable for an injury by rain to the jute which she was compelled to unload on an uncovered part of the wharf because the shed under which most of it was placed had been filled, and where she covered it and took all reasonable care to protect it from injury.

Unloading goods during a storm on an open platform, and leaving them unprotected from the weather is not a fault of the carrier, where there is no building at that station or any agent of the carrier, and the bill of lading provides that when delivered on the platform they are at the risk of the owner. Allam v. Pennsylvania R. Co., 183 Pa. 104, 41 W. N. C. 205, 38 Atl. 709, 39 L. R. A. 535.

permit a delivery to be made otherwise, the delivery must be made to the consignee of the goods, or to his duly authorized agent, and the carrier is responsible if the goods are delivered to any other party.²¹ The carrier is liable in an action for conversion.²² The consignee is the presumptive owner of the thing consigned, and a carrier, without notice to the contrary, must regard the consignee of the goods as the absolute owner, and a legal delivery to him will discharge the carrier from all liability to the consignor.²³ A delivery to the consignee's agent, who has been duly authorized to receive the goods for his principal, is a good delivery;²⁴ or a delivery to a third party under instructions from such agent.²⁵

21. Furman v. Union Pac. R. Co., 106 N. Y. 579, 13 N. E. 587; Viner v. New York, etc., Steamship Co., 50 N. Y. 25. Where a carrier delivered certain merchandise directed to M. at a certain casino to a barkeeper at the casino, who was not M.'s agent, or authorized by her to receive the package, there was no delivery to the consignee, and the carrier was therefore liable. Charles Schlesinger & Sons v. New York, etc., R. Co., 85 N. Y. Supp. 372.

The carrier is entitled to pay to the consignee the value of goods lost while in its charge and for which it is responsible; and the fact that the consignee owned the article by virtue of a conditional sale duly registered will not render it liable to the vendor for the amount still due him by the consignee. Dyer v. Great Northern R. Co., 51 Minn. 345.

22. Security Trust Co. v. Wells, Fargo & Co. Express, 81 App. Div. (N. Y.) 426, 80 N. Y. Supp. 830; Missouri, etc., R. Co. v. Seley, 31 Tex. Civ. App. 158, 72 S. W. 89; Cleveland, etc., Ry. Co. v. Wright, 25 Ind. App. 525, 58 N. E. 559.

A demand of the delivery of goods by a mortgagee, by virtue of a chattel mortgage after condition broken, but without legal process, will not make the carrier liable for conversion;

if it refuses to surrender them, where the goods were received from a third person who has a bill of lading therefor. Kohn v. Richmond, etc., R. Co., 37 S. C. 1, 34 Am. St. Rep. 726, 16 S. E. 376, 47 Alb. L. J. 71.

23. O'Dougherty v. Boston, etc., R. Co., 1 Thomp. & C. (N. Y.) 477; Tibbs v. Cleveland, etc., R. C., 20 Ind. App. 192, 50 N. E. 486; Bingham v. Lamping, 26 Pa. St. 340, 67 Am. Dec. 418; St. Louis, etc., R. Co. v. Crawford, (Tex. Civ. App.) 35 S. W. 748.

Where goods were consigned to K., care of "B's Express," it was proper for the carrier to deliver the goods to K. without production of the bill of lading, since by the consignment and delivery of the goods to the carrier, to be conveyed to the consignee, the property in the goods became vested in the consignee. Schlesinger v. West Shore R. Co., 88 Ill. App. 273.

24. Ontario Bank v. New Jersey Steamboat Co., 59 N. Y. 510; Platt v. Wells, 26 How. Pr. (N. Y.) 442, 2 Robt. (N. Y.) 101; Illinois Cent. R. Co. v. Simpson, 17 Ill. App. 325; Lewis v. Western R. Corp., 11 Metc. (Mass.) 509; Southern Express Co. v. Everett, 37 Ga. 688.

25. Gates v. Chicago, etc., R. Co., 42 Neb. 379.

Delivery to a cartman, drayman, or other person not authorized by the

A delivery of a money package addressed to a bank or to the cashier of a bank has been held good when delivered to a receiving teller or other employe of the bank acting at the time in the discharge of his duties and authorized and accustomed to receive money packages for the bank.²⁶ So, of a delivery of such a package to a wharfinger, in accordance with a uniform usage to deliver such packages of money shown to have been well known to the plaintiff.²⁷ The delivery of a wife's goods to a husband may be made under such circumstances that the carrier will have the right to presume and act upon the presumption that the husband is the duly authorized agent of the wife.²⁸ It devolves upon the carrier, in an action for misdelivery, to prove the agent's authority to receive the goods, where it defends on the ground that it delivered the goods to the consignee's agent, or to show that the person to whom the goods were delivered had such apparent authority as to justify the carrier in presuming that such person had authority to receive the goods.²⁹ Where the consignor is known to the carrier to be the owner, the carrier must be understood to contract with him only, for his interest, upon such terms as he dictates in regard to the delivery, and the consignee is to be regarded simply as an agent selected by him to receive the goods

consignee to receive the goods is at the carrier's risk. *Dean v. Vaccaro*, 2 Head. (Tenn.) 488, 75 Am. Dec. 744.

26. *Sweet v. Barney*, 23 N. Y. 335; *Hotchkiss v. Artisans' Bank*, 2 Abb. App. Dec. (N. Y.) 403, affg. 42 Barb. (N. Y.) 517.

27. *Bank v. Champlain Transp. Co.*, 16 Vt. 52, 42 Am. Dec. 491.

28. *Reynolds v. New York Cent., etc.*, R. Co., 3 N. Y. Supp. 331, 21 St. Rep. (N. Y.) 319; *Furman v. Chicago, etc.*, R. Co., 57 Iowa, 42, 23 Am. & Eng. R. Cas. 731, 62 Iowa, 395.

29. *Williams v. Holland*, 22 How. Pr. (N. Y.) 137; *Nebenzahl v. Fargo*, 15 Daly (N. Y.) 130, where delivery to one claiming to be a clerk, but whose authority was denied by the consignee, was held to be unauthorized; *Angle v. Mississippi, etc.*, R. Co.,

9 Iowa 487, 18 Iowa, 555, where a new firm was held not to have authority to receive under an authorization given to the old firm; *Adams v. Blankestein*, 2 Cal. 413, 56 Am. Dec. 350; *Hermann v. Goodrich*, 21 Wis. 536, 94 Am. Dec. 562; *Waldron v. Chicago, etc.*, R. Co., 1 Dakota, 336; *The Steamboat Sultana v. Chapman*, 5 Wis. 454.

No greater proof of authority is required than for any other issue in a civil action. *Wilcox v. Chicago, etc.*, R. Co., 24 Minn. 269.

The delivery of goods on a forged order purporting to come from the consignee, although the order was presented by a person who had formerly been the consignee's clerk, does not relieve the carrier from liability. *American Merchants' Union Exp. Co. v. Milk*, 73 Ill. 224.

at the place indicated. A delivery by the carrier in such case, without the knowledge of the shipper, to a third person, at the place of shipment, on the order of the consignee, will render the carrier liable to the shipper.³⁰ Where the consignor has expressly directed a delivery to a third person, or to the consignee only upon his performing certain prescribed conditions, the delivery must be in accordance with such instructions,³¹ and a delivery in accordance with the consignor's orders relieves the carrier from further liability.³² A carrier who, without authority from the consignor or consignee, delivers to the consignor's general agent at the place of delivery a package directed to the consignee, is liable therefor to the consignee.³³ And where the consignee of goods did not reside at the point where they were to be delivered and did not expect to be there to receive them, the carrier was held not to be justified in delivering them to the resident agent of the consignee there.³⁴

§ 5. Delivery may always be made to the true owner of the goods.—When the real owner of goods in the hands of a carrier comes and demands his property he is entitled to its immediate delivery, and it is the duty of the carrier to make it. The law

30. Southern Express Co. v. Dickson, 94 U. S. 549; Louisville, etc., R. Co. v. Hartwell, 99 Ky. 436, 36 S. W. 183, 18 Ky. L. Rep. 745, 4 Am. & Eng. R. Cas. N. S. 550, 38 S. W. 1041.

And where the local agent of the consignor, to whom the goods were consigned has directed the carrier to deliver them only upon his order, a delivery by the carrier to a third person was without authority. Wolfe v. Missouri Pac. R. Co., 97 Mo. 473, 10 Am. St. Rep. 331, 37 Am. & Eng. R. Cas. 715.

An agent of the consignor has no implied authority to direct the carrier as to whom goods shall be delivered to, and a mere statement by him that the goods are intended for certain parties without further directions from the shippers will not justify a delivery to such parties. Saw-

yer v. Chicago, etc., R. Co., 22 Wis. 403, 99 Am. Dec. 49.

31. Foggan v. Lake Shore, etc., R. Co., 16 N. Y. Supp. 25, where the shipper directed a delivery to the consignee only upon his producing a bill of lading; Wright v. Northern Cent. R. Co., 8 Phila. (Pa.) 19, where goods were sent to "order of A. B. & Co., notifying C," the carrier was held liable for a wrongful delivery to C. without an order from A. B. & Co. See also Delivery to holder of bill of lading, § 9, *post*.

32. Ruffin v. Ruggiero, 10 Misc. Rep. (N. Y.) 39; Brasher v. Denver, etc., R. Co., 12 Colo. 384.

33. Ela v. American M. U. Express Co., 29 Wis. 611, 9 Am. Rep. 619.

34. Wilson Sewing Machine Co. v. Louisville, etc., R. Co., 71 Mo. 203.

will not adjudge the performance of this duty tortious as against a consignor or consignee having no title.³⁵ The carrier has the right to interpose, in all cases, as a defense to an action brought by the bailor subsequently for the property, the right of the third person to whom it, as bailee, has yielded by delivering the property.³⁶ Where the carrier surrenders possession of the goods to the person whom it ascertains, in the course of the transportation or before final delivery, to be the real owner, it is discharged from further liability.³⁷ But to justify a delivery to the true owner contrary to or without the orders of the consignor, the carrier assumes the burden of proving the ownership at the time of such delivery and the immediate right of possession to have been in the person to whom such delivery was made.³⁸ The general rule that the agent must account to his principal and cannot set up the *jus tertii*, nor in any way dispute his title, applies to the common carrier, and the carrier must deliver according to the shipper's orders or the terms of the bill of lading, unless the true owner, whose rights are paramount to the claims of all others, has enforced his right to the possession and the carrier has yielded to it.³⁹ The fact that the true owner of the goods is a stranger

35. Western Transp. Co. v. Barber, 56 N. Y. 544; Mullins v. Chicker-
ing, 110 N. Y. 514; The Idaho, 93
U. S. 575, 23 L. Ed. 978, 11 Blatchf.
(U. S.) 218; Wells v. American Ex-
press Co., 55 Wis. 23, 42 Am. Rep.
695, 6 Am. & Eng. R. Cas. 300.

The true owner of the property in the possession of a common carrier may have the same diverted at a station on the route between the shipping point and the place of destination while it is in transit, but may be required to produce the bill of lading or furnish other evidence of ownership to entitle him to this right. Ryan v. Great Northern Ry. Co., (Minn.) 95 N. W. 758.

36. Lake Shore, etc., R. Co. v. National Live-Stock Bank, 178 Ill. 506, 13 Am. & Eng. R. Cas. N. S. 1, revg. 59 Ill. App. 451, 53 N. E. 326; Western Transp. Co. v. Barber, *supra*; Shellenberg v. Fremont, etc.,

R. Co., 45 Neb. 487; Harker v. De-
ment, 9 Gill (Md.) 7, 52 Am. Dec.
670; Biddle v. Bond, 6 B. & S. 224;
White v. Bartlett, 9 Bing. 382; Chees-
man v. Exall, 6 Exch. 341; Dixon v.
Yates, 27 Eng. C. L. 92.

37. Bates v. Stanton, 1 Duer (N.
Y.) 79; Rosenfield v. Express Co., 1
Woods (U. S.) 131; King v. Rich-
ards, 6 Whart. (Pa.) 418, 37 Am.
Dec. 420; Floyd v. Bovard, 6 W. & S.
(Pa.) 75; Hardman v. Wilcock, 9
Bing. 382, note. Compare Kohn v.
Richmond, etc., R. Co., 37 S. C. 1, 34
Am. St. Rep. 726; Story Bailm. (9th
Ed.) § 582.

38. Wolfe v. Missouri Pac. R. Co.,
97 Mo. 473, 10 Am. St. Rep. 331, 37
Am. & Eng. R. Cas. 719.

39. Thomas v. Northern Pac. Exp.
Co., 73 Minn. 185, 75 N. W. 1120, 4
Am. Neg. Rep. 504, 11 Am. & Eng.
R. Cas. N. S. 121; Wells v. Ameri-
can Express Co., *supra*; Western

to the contract of bailment does not affect his right to recover them.⁴⁰

§ 6. Delivery to fraudulent purchaser.—If a carrier delivers goods according to their address he is not responsible for the fact that the person to whom they are addressed fraudulently represented himself in writing or orally to the seller to be another person of the same name, or to be a merchant of good financial credit, and bought the goods in the name of such merchant on credit, and that the seller is swindled out of the goods; and the seller cannot maintain an action against the carrier who receives the goods and carries and delivers them to the purchaser.⁴¹ The fact that the seller was induced to sell by fraud makes the sale voidable but not void, and the carrier is entitled to regard the consignee as the true owner unless actually or constructively notified to the contrary. Delivery to the consignee in such case discharges the carrier, upon the principle that any delivery, valid as to the consignee, is a defense for the carrier as to all persons.⁴² But where a common carrier, without requiring evidence of identity, delivers to a stranger goods which have been fraudulently ordered by him in the name of a fictitious firm, and shipped directed to the firm, he is liable to the consignor for their value.⁴³ Where by means of a

Transp. Co. v. Barber, *supra*; Sheridan v. New Quay Co., 4 C. B. N. S. 618, 93 E. C. L. 618; Ogle v. Atkinson, 5 Taunt. 759; Browne Carr. 221; Hutch. Carr. § 405.

40. Shellenberg v. Fremont, etc., R. Co., *supra*.

41. Edmunds v. Merchants' Despatch Transp. Co., 135 Mass. 283, 16 Am. & Eng. R. Cas. 250; Samuel v. Cheney, 135 Mass. 278, 46 Am. Rep. 467; Dunbar v. Boston, etc., R. Corp., 110 Mass. 26, 14 Am. Rep. 576; Barker v. Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697; The Drew, 15 Fed. 826; Brasher v. Denver, etc., R. Co., 12 Colo. 384; Nanson v. Jacob, 12 Mo. App. 125, 93 Mo. 331; Lake Shore, etc., R. Co. v. Luce, 11 Ohio Cir. Ct. Rep. 543, 1 Ohio Cir. Dec. 145; Bush v. St. Louis, etc., R. Co., 3 Mo. App. 62; McKean v. McIvor, L. R.

6 Exch. 36; Hardman v. Booth, 32 L. J. Exch. 105; Kingsford v. Merry, 26 L. J. Exch. 83; Pacific Exp. Co. v. Hertzberg, 17 Tex. Civ. App. 100, 42 S. W. 795; Norwalk Bank v. Adams Express Co., 4 Blatchf. (U. S.) 455, Fed. Cas. No. 10,354.

A common carrier is not chargeable with negligence in the delivery of goods, where it delivered them to the man to whom they were sent, and who the carrier was induced, by the acts of the shipper in dealing with him, to believe, was the man to whom the shipper intended to send, though he was insolvent and there was a reputable merchant of the same name in the town. Seibert v. Philadelphia, etc., R. Co., 15 Pa. Super. Ct. 435.

42. See Delivery must be made to the consignee or his agent, § 4, *ante*.

43. Price v. Oswego, etc., R. Co.,

fictitious order, a firm is induced to consign valuable merchandise to a person whom they know to be responsible, the carrier is liable for loss from a delivery of the goods to another person claiming to be the proper consignee, though the delivery is induced by false representations to the carrier's agent.⁴⁴ And where a carrier, after notice from the consignee that he had not ordered the goods, delivered them to one who had wrongfully ordered them in the name of the consignee, it was liable to the consignor for their value.⁴⁵

§ 7. Delivery of goods sent in care of carrier's local agent.— The rule in New York and some other jurisdictions, where goods are delivered to a carrier directed to a consignee in care of the carrier's local agent at the termination of the route along which the carrier is to transport the package, is that a delivery to the carrier's agent does not relieve the carrier from liability in case of loss, since such agent does not receive the package as agent of the consignee.⁴⁶ In other jurisdictions it is held that a delivery to

50 N. Y. 213, 10 Am. Rep. 475, 3 Am. Ry. Rep. 325, revg. 58 Barb. (N. Y.) 599; Winslow v. Vermont, etc., R. Co., 42 Vt. 700, 1 Am. Rep. 365; Sword v. Young, 89 Tenn. 126; Wey-and v. Atchison, etc., R. Co., 75 Iowa 573, 9 Am. St. Rep. 504; Pacific Express Co. v. Shearer, 160 Ill. 215, 43 N. E. 816; Stephenson v. Hart, 4 Bing. 476, 15 E. C. L. 47; Wilson v. Adams Express Co., 27 Mo. App. 360, 43 Mo. App. 659; Ryder v. Burlington, etc., R. Co., 51 Iowa 460. Compare Duff v. Budd, 3 B. & B. 177, 7 E. C. L. 399; Heugh v. London, etc., R. Co., L. R. 5 Exch. 51.

44. Oskamp v. Southern Express Co., (Ohio) 56 N. E. 13.

An express company is not relieved from liability for delivering a package of money to a person other than the consignee by the fact that the consignor might have discovered by the exercise of due care that the order and check for the money were forgeries. Security Trust Co. v.

Wells Fargo & Co. Express, 81 App. Div. (N. Y.) 426, 80 N. Y. Supp. 830.

45. Louisville, etc., R. Co. v. Ft. Wayne Electric Co., (Ky.) 55 S. W. 918; Bruhl v. Coleman, 113 Ga. 1102, 39 S. E. 481.

The omission of the word "order" after the name of the consignee in a bill of lading containing a provision that, in the absence of such word, the carrier might deliver without requiring the production of the bill of lading, did not exempt the carrier from liability for a misdelivery of the goods to a complete stranger. Marrus v. New Haven Steamboat Co., 30 Misc. Rep. (N. Y.) 421, 62 N. Y. Supp. 474.

46. Russell v. Livingston, 16 N. Y. 516, 518, revg. 19 Barb. (N. Y.) 346, wherein the court said: "Ordinarily the address of a package to the care of any one is an authority to the carrier to deliver it to such person; but when the person to whom it is

such agent terminates the carrier's responsibility and the agent holds the goods as the agent of either the consignor or the consignee, whoever may be the owner of the goods.⁴⁷

§ 8. Consignor's right to change of consignee.—Where a common carrier receives goods for transportation and delivery to the consignee without any qualification or restriction, the consignor parts with the goods and all control over them and the delivery to the carrier is a delivery to the consignee's agent and the consignor cannot, by a subsequent direction to the carrier, prevent their delivery to the consignee, unless such facts are shown as will justify the stoppage of the goods *in transitu*; and where, by subsequent direction of the consignor, the carrier delivers the goods to another person, it is liable for conversion.⁴⁸ But where the

thus addressed is the agent and principal representative of the carrier himself, at the point where the carriage is to terminate, it may be regarded as a mere expansion of the ordinary direction to have it stopped at the place on the route where that agent is in charge of the business. It should be so regarded; for there is no probable reason why a person sending a package should be supposed to choose to terminate the carrier's responsibility and substitute that of the carrier's agent, when by such change no new duty would be created, and the package would be dealt with in either case by the same person and in the same way. The only object in giving such a direction which could be supposed would be to change the responsibility from the carrier to the agent appointed by the carrier; and as such a change would usually impair the security of the owner, as he must be taken generally to know more of the carrier whom he employs than of the carrier's agent, of whom he will commonly know only the name, it would be acting against the natural presumptions which arise from the situation of the

parties to attribute to the owner such intention." Compare *Bristol v. Rensselaer, etc., R. Co.*, 9 Barb. (N. Y.) 158, holding that a common carrier is discharged from liability, by a delivery to the person to whose care the goods are directed, though such person be the carrier's agent. And see *Platt v. Wells*, 2 Rob. (N. Y.) 101, 26 How. Pr. (N. Y.) 442.

That the package is addressed to himself or his agent does not lessen the liability and duty to deliver of the carrier who receives the package for delivery, there being no understanding that he shall hold the package for the carrier's convenience. *Bennett v. Northern Pac. Exp. Co.*, 12 Or. 49. See also *United States Express Co. v. Rush*, 24 Ind. 403.

47. *Mobile, etc., R. Co., v. Prewitt*, 46 Ala. 63, 7 Am. Rep. 586; *Houston, etc., R. Co. v. Hogg*, 2 Tex. Unrep. Cas. 544; *Edwards v. Cheraw, etc., R. Co.*, 32 S. C. 117; *Taylor v. Grand Trunk R. Co.*, 24 U. C. C. P. 582.

48. *Bailey v. Hudson River R. Co.*, 49 N. Y. 70; *Philadelphia, etc., R. Co. v. Wireman*, 88 Pa. St. 264. See also *Wade v. Hamilton*, 30 Ga. 450. Where, having given such subsequent

delivery to the carrier is qualified, restricted, or conditional, as, for example, where the carrier is notified by the shipper, after delivery to it of the goods, not to deliver them to the consignee until he presents the bill of lading and a draft drawn upon him, the delivery to the carrier is not a delivery to the consignee, and the consignee, on refusal to comply with the condition, acquires no right or title to the property, and a delivery by the carrier to the consignee under such circumstances renders the carrier liable to the consignor.⁴⁹ The consignor under such circumstances may change the consignee while the goods are in transit,⁵⁰ and has the same right to change their destination, after the goods have passed into the hands of a connecting carrier by taking a new bill of lading.⁵¹ The carrier also has the right under such circumstances to change the destination of the property before it has been delivered, after a bill of lading has been issued therefor, provided the bill has not been sent to the consignee or some one for him,⁵² and even where the first consignee has accepted bills on the strength of the consignment.⁵³ Where a bill of lading has been issued by the carrier and forwarded to the consignee, if the carrier issue another it will subject itself to liability on both.⁵⁴ Where goods are shipped to a factor to sell the same and account to the consignor at a certain price, the goods to remain the prop-

direction, the carrier notwithstanding, delivered the goods to the consignee, and in consequence thereof the consignor sues and obtains a judgment against the carrier in another state for a misdelivery of the goods, this will not avail in a suit by the carrier against the consignee. Philadelphia, etc., R. Co. v. Wireman, 88 Pa. St. 264.

49. Louisville, etc., R. Co. v. Hartwell, 99 Ky. 436, 18 Ky. L. Rep. 745, 36 S. W. 183, 4 Am. & Eng. R. Cas. N. S. 550, 38 S. W. 1041; Cayuga County Nat. Bank v. Daniels, 47 N. Y. 631; Bank of Rochester v. Jones, 4 N. Y. 501, 55 Am. Dec. 290.

50. See cases cited under last preceding note.

51. Sutherland v. Peoria Second

Nat. Bank, 78 Ky. 250, 6 Am. & Eng. R. Cas. 368.

52. Jones v. Earl, 37 Cal. 630, 99 Am. Dec. 338, and notice to the agent of the carrier, in possession of the goods, of the change binds the carrier; Blanchard v. Page, 8 Gray (Mass.) 285; Strahorn v. Union Stock Yard, etc., Co., 43 Ill. 424, 92 Am. Dec. 142; Thompson v. Trail, 2 C. & P. 334, 12 E. C. L. 155; Mitchel v. Ede, 11 Ad. & El. 888, 39 E. C. L. 260; Ruck v. Hatfield, 5 B. & Ald. 632, 7 E. C. L. 260. See Duplicate bills of lading, § 19, *post*.

53. Lewis v. Galena, etc., R. Co., 40 Ill. 281. See, also, Delivery to holder of bill of lading, § 9, *post*.

54. Hubbersty v. Ward, 8 Exch. 330. See, Delivery to holder of bill of lading, § 9, *post*.

erty of the consignor until paid for, the consignee is entitled, on presenting the bill of lading, to receive the goods, from the carrier, so long as the contract remains in force, though the consignor notified the carrier not to deliver the goods, and therefore the consignor cannot maintain an action against the carrier for conversion of the goods so delivered to the consignee.⁵⁵ Where a factor has made advances or incurred liability on the strength of a consignment, the consignor has no right by any subsequent order to suspend or control the sale, except as to such surplus as is not necessary for the reimbursement of the advances; so that where the destination of such a consignment was changed to another person, who knew of the factor's claim, the latter was in no better attitude to dispute the factor's right than the consignor himself.⁵⁶ But it has been held, to the contrary, that a debtor who ships goods to his factor and creditor for sale, the proceeds to be applied to the satisfaction of his debt, and sends the bill of lading to such factor, may afterwards change the shipment to another person without making the carrier liable to the first consignee.⁵⁷

§ 9. Delivery to holder of the bill of lading.—A bill of lading is the representative or symbol of the property mentioned therein, and its transfer and delivery without indorsement or when properly indorsed and delivered, when indorsement is necessary, operates as a constructive transfer and delivery of the property itself, and the consignor loses the control of the goods by such transfer.⁵⁸

55. Lester v. Delaware, etc., R. Co.,
73 Hun. (N. Y.) 398, 26 N. Y. Supp.
206.

56. Nelson v. Chicago, etc., R. Co.,
2 Ill. App. 180.

57. Chaffe v. Mississippi, etc., R. Co., 59 Miss. 182, 9 Am. & Eng. R. Cas. 426. Even where the bill of lading had been made out in the name of the factor and forwarded to him, and the object was to pay a debt of the consignor to the consignee, it was held that a delivery to the carrier was not a delivery to the consignee, and that the property was liable in

the hands of the carrier, to attachment by the consignor's creditors. Bonner v. Marsh, 10 Smed. & M. (Miss.) 376, 48 Am. Dec. 754; Dickman v. Williams, 50 Miss. 500.

58. First Nat. Bank v. New York Cent., etc., R. Co., 85 Hun (N. Y.) 160, 32 N. Y. Supp. 604; Robert C. White Live Stock, etc., Co. v. Chicago, etc., R. Co., 87 Mo. App. 330; Storey v. Hershey, 19 Pa. Super. Ct. 485, but when the parties to a transfer of a bill of lading know that the property has been taken, prior to the transfer, by legal process, from the

Therefore, when a bill of lading has been issued, it being the duty of the carrier to deliver to the owner of the goods or the person entitled to receive them, delivery must be made to the holder of the bill of lading, and the carrier is liable for a delivery otherwise than in accordance with the bill of lading, or to a person who was not authorized to receive the goods, although he may be the consignee.⁵⁹ A common carrier delivers at its peril goods to the consignee without a bill of lading either made or indorsed to him.⁶⁰ It is the duty of the carrier to ascertain whether a bill of lading has been issued, and, if it has, to deliver only to the party producing such bill properly indorsed, where indorsement is necessary.⁶¹ The delivery of goods to a carrier will not be held to be a delivery to the consignee, where by taking the bill of lading to his own order the shipper reserves to himself the power of disposing of the property; and, though a bill of lading is fraudulently used, a bank cashing a draft with the bill attached acquires a good title to the property in question, and is entitled to receive the

possession of the carrier, the indorsement and delivery of the bill of lading cannot operate as a transfer of the possession of the property. See also *Dickson v. Merchants' Elevator Co.*, 44 Mo. App. 498.

59. *First National Bank v. Northern Pac. Ry. Co.*, 28 Wash. 439, 68 Pac. 965; *Merchants' Despatch, etc., Co. v. Merriam*, 111 Ind. 5; *Pennsylvania R. Co. v. Stern*, 119 Pa. St. 24, 4 Am. St. Rep. 626; *Illinois Cent. R. Co. v. Miller*, 32 Ill. App. 259; *Young v. East Alabama Ry. Co.*, 80 Ala. 100; *Lake Shore, etc., R. Co. v. National Live Stock Bank*, 59 Ill. App. 451; *Forbes v. Boston, etc., R. Co.*, 133 Mass. 154, 9 Am. & Eng. R. Cas. 76; *Union Pac. R. Co. v. Johnston*, 45 Neb. 57, 63 N. W. 144. Where the bill of lading is attached to a draft, which is accepted and indorsed by the consignee and paid with money advanced by a third party on the security of the bill of lading, the carrier is liable to the holder of the bill of lading, where the shipper pro-

cured a delivery to himself while the goods were in transit. *Wells v. Oregon, etc., R. Co.*, 32 Fed. 51.

60. *Gates v. Chicago, etc., R. Co.*, 42 Neb. 379, 61 Am. & Eng. R. Cas. 218, 60 N. W. 583, holding, also, that a common carrier which delivers goods to a purchaser from the consignee, who is the agent of the owner, at the direction of the consignee, is not liable to the owner upon the purchaser's failure to pay therefor, although the bill of lading is not surrendered to the carrier before delivery, where it is not assigned to any one by the owner. See also *Schwartzschild & Co. v. Savannah, etc., R. Co.*, 76 Mo. App. 623, 1 Mo. A. Repr. 588.

61. *Merchants' Cotton Press, etc., Co. v. Insurance Co. of North America*, 151 U. S. 368, and the fact that the contract between the carrier and the shipper is illegal on account of rebates being improperly allowed to the shipper does not affect the right of the holder of the bill of lading as against the carrier.

goods, and the carrier cannot defend by showing delivery to another.⁶² Under the New York Statute it is an offense for a carrier to deliver any property carried by it without a production and surrender of the bill of lading, or unless it bears on its face the words "not negotiable." Under this statute it has been held that the carrier is liable where it delivers the goods without requiring a surrender of the bill of lading where the bill has not the words mentioned written across its face, although they are written across the back.⁶³ But where a carrier issues a bill of lading which requires it to take up such bill on the delivery of the goods, but delivers the goods, on the order of the consignee, without taking up the bill, which is afterwards assigned to a third person for a valuable consideration, such third person cannot recover from the carrier for a conversion of the goods, since the bill when received by him was a spent bill, and did not operate to pass title to the goods.⁶⁴ And the fact that a common carrier negligently omitted to take up the bill of lading upon which an endorsement "non-negotiable" did not appear, when it delivered the goods represented thereby, although it was in fact non-negotiable, and, therefore, the carrier may have become technically guilty of a violation of the statute, does not entitle a subsequent *bona fide* transferee of the bill of lading, which has been fraudulently altered so as to make it negotiable, to maintain an action against the carrier to recover damages for his neglect, for the reason that the forgery was not the proximate result of such neglect, but was the independent and felonious act of another person.⁶⁵ It is no defense to a carrier for failure to deliver goods

62. Illinois Cent. R. Co. v. Southern Bank, 41 Ill. App. 287. But a carrier is not liable to the transferee of a bill of lading on account of the delivery of the goods called for to the consignee by agents of the transferee, who were ignorant of the transfer, while it was at a compress operated by the transferee. Missouri, etc., R. Co. v. McFadden, 89 Tex. 138, 33 S. W. 853.

63. Syracuse First Nat. Bank v. New York Cent., etc., R. Co., 85 Hun. (N. Y.) 160, 32 N. Y. Supp. 604; N. Y. Penal Code, § 633.

64. National Commercial Bank v. Lackawanna Transp. Co., 172 N. Y. 596, 64 N. E. 1123, affg. 59 App. Div. (N. Y.) 270, 6 N. Y. Supp. 396; Colgate v. Pennsylvania Co., 102 N. Y. 120, affg. 31 Hun (N. Y.) 300.

65. Mairs v. Baltimore, etc., R. Co., 175 N. Y. 409, 67 N. E. 901. A warehouseman who pays a bank which deposits a draft secured by a warehouse receipt of a cargo of peas, which has been accepted by the consignee, upon the claim that the consignee after accepting the draft has without authority taken possession of

to the *bona fide* holder of a bill of lading therefor, that the same were attached and seized for a debt of the consignor, where such attachment and seizure were made possible by a change of destination of the goods under an arrangement between the consignor, the carrier, and a third person, which was not binding upon the holder of such bill.⁶⁶ Where a shipper takes a bill of lading for the delivery of goods to himself, the carrier is liable for delivery to another person on his mere presentation of the bill of lading unindorsed.⁶⁷ But if the bill of lading is produced, properly indorsed, the carrier is protected by it from liability for delivery to the holder, although the party producing it may have no right to it and may have wrongfully obtained possession of it.⁶⁸ So, if the carrier delivers upon the production of one of two bills of lading indorsed to different persons.⁶⁹ The rule is based upon the familiar principle of law that where one of two innocent parties must suffer, the loss should fall upon him who enabled the third person to commit the wrong.⁷⁰ But the rule does not apply where the carrier has issued two bills of lading, and delivery is made to one presenting an unindorsed bill, which does not vest the holder with any apparent ownership.⁷¹ And where a bill of lading has been issued for property not actually delivered, by an agent having no authority to issue bills except on receipt of prop-

the peas, and obtains a transfer from the bank, together with the warehouse receipt, may bring an action on the draft against the consignee; and the defense that plaintiff has wrongfully delivered up the cargo of peas to defendant in violation of N. Y. Penal Code, § 633, forbidding the warehouseman from delivering to another than the holder of a warehouse receipt issued by him the property covered by it, is unavailable. *Burnham v. Cape Vincent Seed Co.*, 142 N. Y. 169.

66. *Western & A. R. Co. v. Ohio Valley Bkg. & T. Co.*, 107 Ga. 512, 15 Am. & Eng. R. Cas. N. S. 839, 33 S. E. 821.

67. *Weyand v. Atchison*, etc., R. Co., 75 Iowa 573, 9 Am. St. Rep. 504, 1 L. R. A. 650; *Douglass v. Peoples Bank*, 86 Ky. 176, 5 S. W. 420, 9 Am.

St. Rep. 276, 32 Am. & Eng. R. Cas. 511.

68. *Douglass v. Peoples Bank*, *supra*. Compare *Cleveland, etc., R. Co. v. Moline Plow Co.*, 13 Ind. App. 225.

69. *Fearon v. Bowers*, 1 Smith's L. C. 792.

70. *Brooks v. New York*, etc., R. Co., 108 Pa. St. 529, 56 Am. Rep. 235; *American Nat. Bank v. Georgia R. Co.*, 96 Ga. 665, 2 Am. & Eng. R. Cas. N. S. 618, 23 S. E. 898; *Wilming-ton, etc., R. Co. v. Kitchin*, 91 N. C. 39.

71. *Weyand v. Atchison*, etc., R. Co., 75 Iowa 573, 9 Am. St. Rep. 504, revg. 30 Am. & Eng. R. Cas. 102, 33 N. W. 133; *St. Louis, etc., R. Co. v. Larned*, 103 Ill. 293.

erty for transportation, and has been transferred by the shipper to one who has, in good faith, discounted a draft drawn upon the consignee, the carrier is liable to the holder of the bill of lading.⁷² A bill of lading, while not negotiable in the sense that a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself,⁷³ is negotiable in the sense that it may be transferred by indorsement and delivery, but the transferee, however innocent, takes only the rights which the transferor had.⁷⁴ If, however, a custom or usage exists for a carrier at the point of destination to deliver to a consignee goods consigned to him by a bill of lading, not containing the words "or order," without requiring the production of the bill of lading, such a delivery is good as against a person to whom the consignee has previously delivered the bill of lading as security for an advance made by him to the consignee.⁷⁵ It is no excuse for a delivery to the wrong person that the indorsee of the bill of lading was unknown to the carrier and notice of the arrival could not be given, or that he delayed too long before calling for his goods; diligent inquiry for the consignee, or indorsee of a bill of lading for delivery to order, is required of the carrier, and if either cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them in a reasonably safe place for and on account of their owner. It has no right, under any circumstances, to deliver to a stranger.⁷⁶

72. Bank of Batavia v. New York, etc., R. Co., 106 N. Y. 195, 60 Am. Rep. 440, 7 Cent. Repr. 822; Sioux City, etc., R. Co. v. First Nat. Bank of Fremont, 10 Neb. 556, 35 Am. Rep. 488; Armour v. Michigan Cent. R. Co., 65 N. Y. 111; St. Louis, etc., R. Co. v. Larned, 103 Ill. 293; Brooke v. New York, etc., R. Co., 108 Pa. St. 529. To the contrary see note to 106 N. Y. 195.

73. Friedlander v. Texas, etc., R. Co., 130 U. S. 424, 32 L. Ed. 994; Pollard v. Vinton, 105 U. S. 8, 26 L. Ed. 998; Shaw v. Merchants' Nat. Bank, 101 U. S. 557, 25 L. Ed. 892; Stollenwerck v. Thacher, 115 Mass.

24; Raleigh, etc., R. Co. v. Lowe, 101 Ga. 320, 28 S. E. 867, 10 Am. & Eng. R. Cas. N. S. 398; Gurney v. Behrend, 3 El. & Bl. 622, 633.

74. Merchants' Bank v. Union R., etc., Co., 69 N. Y. 374; Pollard v. Vinton, 105 U. S. 7; Lallande v. His Creditors, 42 La. Ann. 705, 45 Am. & Eng. R. Cas. 301; Douglass v. Peoples Bank, 86 Ky. 176, 5 S. W. 420; Empire Transp. Co. v. Steele, 70 Pa. St. 188.

75. Forbes v. Boston, etc., R. Co. 133 Mass. 154. See § 20, *post*. See also Richardson v. Goddard, 23 How. (U. S.) 28.

76. The Thames, 14 Wall. (U. S.)

§ 10. Carrier entitled to demand bill of lading.—The consignee is presumptively the owner of the goods, and a delivery to him, without notice to the contrary, will discharge the carrier.⁷⁷ If the party who claims the goods is not the consignee, and even where he is the consignee, the carrier is entitled to demand the production of the bill of lading in order to obtain possession of the goods, and for its own security, because of the assignability of bills of lading whereby all rights in the goods may be transferred to a stranger, should require it to be presented before making delivery either to the consignee or the holder of the bill.⁷⁸ This is a reasonable regulation necessary to protect the carrier from any loss, although the carrier may only be entitled to a receipt after being shown the bill of lading and may not require the holder to surrender the bill.⁷⁹ For the carrier will be liable to a *bona fide* holder of the bill of lading if it delivers the goods to the consignee after he has assigned the bill of lading.⁸⁰ The statute in New York makes it the duty of a carrier not to deliver goods except upon production and cancellation of the bills of lading, and for a delivery to a consignee without the production of the bill of lading, which provided for a delivery to him, but which he had in the meantime indorsed and negotiated, the carrier is liable to the holder of the bill as for a conversion of the property.⁸¹ And it is liable to the shipper for the loss sustained by him, where it delivers goods to the consignee, in violation of instructions of the shipper not to deliver without a bill of lading.⁸²

98; *Galloway v. Hughes*, 1 Conk. Adm. 96. See *Laches of Holder of bill of lading*, § 12, *post*.

77. *Sweet v. Barney*, 23 N. Y. 335; *Lawrence v. Minturn*, 17 How. (N. Y.), 100; *O'Dougherty v. Boston, etc., R. Co.*, 1 Thomp. & C. (N. Y.) 477. See also § 4, *ante*.

78. *Bass v. Glover*, 63 Ga. 745, 1 Am. & Eng. R. Cas. 277; *Finn v. Western R. Corp.*, 102 Mass. 283. Compare *Gulf, etc., R. Co. v. McCown* (Tex. Civ. App.), 25 S. W. 435.

Where no bills of lading are issued, the carrier is justified in de-

livering the goods to the consignee without the production of receipts or other evidences of ownership issued to the consignor. *Schlichting v. Chicago, etc., Ry. Co. (Iowa)*, 96 N. W. 959.

79. *Dwyer v. Gulf, etc., R. Co.*, 69 Tex. 707, 32 Am. & Eng. R. Cas. 461.

80. See § 11.

81. *Furman v. Union Pac. R. Co.*, 106 N. Y. 579, 32 Am. & Eng. R. Cas. 500; *Colgate v. Pennsylvania Co.*, 102 N. Y. 120; *Bank of Commerce v. Bissell*, 72 N. Y. 615.

82. *Foggan v. Lake Shore, etc., R. Co.*, 16 N. Y. Supp. 25.

§ 11. Carrier's liability to innocent purchaser of bill of lading.

—A carrier, in delivering goods to a party claiming them, without requiring him to produce the bill of lading, always assumes the risk of the bill's having been previously transferred to an innocent purchaser.⁸³ Where a common carrier delivers goods entrusted to him for carriage, without production of the bill of lading describing the goods, it is liable in trover for their value to a *bona fide* holder of such bill, taken for value, before the delivery of the goods at destination;⁸⁴ even where it delivered the goods to the shipper at an intermediate point.⁸⁵ But it is not liable where the transfer of the bill takes place after the delivery to the consignee, since the innocent purchaser takes only such title as his transferor had, and the latter's title had been extinguished by delivery.⁸⁶ A railroad company which makes one of a firm which is almost the only consignee of goods delivered at a station its agent at such station, charged with the responsibility of the business as between the company and the firm, is liable to an innocent purchaser of a bill of lading for goods consigned to such firm, which have been delivered to it without surrender of the bill of lading.⁸⁷

§ 12. Laches of holder of bill of lading.—Laches on the part of the holder of a bill of lading cannot be assumed from delay by the holder in presenting it and demanding delivery of the goods, unless by reason of the delay the carrier may have lost a remedy or could not protect itself.⁸⁸ And a carrier cannot avoid its obligation under a bill calling for delivery to the shipper's

83. Pennsylvania R. Co. v. Stern, 119 Pa. St. 24, 4 Am. St. Rep. 626; Gates v. Chicago, etc., R. Co., 42 Neb. 379, 61 Am. & Eng. R. Cas. 218; Midland Nat. Bank v. Missouri, etc., R. Co., 1 Mo. App. Rep. 417.

84. Peoria Bank v. Northern R. Co., 58 N. H. 203; Houston, etc., R. Co. v. Adams, 49 Tex. 748, 30 Am. Rep. 116.

85. Ratzer v. Burlington, etc., R. Co., 64 Minn. 245, 66 N. W. 988, 4 Am. & Eng. R. Cas. N. S. 55.

86. Alabama Nat. Bank v. Mobile, etc., R. Co., 42 Mo. App. 284.

87. Walters v. Western, etc., R. Co., 56 Fed. 369, 61 Am. & Eng. R. Cas. 162.

88. First Nat. Bank of Syracuse v. New York Cent., etc., R. Co., 85 Hun (N. Y.), 160, 66 St. Rep. (N. Y.) 112, 32 N. Y. Supp. 604; Barber v. Meyerstein, L. R. 4 H. L. 317, L. R. 2 C. P. 38, holding that notice is not necessary, and that only a failure of ordinary prudence in completing his security would amount to laches.

order, to deliver the shipment to an indorsee for value of the bill upon presentation thereof, by a custom of such carriers to deliver the property to the consignee after six days, if the indorsee was without notice that the carrier had acted under such custom, although he may have been aware of the custom.⁸⁹ But the holder of a bill of lading may lose his rights by negligence, as where a bank, to which is delivered for collection a draft, together with a bill of lading (requiring notice to the drawer) for a carload of feed issued by a transportation company, which permits the drawee to pay the draft by discounting his draft on a third person attached to the bill of lading, gave no notice to the railroad company that it held the bill of lading and the feed was delivered by the carrier to one to whom the drawer consigned it. The bank in such case cannot recover from the railroad company.⁹⁰ While the assignee or indorsee of a bill of lading may, by his laches, lose his right to claim the goods from an innocent purchaser, by permitting the property to remain under the control and apparent ownership of his assignor or endorser, the transfer of the bill of lading passes the complete title to the assignee or endorsee, and he is not required to take possession of the property immediately upon its arrival, or to give notice to the carrier or warehouseman in charge of it.⁹¹

§ 13. Goods received from connecting carrier.—It is the duty of a carrier to ascertain whether a bill of lading was delivered to the shipper, and if so, to detain the property until demanded by one claiming under that title; if delivery is made without it, he runs the risk of showing a delivery in accordance with its instructions. If the owner or consignor has placed a direction upon the property, showing where it is to be transported, and obtained a bill of lading for it, he has a right to assume that delivery will only be made in accordance with the terms of the bill, and the duty of the carrier is only thereby discharged.⁹² The contract contained in and evidenced by the receipt or bill of lad-

89. Midland Nat. Bank v. Missouri Pac. R. Co., 132 Mo. 492, 2 Am. & Eng. Corp. Cas. N. S. 586, 33 S. W. 521.

90. National Bank v. Philadelphia, etc., R. Co., 163 Pa. St. 467, 61 Am. & Eng. R. Cas. 162, 30 Atl. 228.

91. Farmers', etc., Nat. Bank v. Logan, 74 N. Y. 568; Forbes v. Boston, etc., R. Co., 133 Mass. 154, 9 Am. & Eng. R. Cas. 78.

92. Furman v. Union Pac. R. Co., 106 N. Y. 579, 32 Am. & Eng. R. Cas. 500.

ing binds each and every one of the connecting carriers who accept the goods and transport them over its line,⁹³ and they are charged with knowledge of the contents of the bill of lading.⁹⁴ A carrier receiving goods from another carrier is, therefore, liable for a delivery to the wrong person without a production by him of the bill of lading, where one has been issued, and is not excused by the fact that such delivery was made in accordance with papers received from the preceding carrier in which a different consignee from the one in the bill of lading is named.⁹⁵ The contrary, however, has been held where the carrier which made the delivery had no notice of the bill of lading, or the fact that it had been issued, and was ignorant of the true ownership of the goods.⁹⁶ The initial carrier is the agent of the consignor in forwarding goods and delivering them to a connecting line,⁹⁷ but such agency does not relieve the connecting carrier from liability for failure to demand the production and surrender of the bill of lading before delivery of the goods, when it knows, or ought to have known, that a bill of lading had been issued and was outstanding.⁹⁸

§ 14. Stoppage in transitu as a defense.—The right of stoppage *in transitu* is defeated by the transfer of a bill of lading to a *bona fide* indorsee before the right of stoppage is exercised, the assignment of the bill of lading transferring the title to the property, upon the principle that whenever one of two innocent persons must suffer by the act of a third, he who has enabled the third person to do or occasion the injury must suffer the loss.⁹⁹

93. Babcock v. Lake Shore, etc., R. Co., 49 N. Y. 497; Maghee v. Camden, etc., R. Co., 45 N. Y. 514; Halliday v. St. Louis, etc., R. Co., 74 Mo. 159.

94. City Bank v. Rome, etc., R. Co., 44 N. Y. 136; Howard v. Shepard, 9 M. Gr. & S. 296; Tyndale v. Taylor, 4 El. & Bl. 219; Colgate v. Pennsylvania Co., 102 N. Y. 120.

95. Furman v. Union Pac. R. Co., 106 N. Y. 579, 32 Am. & Eng. R. Cas. 500; Alderman v. Eastern R. Co., 115 Mass. 233; Ratzer v. Burlington, etc., R. Co., 64 Minn. 245, 66 N. W. 988, 4 Am. & Eng. R. Cas. N. S. 55.

96. National Bank v. Philadelphia,

etc., R. Co., 163 Pa. St. 467; Nanson v. Jacob, 93 Mo. 331, 3 Am. St. Rep. 531.

97. Mallory v. Burritt, 1 E. D. Smith (N. Y.), 234; Moses v. Port Townsend, etc., R. Co., 5 Wash. 595, 55 Am. & Eng. R. Cas. 419; Wells v. Thomas, 27 Mo. 17, 72 Am. Dec. 228; Briggs v. Boston, etc., R. Co., 6 Allen (Mass.), 246, 83 Am. Dec. 626; Bird v. Georgia R. Co., 72 Ga. 655, 27 Am. & Eng. R. Cas. 39.

98. See Delivery to holder of bill of lading, § 9, *ante*.

99. Dows v. Greene, 24 N. Y. 641; Dows v. Perrin, 16 N. Y. 325; Dows.

The carrier cannot, therefore, relieve itself from liability for failure to deliver the property to the holder of the bill of lading by showing that it had delivered it upon a stoppage *in transitu* to the consignor. If the transfer of a bill of lading by way of pledge or mortgage, or as collateral security for a loan, does not absolutely defeat the right of stoppage *in transitu*, the seller cannot exert that right until he has discharged the debt secured by the transfer, as his right is subject to that of the mortgagee or pledgee.¹

§ 15. Holder of bill of lading has priority over creditors.—The transfer of a bill of lading, for value, by indorsement and delivery, passes to the transferee whatever title the transferer had to the property at the time. Goods covered by a bill of lading pledged for the acceptance and payment of a draft are not, therefore, subject in the hands of a carrier to the levy of an attachment by creditors as the property of the consignor.² A consignee of goods is not entitled to a preference for a balance of advances made by him to the consignor, over the claims of a holder of a draft to secure which bills of lading for the goods have been transferred by the consignor, when the goods were not shipped in payment of such advances, since a bill of lading, by the commercial law as well as by the statute, when legally transferred, gives title to the property which it represents.³

§ 16. Effect of the word "notify" in bill of lading.—The direction in a bill of lading to "notify" a given party shows that such party is not intended as the consignee. If he is, the word is wholly unnecessary. It is the duty of the carrier to notify the consignee of the arrival of the goods. If no one is named as consignee in the bill, no delivery should be made to any one who does not produce it.⁴ Directions in a bill of lading to notify a person

v. Rush, 28 Barb. (N. Y.) 157; Wells v. Oregon R., etc., Co., 32 Fed. 51, 12

Sawy. (U. S.) 519; Lickbarrow v. Mason, 2 T. R. 63, 6 East, 21, 1 Smith's L. Cas. 753; Gurney v. Behrend, 3 El. & Bl. 622, 77 E. C. L. 622.

1. Missouri Pac. R. Co. v. Heidenheimer, 82 Tex. 195, 27 Am. St. Rep. 861, 49 Am. & Eng. R. Cas. 73 note;

Chandler v. Fulton, 10 Tex. 24, 60 Am. Dec. 188.

2. Dickson v. Merchants' Elevator Co., 44 Mo. App. 498; Neill v. Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. 702.

3. Starksville First Nat. Bank v. Meyer, 43 La. Ann. 1, 8 So. 433.

4. Furman v. Union Pac. R. Co.,

other than the consignee of the arrival of the shipment does not authorize the carrier to deliver the shipment to such person without the production of a bill of lading.⁵ For such a delivery the carrier is liable to a bank which has discounted drafts drawn against the consignment on the security of receipts indorsed over to it by the shipper and consignee.⁶ The holder of the bill of lading, properly indorsed to him and which is attached to a draft which he has paid, is not obliged to notify the carrier not to deliver to the party to whom notification is to be given, nor to do anything to prevent such a delivery, except to present the bill of lading and demand delivery within a reasonable time.⁷ A *bona fide* holder for value without notice of a bill of lading which stipulates for the delivery of the goods to the shipper's order at a designated point, with direction to notify a third person, is not affected by a prior agreement or custom among the consignor, the carrier, and such third person, to the effect that the latter may, without production of the bill, change the destination of the goods.⁸

§ 17. Bill of lading attached to draft.—Where the shipper or owner of property consigns the property shipped to the purchaser upon payment of draft attached to the bill of lading for the purchase price of the goods, the title to the property does not pass to the purchaser, and the purchaser, though named as consignee, is not entitled to a delivery of the property, until he has accepted

106 N. Y. 579, 32 Am. & Eng. R. Cas. 500, revg. 35 Hun (N. Y.), 669. See also Colgate v. Pennsylvania Co., 102 N. Y. 120.

5. Union Stock Yards Co. v. Westcott, 47 Neb. 300, 3 Am. & Eng. R. Cas. N. S. 375, 66 N. W. 419.

6. North Pennsylvania R. Co. v. Commercial Bank, 123 U. S. 727, 35 Am. & Eng. R. Cas. 556; Libby v. Ingalls, 124 Mass. 503. See also North v. Merchants, etc., Transp. Co., 146 Mass 315, 32 Am. & Eng. R. Cas. 509, note.

7. Chester Nat. Bank v. Atlanta, etc., Air Line R. Co., 25 S. C. 216.

8. Western, etc., R. Co. v. Ohio Valley Bkg. & T. Co., 107 Ga. 512, 33 S.

E. 21, 15 Am. & Eng. R. Cas. N. S. 839. A bank may, after reimbursing the owner of the goods, maintain an action against a common carrier for an unauthorized delivery of them, when it turned them over to parties for whom it had reason to believe they were ultimately infended, taking an indemnifying check for security, which it later surrendered, when the goods were delivered to one whom the bill of lading directed to be notified, who had possession of such bill, which he had purloined from the bank. Raleigh, etc., R. Co. v. Lowe, 101 Ga. 320, 28 S. E. 867, 10 Am. & Eng. R. Cas. N. S. 398.

and paid the draft accompanying the bill of lading and received the bill of lading; and a delivery to him before the draft is paid and the bill of lading delivered to him, or without requiring the production of the bill of lading properly indorsed, will render the carrier liable to the shipper or owner of the property for the amount of the draft if the purchaser fails to pay for the property.⁹ Where the consignor of property, upon its shipment and before delivery, draws a bill of exchange upon the consignee and procures the same to be discounted at a bank upon the security of a bill of lading which is transferred and delivered with it, the bank acquires title to the property described in the bill of lading, conditional upon the acceptance of the draft by the consignee; upon such acceptance, the title passes to the acceptor; but upon refusal to accept, the title continues unimpaired in the bank, and upon the receipt by the consignee of the property and its conversion, he is liable to the bank for the money advanced upon it.¹⁰ And upon delivery of the goods to the consignee in such a case without requiring him to produce the bill of lading, the carrier is guilty of a conversion of the goods and liable accordingly.¹¹

9. Commercial Bank v. Chicago, etc., R. Co., 160 Ill. 401; Libby v. Ingalls, 124 Mass. 503; Finn v. Western R. Corp., 102 Mass. 283; Walters v. Western, etc., R. Co., 63 Fed. 391; Wells v. Oregon, etc., R. Co., 32 Fed. 51, 12 Sawy. (U. S.) 519, but the carrier cannot deliver the goods to the shipper while in transit; Houston, etc., R. Co. v. Adams, 49 Tex. 748, 30 Am. Rep. 116.

10. Commercial Bank v. Pfeiffer, 108 N. Y. 242; Marine Bank v. Wright, 48 N. Y. 1; Peters v. Elliott, 78 Ill. 321; Michigan Cent. Ry. Co. v. Phillips, 60 Ill. 190; Illinois Cent. R. Co. v. Southern Bank, etc., 41 Ill. App. 287; Chicago Fifth Nat. Bank v. Bayley, 115 Mass. 228; Hathaway v. Haynes, 124 Mass. 311.

11. Jeffersonville, etc., R. Co. v. Irvin, 46 Ind. 180; McEwen v. Jeffersonville, etc., R. Co., 33 Ind. 368, 5 Am. Rep. 216, 32 Am. & Eng. R. Cas. 508, note; Joslyn v. Grand

Trunk R. Co., 51 Vt. 92; Alderman v. Eastern R. Co., 115 Mass. 233; Allen v. Williams, 12 Pick. (Mass.) 297. The fact that the delivery of the goods to the party whom the carrier was directed to notify was in accordance with the custom and course of business at the station where delivery was made will not relieve the carrier from liability to the holder of the draft with the bill of lading attached, unless it was known and assented to by the shipper. North Pennsylvania R. Co. v. Commercial Bank, 123 U. S. 727, 35 Am. & Eng. R. Cas. 556.

Acceptance of time draft.—A bank to which a bill of lading is forwarded with a time draft attached for collection, without special instructions, must surrender the bill of lading to the drawee upon his acceptance of the draft, and is not bound to retain it, as the inference is that the transaction is a sale on credit, and

Where a bill of lading is indorsed by the consignor and negotiated for value as security for a draft drawn on a third person by the consignor, the carrier cannot deliver the goods to such third person without the production of the bill of lading, or authority from the holder thereof, and if it makes such a delivery it will be liable to the holder of such bill.¹² But since indorsement of the bill of lading transfers only such title as the consignor had, evidence is admissible to prove ownership in such third person.¹³

§ 18. Effect of bill of lading as estoppel.—A carrier is liable upon a bill of lading issued in its name by an agent having no authority to issue bills except on receipt of property for transportation to one who, upon transfer by the shipper upon the faith of the bill, has, in good faith discounted a draft drawn upon the consignee, although there was no actual delivery of the property; the carrier is bound by its agent's acts and is estopped from denying the receipt of the goods.¹⁴ This rule is maintained in New York and certain other states, and the reasons upon which the rule is based are, substantially, that the question does not depend upon the negotiability of bills of lading but upon the settled doctrine of the law of agency that where a principal has clothed his

that the bill of lading is security for an acceptance, and not for payment of the draft. *Commercial Bank v. Chicago, etc.*, R. Co., 160 Ill. 401, 43 N. E. 756, affg. 58 Ill. App. 438.

12. *Newcomb v. Boston, etc.*, R. Corp., 115 Mass. 230; *Alderman v. Eastern R. Co.*, 115 Mass. 233; *The Thames*, 14 Wall. (U. S.) 98; *Wichita Savings Bank v. Atchison, etc.*, R. Co., 20 Kan. 519; *Boatmen's Savings Bank v. Western, etc.*, R. Co., 81 Ga. 221; *Chester Nat. Bank v. Atlanta, etc.*, Air Line R. Co., 25 S. C. 216; *Neill v. Rogers Bros. Produce Co.*, 41 W. Va. 37; *Lake Shore, etc.*, R. Co. v. *National Live Stock Bank*, 59 Ill. App. 451; *The Argentina*, L. R. 1 Adm. & Eccl. 370; *The Emilinen Marie*, 32 L. T. N. S. 435.

13. *Empire Transp. Co. v. Steele*, 70 Pa. St. 188.

14. *Bank of Batavia v. New York*,

etc., R. Co., 106 N. Y. 195, 60 Am. Rep. 440, 19 Abb. N. C. (N. Y.) 131; *Brooke v. New York, etc.*, R. Co., 108 Pa. St. 529, 2 East Repr. 125, 56 Am. Rep. 235; *Armour v. Michigan Cent. R. Co.*, 65 N. Y. 111, 22 Am. Rep. 603; *Griswold v. Haven*, 25 N. Y. 595, 601; *New York, etc.*, R. Co. v. *Schuylerville*, 34 N. Y. 30; *North River Bank v. Aymar*, 3 Hill (N. Y.), 262; *Sioux City, etc.*, R. Co. v. *First Nat. Bank of Fremont*, 10 Neb. 556; *St. Louis, etc.*, R. Co. v. *Larned*, 103 Ill. 293; *Wichita Bank v. Atchison, etc.*, R. Co., 20 Kan. 519; *Smith v. Missouri Pac. R. Co.*, 74 Mo. App. 48; *St. Louis, etc.*, R. Co. v. *Adams*, 4 Kan. App. 305, 45 Pac. 920; *Adams Express Co. v. Schlessinger*, 75 Pa. St. 246; *Louisville, etc.*, *Packet Co. v. Rogers*, 20 Ind. App. 594, 49 N. E. 970.

agent with power to do an act upon the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact, to the prejudice of a third person, who has dealt with the agent or acted on his representation, in good faith, in the ordinary course of business, pursuant to his apparent power. Force is added to this reasoning by the facts that, while bills of lading are not negotiable in the sense applicable to commercial paper, they are commonly transferred as security for loans and discounts, carry with them the ownership, either general or special, of the property which they describe, and are viewed and dealt with by the commercial world as *quasi* negotiable, and consequently it is desirable that they should be viewed with confidence and not distrust and should pass free from one to another and advances be made upon their faith; and that because of these considerations it is better to cast the risk of the goods not having been shipped upon the carrier, who has placed it in the power of agents of his own choosing to make these representations, rather than upon the innocent consignee or endorsee, who, as a rule, has no means of ascertaining the fact other than the representations of the carrier's own agent.¹⁵ On the contrary, it is held by the Federal courts, the courts of many of the states, and the authorities in England that a bill of lading issued by a station or shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier, even to an innocent consignee or indorsee for value, and that the carrier is not estopped by the statements in the bill from showing that no goods were in fact received for transportation, and that the rule is the same whether the act of the agent was fraudulent and collusive, or merely the result of a mistake.¹⁶ Of course this is predicated

15. See cases cited under note 14, *supra*.

16. Friedlander v. Texas, etc., Ry. Co., 130 U. S. 416, 28 Cent. L. J. 503, note; St. Louis, etc., R. Co. v. Commercial U. Ins. Co., 139 U. S. 223, 35 L. Ed. 154, 11 Sup. Ct. Rep. 554; Pollard v. Vinton, 105 U. S. 7; Robinson v. Memphis, etc., R. Co., 9 Fed.

129; *The Freeman*, 18 How. (U. S.) 182, 191, 59 U. S. 182; *The Lady Franklin*, 8 Wall. (U. S.) 325; St. Louis, etc., R. Co. v. Knight, 122 U. S. 79, 87, 7 Sup. Ct. Repr. 1132; *National Bank v. Railroad Co.*, 44 Minn. 224, 20 Am. St. Rep. 566, 9 L. R. A. 263; *Sears v. Wingate*, 3 Allen (Mass.), 103; *Baltimore & O. R.*

upon the assumption that the authority of the agent is limited to issuing bills of lading for freight received before, or concurrent with, the issuing of the bills, which would be the presumption in the absence of evidence to the contrary. A carrier may adopt a different mode of doing business by giving his agents authority to issue bills of lading for goods not received, so as to render him liable in such cases to third parties.¹⁷ The reasoning by which the latter doctrine is usually supported is that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for the goods it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; that it is not within the scope of the authority of the shipping agent of the carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; that this real and apparent authority, *i. e.*, the power with which his principal has clothed him in the character in which he is held out to the world, is the same, *viz.*, to give bills of lading for goods received for transportation, and that this limitation upon his authority is known to the commercial world; and, therefore, any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill, the rule being that if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event or the happening of the contingency, or the

Co. v. Wilkens, 44 Md. 11; Fellows v. The R. W. Powell, 16 La. Ann. 316; Hunt v. Mississippi Cent. R. Co., 29 La. Ann. 446; Louisiana Nat. Bank v. Laveille, 52 Mo. 380; Williams v. Wilmington, etc., R. Co., 93 N. C. 42; Dean v. King, 22 Ohio St. 118; Chandler v. Sprague, 38 Am. Dec. 410, note; Grant v. Norway, 10 C. B. 665; Coleman v. Riches, 16 C. B. 104; Hubbersty v. Ward, 8 Exch.

330; Brown v. Powell D. S. Coal Co., L. R. 10 C. P. 562; McLean v. Fleming, L. R. 2 Sc. App. Cas. 128; Cox v. Bruce, L. R. 18 Q. B. Div. 147; Meyer v. Dresser, 15 C. B. (N. S.) 646; Jessel v. Bath, L. R. 2 Exch. 267.

17. National Bank v. Railroad Co., 44 Minn. 224, 20 Am. St. Rep. 566, 9 L. R. A. 263.

performance of the condition, must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority.¹⁸

§ 19. Duplicate bills of lading.—Where bills are issued in sets of two or more, and the several parts of the bill are transferred to different parties who respectively make advances upon the faith of the bill, the property in the goods passes to the first transferee, unless a subsequent transferee has a superior equity to that of being, like the first, a *bon fide* transferee for value.¹⁹ Where the several bills issued provided that when delivery is made on one the others are to be void, a delivery by the carrier upon presentation of a duplicate bill of lading properly indorsed is a discharge of the carrier from further liability.²⁰ Where the original bill of lading contains no such provision the carrier is liable to a *bona fide* holder thereof for failure to deliver to him, and proof of the delivery to a holder of a properly indorsed duplicate will be no defense.²¹ Where the consignor received from the carrier a bill of lading containing a provision that the goods should be delivered to the consignee upon the presentation of a duplicate of such bill of lading, the carrier was held liable for delivering the goods without requiring the production of the duplicate.²² But where the consignor, upon receiving two bills

18. See cases cited note 16, *supra*.

Carrier's liability to assignor of bill of lading.—A. bought a certain quantity of iron, as called for by a bill of lading, and sold the same to an iron company, who paid for it, and to whom it was delivered. The iron company recovered a judgment against A. for a shortage. Held, that this judgment did not conclude the carrier issuing the bill of lading, although the carrier was notified by A. to defend, as the defences available to the carrier would not have exonerated A. from liability to the iron company. *Garrison v. Baggage Transp. Co.*, 94 Mo. 130, 32 Am. & Eng. R. Cas. 525.

19. *Skilling v. Bollman*, 6 Mo. App. 676; *Meyerstein v. Barber*, L.

R. 44 L. 317; *Sanders v. McLean*, 11 Q. B. Div. 327.

20. *Glyn v. East, etc.*, India Dock Co., L. R. 7 App. 591; *Skilling v. Bollman*, 73 Mo. 665, 39 Am. Rep. 537.

21. *Midland Nat. Bank v. Missouri Pac. R. Co.*, 132 Mo. 492.

Where a railroad company issues two delivery orders for the same grain, both orders being in the same form and containing nothing to show that they related to the same consignment, such company is liable to third persons making advances on both orders. *Coventry v. Great Eastern R. Co.*, 11 Q. B. Div. 776.

22. *McEwen v. Jeffersonville, etc.*, R. Co., 33 Ind. 368, 5 Am. Rep. 216; *The Saugerties*, 44 Fed. 625.

of lading, sends one of them with a draft attached, to a bank for collection of the draft, and sends the other to the consignee, who presents it and receives the goods, he is estopped from maintaining an action against the carrier for a wrongful delivery by the fact that he himself clothed the consignee with apparent authority to receive.²³

§ 20. Necessity of indorsement of bill of lading.—Under the law merchant bills of lading were transferable by delivery merely.²⁴ Where a bill of lading directs a delivery to bearer, or to a named consignee or bearer, the delivery of the bill passes the title to the property, and the carrier is entitled to deliver to any one holding the bill without any indorsement.²⁵ The delivery of a bill of lading, with intent to pass the title, has that effect, though drawn to order, and not indorsed.²⁶ But, except where the bill of lading directs a delivery to bearer, the carrier is responsible for delivering to any one but the original holder of the bill of lading, unless it is properly indorsed by him; a delivery to a third person on an unindorsed bill of lading is always at the risk of the carrier.²⁷ Where the goods are consigned to a party named but, by the bill of lading, the consignor retains the right of dispo-

Duplicate bills of lading copied from the stub books from which the original bills were issued, by the local agent some time after such issuance, are inadmissible in evidence as against the carrier. They are within the rule that the declarations of an agent as to a past transaction are not admissible to bind his principal. *Edgerton v. Wilmington*, etc., R. Co., 115 N. C. 645, 20 S. E. 184, 61 Am. & Eng. R. Cas. 253; *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 27 Am. St. Rep. 861.

23. *Weyand v. Atchison*, etc., R. Co., 75 Iowa, 573, 9 Am. St. Rep. 504.

24. *Scharff v. Meyer*, 133 Mo. 428, 42 Cent. L. J. 367; *Crowell v. Van Bibber*, 18 La. Ann. 637; *Par. Mer. Law*, 346; 2 Kent's Com.

25. *Allen v. Williams*, 12 Pick.

(Mass.) 297; *Nathan v. Giles*, 5 Taunt. 558; *Low v. De Wolf*, 8 Pick. (Mass.) 101.

26. *City Bank v. Rome*, etc., R. Co., 44 N. Y. 136; *Merchants' Bank v. Union R. & Transp. Co.*, 69 N. Y. 376; *Michigan Cent. R. Co. v. Phillips*, 60 Ill. 190; *Western Ry. Co. v. Wagner*, 65 Ill. 197; *Green Bay First Nat. Bank v. Dearborn*, 115 Mass. 219; *Jeffersonville*, etc., R. Co. v. *Irvin*, 46 Ind. 180; *Becker v. Hallgarten*, 86 N. Y. 167; *Bank of Rochester v. Jones*, 4 N. Y. 497; 55 Am. Dec. 290; *Richardson v. Nathan*, 167 Pa. St. 513; *American Zinc*, etc., Co. v. *Markle Lead Works*, 102 Mo. App. 158, 76 S. W. 668; *The Carlos F. Roses*, 177 U. S. 655, 40 L. Ed. 929.

27. *Capehart v. Granite Mills*, 97 Ala. 353, 12 So. 44; *Jordan v. Penn-*

sition over the goods, the delivery of the bill of lading for value, without indorsement, transfers the title to the property covered by the bill and justifies a delivery by the carrier to the holder of the bill.²⁸ The rule is the same, in the case of a sale of the goods, if the right to dispose of the property is, by the bill of lading, retained by the consignor.²⁹ Proof of a custom to deliver without indorsement, unless it be shown that the party injured thereby knew and acted with knowledge of the custom, will not excuse a delivery by the carrier upon the presentation of an unindorsed bill of lading.³⁰ Where an invoice of goods shows that the delivery is to be made only to the party producing the bill of lading, delivery to the holder of the invoice without requiring production of the bill of lading will render the carrier liable.³¹

§ 21. Carrier's liability for misdelivery.—Common carriers deliver property at their peril and must take care that it is delivered to the right party. The obligation to deliver to the proper person is absolute and is rigorously enforced by the courts, and the law allows no excuse for a wrong delivery, except the fault of the shipper himself. When there is any doubt as to who is the proper person to make delivery to and it can be determined by the bill of lading or other documentary evidence, its production should be required by the carrier, and the property detained until demanded by one claiming under such a title.³² If delivery be made to the wrong person, either by an innocent mistake, or

sylvania Co., 18 Am. & Eng. R. Cas. 647, 31 Alb. L. J. 250; Sword v. Young, 89 Tenn. 126, 45 Am. & Eng. R. Cas. 384; Weyand v. Atchison, etc., R. Co., 75 Iowa, 573, 9 Am. St. Rep. 504, 33 N. W. 133, revg. 30 Am. & Eng. R. Cas. 102; Cavallaro v. Texas, etc., R. Co., 110 Cal. 348.

28. Marine Bank v. Wright, 48 N. Y. 1; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Holmes v. German Security Bank, 87 Pa. St. 525; Phelps v. Bank, 2 McGloin (La.), 19; Green Bay First Nat. Bank v. Dearborn, 115 Mass. 219; Cairo First Nat. Bank v. Crocker, 11 Mass. 163; Davenport Nat. Bank v. Homeyer, 45 Mo. 145, 100 Am. Dec.

363; Valle v. Cerre, 36 Mo. 576, 88 Am. Dec. 161.

29. Weyand v. Atchison, etc., R. Co., 75 Iowa, 573, 9 Am. St. Rep. 504.

30. Louisville, etc., R. Co. v. Barkhouse, 100 Ala. 543; Weyand v. Atchison, etc., R. Co., *supra*.

31. Pennsylvania R. Co. v. Stern, 119 Pa. St. 24, 4 Am. St. Rep. 626; North Pennsylvania R. Co. v. Commercial Bank, 123 U. S. 727.

32. N. Y.—Security Trust Co. v. Wells Fargo Express, 178 N. Y. 620, 70 N. E. 1109, affg. 81 App. Div. (N. Y.) 426, 80 N. Y. Supp. 830; Furman v. Union Pac. R. Co., 106 N. Y. 579, 32 Am. & Eng. R. Cas. 500; Entee v. New Jersey Steamboat Co.,

through the fraud, imposition, or deceit of a third person, as upon a forged order, the carrier will be responsible, and the wrongful delivery will be treated as a conversion.³³ That the delivery was

45 N. Y. 34, 6 Am. Rep. 28; *City Bank v. Rome, etc., R. Co.*, 44 N. Y. 136; *Scheu v. Erie R. Co.*, 10 Hun (N. Y.), 498; *Oswego Bank v. Doyle*, 91 N. Y. 32, 43 Am. Rep. 634; *Packard v. Getman*, 4 Wend. (N. Y.) 613, 21 Am. Dec. 166; *Sonn v. Smith*, 57 App. Div. (N. Y.) 372, 68 N. Y. Supp. 217.

Ark.—*Little Rock, etc., R. Co. v. Glidewell*, 39 Ark. 487, 18 Am. & Eng. R. Cas. 539.

Dak.—*Waldron v. Chicago, etc., R. Co.*, 1 Dak. 336.

Ill.—*St. Louis, etc., R. Co. v. Rose*, 20 Ill. App. 670; *Indianapolis, etc., R. Co. v. Vanduzen*, 81 Ill. 143; *American Express Co. v. Baldwin*, 26 Ill. 504, 79 Am. Dec. 101.

Mass.—*Forbes v. Boston, etc., R. Co.*, 133 Mass. 154; *Mahon v. Blake*, 125 Mass. 477; *Hall v. Boston, etc., R. Co.*, 14 Allen (Mass.), 439, 92 Am. Dec. 783; *Clafin v. Boston, etc., R. Co.*, 7 Allen (Mass.), 341.

Mich.—*Gibbons v. Farwell*, 63 Mich. 344, 6 Am. St. Rep. 301, 29 N. W. 855.

Minn.—*Jellett v. St. Paul, etc., R. Co.*, 30 Minn. 265, 15 N. W. 237.

Mo.—*Cole v. Wabash, etc., R. Co.*, 21 Mo. App. 443; *Erskine v. Steam-boat Thames*, 6 Mo. 371.

N. H.—*Smith v. Nashua, etc., R. Co.*, 27 N. H. 86, 59 Am. Dec. 364.

Pa.—*Wernwag v. Philadelphia, etc., R. Co.*, 117 Pa. St. 46, 20 W. N. C. (Pa.) 150, 32 Am. & Eng. R. Cas. 515; *Graff v. Bloomer*, 9 Pa. St. 114.

Tenn.—*Sword v. Young*, 89 Tenn. 126; *Bloomingdale v. Memphis, etc., R. Co.*, 6 Lea (Tenn.), 618, 6 Am. & Eng. R. Cas. 371; *Erie Despatch v. Johnson*, 87 Tenn. 490, 11 S. W. 441.

Tex.—*Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 30 Am. Rep. 116; *Missouri, etc., R. Co. v. Seley*, 31 Tex. Civ. App. 158, 72 S. W. 89.

Vt.—*Winslow v. Vermont, etc., R. Co.*, 42 Vt. 700, 1 Am. Rep. 365.

Eng.—*Fowles v. Great Western R. Co.*, 7 Exch. 699, 22 L. J. Exch. 76; *Richards v. London, etc., R. Co.*, 7 C. B. 839, 62 E. C. L. 839; *Moffatt v. Great Western R. Co.*, 15 L. T. N. S. 630; *Hoare v. Great Western R. Co.*, 25 W. R. 63; *Youl v. Harbottle, Peake N. P.* 49.

Delivery to one who had been consignor's agent.—In an action against a carrier for the conversion of goods by delivering them to the person to whom they were consigned and who had been plaintiff's agent, after termination of the agency and notice by plaintiff not to do so, it is no defense that such person had a lien on the goods for freight paid, where it appears that he at the time owed plaintiff a larger sum. *Lester v. Delaware, etc., R. Co.*, 92 Hun (N. Y.), 342, 36 N. Y. Supp. 907.

33. McEntee v. New Jersey Steam-boat Co., 45 N. Y. 34, 6 Am. Rep. 28; *Guillame v. Hamburg & Am. Packet Co.*, 42 N. Y. 212; *Powell v. Myers*, 26 Wend. (N. Y.) 590; *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586; *Shenk v. Philadelphia Steam Propeller Co.*, 60 Pa. St. 109, 100 Am. Dec. 541.

Misdelivery through mistake.—*Chicago, etc., R. Co. v. Ames*, 40 Ill. 249, mistake in marking the number of a car; *Wilson v. Wabash, etc., R. Co.*, 23 Mo. App. 50, mistake in making out shipping bills; *Arlington v. Wilmington, etc., R. Co.*, 6 Jones L. (N. C.) 68, 72 Am. Dec. 559, mis-

made in accordance with the usual course of business and the carrier's usual custom at the destination of the goods, will not relieve the carrier from liability for misdelivery, except under special circumstances where it clearly appears that the party injured was aware of the custom and acted with knowledge of it.³⁴ No amount of care or caution will relieve the carrier, since it is not a question of want of care or negligence; the carrier's undertaking as an insurer is to deliver safely as well as to carry safely; its liability as an insurer extends to a delivery to the proper party, and its warranty as an insurer is broken by a misdelivery.³⁵ It is the duty of the carrier in all cases to be diligent in its efforts to secure a delivery of the property to the person entitled, and where delivery is to be made to the consignee or any other particularly specified person, the carrier is bound to require evidence of identity of the party claiming delivery as the real party entitled, and it cannot properly, or without incurring liability to the true owner, deliver goods to any person who calls for them other than the rightful owner, and cannot plead imposition practiced by others as a defense to an action for misdelivery.³⁶ A carrier will

take in the waybill of the carrier; Clement v. New York Cent., etc., R. Co., 9 N. Y. Supp. 601, goods delivered to third party by mistake.

Fraud and misrepresentation. —Viner v. New York, etc., Steamship Co., 50 N. Y. 23; Wilson Sewing Machine Co. v. Louisville, etc., R. Co., 71 Mo. 203; Houston, etc., R. Co. v. Adams, 49 Tex. 748, 30 Am. Rep. 116; Winslow v. Vermont, etc., R. Co., 42 Vt. 700, 1 Am. Rep. 365; South, etc., Alabama R. Co. v. Wood, 66 Ala. 167, 41 Am. Rep. 749, 9 Am. & Eng. R. Cas. 419; American Sugar Refining Co. v. McGhee, 96 Ga. 27; Price v. Oswego, etc., R. Co., 50 N. Y. 213, 10 Am. Rep. 475. Compare Dunbar v. Boston, etc., R. Corp., 110 Mass. 26, 14 Am. Rep. 576.

34. Sinsheimer v. New York, etc., R. Co., 21 Misc. Rep. (N. Y.) 45, 46 N. Y. Supp. 887; Hall v. Boston, etc., R. Corp., 14 Allen (Mass.), 439, 92 Am. Dec. 783; Winslow v. Vermont,

etc., R. Co., 42 Vt. 700, 1 Am. Rep. 365. Compare Bush v. St. Louis, etc., R. Co., 3 Mo. App. 62. See also § 20, note 30.

35. Forbes v. Boston, etc., R. Co., 133 Mass. 154, 9 Am. & Eng. R. Cas. 76; Hall v. Botson, etc., R. Corp., 14 Allen (Mass.), 439, 92 Am. Dec. 783; South, etc., Alabama R. Co. v. Wood, 66 Ala. 107, 41 Am. Rep. 749, 9 Am. & Eng. R. Cas. 419; Bodenham v. Bennett, 4 Price 31; Richards v. London, etc., R. Co., 7 C. B. 839, 62 E. C. L. 839, 18 L. J. C. P. 251.

36. Price v. Oswego, etc., R. Co., 50 N. Y. 213, 10 Am. Rep. 475, 3 Am. Ry. Rep. 325, revg. 58 Barb. (N. Y.) 599; McEntee v. New Jersey Steamboat Co., 45 N. Y. 34, 6 Am. Rep. 28; Powell v. Myers, 26 Wend. (N. Y.) 591; Baltimore, etc., R. Co. v. Pumphrey, 59 Md. 390, 9 Am. & Eng. R. Cas. 331; Pacific Express Co. v. Shearer, 160 Ill. 215; Ten Eyck v. Harris, 47 Ill. 268; Sword

be protected in refusing delivery until reasonable evidence is furnished it that the party claiming is the party entitled, so long as it acts in good faith and with a sole view to a proper delivery,³⁷ and it may refuse to deliver to a consignee who is not identified, although he may offer security, and an action cannot be maintained by such person against the carrier based upon such refusal.³⁸ Where, however, the relation of the parties is not that of carrier and owner or consignee, or where the responsibility of the carrier has terminated and that of a warehouseman has commenced or exists, the strict rule of responsibility as insurer does not prevail, and the carrier is responsible for proper diligence and care only in the preservation of the property and its delivery to the true owner, and liable only for losses resulting from its own negligence.³⁹ The delivery of goods by a carrier at destination, without requiring the surrender of a bill of lading, as required by a stipulation therein, does not involve any breach of duty to the consignor, if the delivery is made to the consignee, or upon his order, or by his authority.⁴⁰

§ 22. Delivery to one of two persons of the same name.—A shipper may recover for goods delivered to the wrong consignee, through the carrier's failure to exercise ordinary and proper care, as where the carrier delivers goods to an impostor or swindler who ordered them in the name of a responsible person; and the right to recover is not dependent upon the shipper's discovering the

v. Young, 89 Tenn. 126, 129, 14 S. W. 481, 604. See also § 6, *Delivery to fraudulent purchaser.*

37. McEntee v. New Jersey Steamboat Co., 45 N. Y. 34, 6 Am. Rep. 28.

38. Houston, etc., R. Co. v. Adams, 49 Tex. 761, 30 Am. Rep. 116; Gulf, etc., R. Co. v. Freeman, 4 Tex. App. Civ. Cas. 245. Compare Thomas v. Pacific Express Co., 30 Mo. App. 86, wherein it is held that a consignor of goods sent by express, which are not delivered at their destination but brought back to the place of shipment, cannot be refused the return of the goods to him because of a rule of the express company requiring identification of consignees.

39. Burnell v. New York Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61; Carroll v. Southern Express Co., 37 S. C. 452.

40. Chicago Packing & P. Co. v. Savannah, etc., R. Co., 103 Ga. 140, 29 S. E. 698, 40 L. R. A. 367, 10 Am. & Eng. R. Cas. N. S. 391.

A consignor waives his right of action for conversion against the carrier for the delivery of the goods to the consignee without the production of the bill of lading, as required by the terms thereof, by taking the consignee's acceptance of a draft drawn against the shipment, after he knew that the goods had been delivered without a production of the

fraud and stopping the goods *in transitu*.⁴¹ But the carrier is not liable for a misdelivery, where there are two persons of the same name in the same place, in delivering goods to one of the two when the other was intended as the consignee, where there is nothing in the marking on the shipment or in the bill of lading to indicate which of the two is intended as consignee, and delivery is made to the person who produces the bill of lading and demands the goods. The loss must be borne by the consignor because of his negligence in not marking the shipment more specifically.⁴² A carrier is not liable for misdelivery in delivering to that one of two men of the same name in the same town who orders the goods shipped, although the shipper believed the order was from and intended the goods to go to the other, notwithstanding the purchaser fraudulently assumed such name in buying, provided he was known by it at the place of destination.⁴³ But a mere similarity of names is no defense to an action for misdelivery in delivering goods to the wrong party.⁴⁴ Delivery by an express company of goods received by it under a contract for their delivery to a specified consignee at a point beyond its terminal office, to an agent of such consignee duly authorized to receive them, completes the contract of carriage, although the goods were not

bill of lading, and that his intention to prevent a delivery of the goods until payment of the purchase price had been thereby defeated. Southern R. Co. v. Kinchen, 103 Ga. 186, 29 S. E. 816.

41. Wilson v. Adams Express Co., 43 Mo. App. 659, 27 Mo. App. 360; Pacific Express Co. v. Critzer (Tex. Civ. App.), 42 S. W. 1017. See also § 6, *ante*.

42. Bush v. St. Louis, etc., R. Co., 3 Mo. App. 62. In the case cited the carrier had tendered the goods to the consignee intended, who said he had not ordered them and refused them, and the company then stored them as warehousemen and subsequently delivered them on demand and production of the bill of lading to the other person of the same name. It was held that the company, as warehouse-

men, were liable for due diligence only; that they were not chargeable, under the circumstances, with negligence; and there had not been a misdelivery.

The rule that the owner must bear the loss in case of a misdelivery arising from his improperly marking the package,—applied where the package was carried to the wrong place, and there destroyed by fire, without fault of the carrier. Southern Express Co. v. Kaufman, 12 Heisk. (Tenn.) 161.

43. Southern Express Co. v. Os-kamp, 14 Ohio C. C. 176, 7 Ohio Dec. 417.

44. Wernwag v. Philadelphia, etc., R. Co., 117 Pa. St. 46, 32 Am. & Eng. R. Cas. 515; Houston, etc., R. Co. v. Adams, 49 Tex. 748, 30 Am. Rep. 116, 32 Am. & Eng. R. Cas. 508.

ordered by the consignee to whom the shipper really intended to send them, but by another person bearing, or pretending to bear, the same name, to whom the goods were finally delivered after passing through the hands of the real consignee's agent.⁴⁵

§ 23. Place of delivery.—In the absence of special contract or a statute fixing the place of delivery, a carrier's contract of carriage is not completed, but its obligation continues, until delivery at its depot or warehouse where goods are customarily unloaded and delivered at the place of destination of the goods; and an offer by the carrier to deliver at such place, except where personal delivery is requisite, is sufficient, without regard to where the consignee may actually be.⁴⁶ An attempt by the carrier to deliver at a new and unusual place will render it liable for all losses or injuries which might have been avoided by delivery at the proper place;⁴⁷ and a refusal to deliver at the place agreed upon and subsequent delivery elsewhere will render the carrier

45. Southern Express Co. v. Williams, 99 Ga. 482, 27 S. E. 743.

46. D. Klass Commission Co. v. Wabash R. Co., 80 Mo. App. 164, 2 Mo. App. Repr. 545, and delivery is not completed by the carrier sidetracking cars at its yards; Gulf, etc., R. Co. v. Clark, 2 Tex. App. Civ. Cas. § 511, 18 Am. & Eng. R. Cas. 628, and if the goods are tendered elsewhere, the consignee need not receive them, but may sue as for a total loss; Cox v. Peterson, 30 Ala. 608, 68 Am. Dec. 145, and the acceptance of a part of such goods will not bar a suit for non-delivery of the remainder; Loomis v. Wabash, etc., R. Co., 17 Mo. App. 340, goods marked to a particular destination must be delivered at the station named.

A contract to carry goods to a certain place cannot be made to bind the carrier to deliver them at another station, either for the reason that the goods were addressed to the consignee at such other station or because the consignee was described as

being at such other station. Wheeler v. St. Louis, etc., R. Co., 3 Mo. App. 358.

47. Benbow v. North Carolina R. Co., Phil. L. (N. C.) 421, 98 Am. Dec. 76.

As to special damage not proximate result.—Where, in an action against a carrier for failure to deliver cotton at the destination named in the bill of lading, the consignor claimed damages suffered by reason of the consignee's refusal to accept after having procured samples, which he would not have done if the cotton had been delivered at the proper place, plaintiff could not recover, in the absence of proof that the carrier was instrumental in permitting the consignee to procure the samples, or that it had any knowledge of the contract between plaintiff and the consignee, since such damages were special, and not the proximate result of the carrier's breach of contract. Gulf, etc., Ry. Co. v. Pickens (Tex. Civ. App.), 58 S. W. 156.

liable for all damages thereby caused, including punitive damages for a wilful misdelivery.⁴⁸ On a consignment of goods to a place where there is no depot, warehouse, agent, or even side track, it is the duty of the carrier, in case the consignee is not present to receive the goods, to unload them and leave them there on the ground, if not goods susceptible to injury; and the carrier has no right because the consignee is not present, to carry them on to the next station and leave them on a side track, and is liable for the value of the goods if it does so.⁴⁹ But where there are two places in a town for the acceptance of freight, one the depot proper and the other a platform where heavy and bulky articles are received and deposited, the usage of the place as to which one would be the proper place for the reception and shipment of certain goods and to which place they would be likely to go when addressed to the town generally, may be shown by proof.⁵⁰ In

48. Stricker v. Leathers, 68 Miss. 803.

49. Louisville, etc., R. Co. v. Gilmer, 89 Ala. 534, 42 Am. & Eng. R. Cas. 450, 7 So. 654. See also South, etc., Alabama R. Co. v. Wood, 72 Ala. 451, 18 Am. & Eng. R. Cas. 634.

As to goods susceptible to injury a consignee has been held not to be entitled to have them delivered at a certain station where the accommodations were insufficient to receive all classes of goods, and the carrier was accustomed to deliver minerals there, but other goods at its general goods station, some distance away. Thomas v. North Staffordshire R. Co., 3 Ry. & C. T. Cas. 1.

Freight destined to switches or side tracks.—Defendant, as a connecting carrier, received a car load of freight, consigned to H., for transportation to a point on its road where it had neither freight agent nor depot building. The bill of lading issued by the initial carrier showed that the freight charges were paid, and provided that delivery of freight destined to switches or side tracks having no

agent should be complete upon switching the car at such side track. Defendant carried the car to the point indicated, and side-tracked it on a switch in front of the office of a lumber company, for whom the freight was really intended, though consigned to H. The manager of the lumber company, without consent of either defendant or the consignors, broke open the car, which was sealed and locked, unloaded its contents, and carried the same away, and failed to pay a draft made upon him for its value. In an action it was held that the delivery was complete, and that defendant was not liable to the consignor for the loss of the contents of the car. Hill v. St. Louis, etc., Ry. Co., 67 Ark. 402, 55 S. W. 216.

50. Homesly v. Elias, 66 N. C. 330. The delivery of cotton by defendant at its wharf at West Wego, which is on the opposite side of the river from New Orleans, was a compliance with the bill of lading requiring its delivery at the port of New Orleans, although West Wego was not at that time within the boundaries of the

the absence of a usage or custom to the contrary, the station agent of the carrier has no authority to undertake to make a delivery elsewhere than at the customary depot or warehouse; and an undertaking on his part to make such delivery at a different place will not render the carrier liable for the negligence of the agent in carrying out his undertaking.⁵¹ None of the carriers in transit have a right to require the owner to receive goods elsewhere than at the destination named in the contract of shipment.⁵² The duty of a carrier, in the absence of orders from the shipper, to exercise reasonable care to protect his interest in a sudden emergency like a strike preventing the forwarding of perishable goods to their destination, is violated by shipping the goods over another line of its system to another place and selling them there at a less price than could have been obtained at the place of destination, to which the goods might have been forwarded by another available route.⁵³ Delivery must be made by the carrier at a reasonably safe and convenient place for the consignee to receive the goods, and if made at an unusual and unfit place the carrier will be liable.⁵⁴ If the consignee accepts a delivery of the goods at a place or in a manner different from what a common carrier is liable at law to deliver them, the business of removing them becomes from that time his business, and the carrier cannot be held liable for the acts or omissions of those employed to do the work.⁵⁵ But a shipper of goods billed for a designated place does not relieve the initial carrier from liability as an insurer of their safe delivery at various intermediate points according to an agreement between him and the carrier to whom he directed them to be delivered, in-

port of New Orleans, as defined in the statute, it being, in a well understood commercial and business sense, the part of that port where steamship companies rightfully expected to receive cotton from Texas for transportation to European ports. Reiss v. Texas, etc., R. Co., 98 Fed. 533, 39 C. C. A. 149, affd. Texas, etc., R. Co. v. Reiss, 99 Fed. 1006, 39 C. C. A. 680; Marande v. Texas, etc., R. Co., 102 Fed. 246, 42 C. C. A. 317.

51. Melbourne v. Louisville, etc., R. Co., 88 Ala. 443.

52. Gulf, etc., R. Co. v. A. B. Frank Co. (Tex.), 48 S. W. 210.

53. Alabama, etc., R. Co. v. Bri-chetti, 72 Miss. 891, 18 So. 421; Louisville, etc., R. Co. v. O'Dill, 96 Tenn. 61, 33 S. W. 611. See also Liability for delay, chap. 8.

54. Benbow v. North Carolina R. Co., Phil. L. (N. C.) 421, 98 Am. Dec. 76. Delivery must be made at the place of business of the consignee and not at that of another party. Mahon v. Blake, 125 Mass. 477.

55. Jewell v. Grand Trunk R. Co., 55 N. H. 84, 11 Am. Ry. Rep. 596.

curred by such initial carrier's wrongful delivery of them to another carrier, by paying the latter the freight for the entire route to induce it to deliver goods at one of the intermediate points, and an agreement by it to carry the remaining portion to their destination at its own cost.⁵⁶ An option given a carrier by contract as to the place of delivery to the owner is waived by its refusal to deliver at all.⁵⁷ The delivery by a railroad company of a carload of grain on a side track which had been generally designated as the place for unloading by one to whom the consignee had ordered the agent of the railroad company to deliver all grain billed to such consignee, without presentation of the bill of lading and the notification by the company that the car had been placed on such track, constitute a complete delivery where the consignee had been paid in full therefor, which will prevent the company from retaking possession on the presentation of the bill of lading by a third person.⁵⁸ A deposit of goods with notice, express or implied, by an initial carrier, at any place where the second carrier has control of them, conformably with usage created by the course of business between the two carriers, is a sufficient delivery to discharge the initial carrier.⁵⁹

§ 24. Right of owner or consignee to change place of delivery.

—The instructions of the owner or freighter, as to the delivery of goods, must be obeyed, and he may change their destination while *in transitu* and direct delivery at an intermediate point without changing the contract with the carrier. No responsibility for loss is incurred by the carrier where it obeys such instructions, but it is liable if the directions given are not obeyed.⁶⁰ Where delivery

56. Brown, etc., Co. v. Pennsylvania Co., 63 Minn. 546, 65 N. W. 961, 2 Am. & Eng. R. Cas. N. S. 640. See also Waiver, § 35, *post*.

57. Buckeye Pipe Line Co. v. Fee, 15 Ohio C. C. 637.

58. Anchor Mill Co. v. Burlington, etc., R. Co., 102 Iowa, 262, 71 N. W. 255.

59. Texas, etc., R. Co. v. Clayton, 51 U. S. App. 676, 84 Fed. 305, 9 Am. & Eng. R. Cas. N. S. 821, 28 C. C. A. 142; Aetna Ins. Co. v. Wheeler, 49 N. Y. 616; Mills v. Michigan Cent.

R. Co., 45 N. Y. 622, 6 Am. Rep. 152; Van Santvoord v. St. John, 6 Hill (N. Y.), 157; Converse v. Norwich Transp. Co., 33 Conn. 166; Hewett v. Chicago, etc., R. Co., 63 Iowa, 611; Truax v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 233; Pratt v. Grand Trunk R. Co., 95 U. S. 43, 24 L. Ed. 336; Palmer v. Chicago, etc., R. Co., 56 Conn. 137; Kentucky, etc., Ins. Co. v. Western, etc., R. Co., 8 Baxt. (Tenn.) 268.

60. Michigan Southern, etc., R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278;

is directed or demanded at an intermediate point, the carrier may demand and is entitled to receive full freight charges for the entire distance, and such incidental expenses as may have been incurred by reason of the change of destination.⁶¹ But although a consignor or consignee of goods may change his instructions as to their destination, and substitute a different place of delivery, he must do so during the transit, and not after their destination has been reached and the carrier's obligation fulfilled.⁶² After the

Strahorn v. Union Stock Yards, etc., Co., 43 Ill. 424, 92 Am. Dec. 142; **Hartman v. Louisville, etc., R. Co.**, 39 Mo. App. 88; **Seothorn v. South Staffordshire R. Co.**, 8 Exch. 341; **London, etc., R. Co. v. Bartlett**, 7 H. & N. 400, 8 Jur. N. S. 58, 10 W. R. 109; **Cork Distilleries Co. v. Great Southern, etc., R. Co.**, L. R. 7 H. L. Cas. 269, 8 Ir. R. C. L. 334; **Sutherland v. Peoria Bank**, 78 Ky. 250, 6 Am. & Eng. R. Cas. 368, the right is the same where the goods have passed into the hands of a connecting carrier.

61. *The Gazelle*, 128 U. S. 474, a shipowner who is prevented from performing the voyage by a wrongful act of the charterer is *prima facie* entitled to the freight that he would have earned, less what it would have cost him to earn it; *Clark v. Massachusetts, etc., Ins. Co.*, 2 Pick. (Mass.) 104, 13 Am. Dec. 400, where a ship was so damaged that it would require two months to repair her, her master may retain the cargo and earn his freight, since neither party is at liberty to abandon the contract of affreightment, but for legal cause, or with the consent of the other; *Braithwaite v. Aikin*, 1 N. D. 455, 48 N. W. 361; *Violett v. Stettinius*, 5 Cranch (C. C.), 559; *Shipton v. Thornton*, 9 Ad. & El. 314, 36 E. C. L. 150; *Luke v. Lyde*, 2 Burr. 887; *Thompson v. Small*, 1 C. B. 328, 50 E. C. L. 328.

Where a common carrier who has undertaken to carry goods by water to a certain place, is obliged by low water to land, and store them at an intermediate port, and the owner accepts them at the latter place, and pays all charges for freight and storage, the common carrier is discharged from all subsequent liability on account of his contract. *Bennett v. Byram*, 38 Miss. 17, 75 Am. Dec. 90.

Must be sufficient demand.—

The carrier is not liable for failure to deliver at an intermediate station in the absence of proof of a sufficient demand for such delivery. *Worden v. Canadian Pac. R. Co.*, 13 Ont. Rep. 652, 30 Am. & Eng. R. Cas. 127.

Where the consignee of part of the cargo of a vessel which had put into port in distress and was detained four months for repairs demanded his goods, offering to pay full freight and incidental expenses and to sign a general average bond, the vessel was held liable for the damage by leakage and deterioration to the cargo when delivered finally at the port of original destination. *The Martha*, 35 Fed. 313.

62. *Melbourne v. Louisville, etc., R. Co.*, 88 Ala. 443, 6 So. 762, and, in the absence of a custom authorizing the agent of a carrier, at the request of the consignee, to undertake, after the car has reached its destination, a delivery thereof at another place and to another party than the

goods have reached their original destination the undertaking of the carrier for transportation is at an end and it is then the right and interest of the carrier to see that the goods are delivered to none but the true owner, so that where an agent collected money for his principal and forwarded it to him by an express company, but the latter could not deliver the same because the consignee could not be found, the agent could not maintain an action against the company, he not being the owner or having any special interest in the goods.⁶³ *Prima facie*, the consignee is the owner of the goods in transit, the property therein vesting in the consignee upon delivery to the carrier, the latter being commonly the agent of the consignee, and he only can sue the carrier for non-delivery, though a receipt was given to the consignor.⁶⁴ The carrier is entitled to consider and is bound to treat the consignee as such owner unless it is advised that a different relation exists, or unless notice of such fact is to be implied from the manner of shipment, as where the goods are sent C. O. D.⁶⁵ The carrier is bound to deliver the goods at their destined place, to the consignee, or as the consignee may direct. The carrier is therefore entitled to deliver the goods at a different place from that stated in the instructions of the consignor, when directed to do so by the consignee, or when the consignee is willing to accept them at a different place. The consignee, or his authorized agent, may receive goods addressed to him in the hands of a carrier at any place, either before or after their arrival at their place of destination, and such acceptance operates as a discharge of the carrier from his liability. So a delivery in accordance with instructions of the consignee will relieve the carrier from liability from any consequences resulting from a change in the place of delivery.⁶⁶ But where the consignor

consignee, an arrangement between the latter and the agent cannot fix any liability on the company on account of the negligence of the agent in carrying it out.

63. Thompson v. Fargo, 49 N. Y. 188, 10 Am. Rep. 342; Duff v. Budd, 3 Brod. & B. 177, 7 E. C. L. 399; Krudler v. Ellison, 47 N. Y. 36, 7 Am. Rep. 402; Green v. Clarke, 12 N. Y. 343.

64. Thompson v. Fargo, *supra*;

Madison, etc., R. Co. v. Whitesel, 11 Ind. 55.

65. Price v. Powell, 3 N. Y. 322; Sweet v. Barney, 23 N. Y. 335.

66. Sweet v. Barney, 23 N. Y. 335; Lewis v. Western R. Corp., 11 Metc. (Mass.) 509; Sutherland v. Peoria Bank, 78 Ky. 250, 6 Am. & Eng. R. Cas. 368; London, etc., R. Co. v. Bartlett, 7 H. & N. 400; Mitchell v. Ede, 11 Ad. & El. 888, 39 E. C. L. 260; Foster v. Frampton, 6 B. & C. 107, 13 E. C. L. 111.

is known to the carrier to be the owner, or the carrier has notice, actual or implied, that the ownership of the goods is not in the consignee, the carrier must be understood to contract with the consignor only, for his interest, upon such terms as he dictates in regard to delivery, and the consignee is to be regarded simply as an agent selected by him to receive the goods at the place indicated, and instructions from such a consignee will constitute no defense to an action for a delivery not in accordance with the original instructions of the consignor.⁶⁷

§ 25. Statutory requirements as to delivery of grain.—Under a statute providing that every railroad company, which shall receive any grain in bulk for transportation, shall deliver it to any elevator, warehouse, or place to which it may be directed, if such warehouse or place can be reached by any track which can be used by the company, where a car of grain is received by a railroad company on its line of road, billed to an elevator on a track, it must deliver the car at the elevator; and it cannot discharge its duty, by leaving it on its own side track,⁶⁸ nor by delivering it to any warehouse other than that to which it is consigned, except when the consent of the owner or consignee has been obtained.⁶⁹ The relaxation of the common law rule requiring an actual delivery to the consignee, in fixing the liability of railroads, by

Agent with limited authority.—Where dutiable goods are sent into the United States from Canada, marked to the care of another person than the consignee, in order that such person may pay the duties, under an arrangement by which such goods come in bond, this gives the agent no authority to change their destination; and a carrier who, knowing the limited authority thus conferred upon the agent, upon his order delivers them to persons not entitled to receive them, is liable for a conversion. *Claflin v. Boston, etc., R. Co.*, 7 Allen (Mass.), 341.

67. Southern Express Co. v. Dickson. 94 U. S. 549.

68. Galesburg, etc., R. Co. v. West, 108 Ill. App. 504. The statute ap-

plies only to shipments of grain in bulk and not to any other merchandise. *Stetler v. Chicago, etc., R. Co.*, 49 Wis. 609; *Chicago, etc., R. Co. v. Stanbro*, 87 Ill. 195, 18 Am. Ry. Rep. 180.

69. Vincent v. Chicago, etc., R. Co., 49 Ill. 33, explaining the obligation of railroad corporations, both at common law and under the statute, and the grounds upon which that obligation may be enforced by injunction, with reference to the usages and public interests connected with the management of grain elevators, in Chicago and other cities. *Arthur v. St. Paul, etc., R. Co.*, 38 Minn. 95, as to usage at Duluth in the delivery of wheat to a public warehouseman.

reason of their inability, because of their methods of transportation, to make such delivery, and substituting a delivery at a safe depot for a personal delivery,⁷⁰ is not maintained when the consignee's place of business, to which goods are consigned, can be reached by a track used by the railroad company, but the common law rule of an actual delivery applies in such cases.⁷¹ A statute requiring that all railroad companies shall deliver grain to any elevator that can be reached by any track which "can be used" by such companies does not refer to mere physical possibility. A company cannot be compelled to run cars over a track owned by other persons or for the use of which it has no license or contract.⁷² Nor is the company liable under such a statute, unless the grain was consigned to a particular warehouse at the time of shipment.⁷³

§ 26. When place of destination is not on carrier's line.—A carrier is liable for detention of goods addressed to a specified place not on its line "via" of another place on its line, at the latter place, without using reasonably available means to forward them to their destination or notifying the consignee, notwithstanding any custom of its own not communicated to the shipper or consignee. Where there is no connecting carrier to which the goods may be delivered for further transportation, it is the duty of the carrier to store the goods in its warehouse or leave them in charge of some responsible warehouseman at the nearest point on its line to their destination and notify the consignee. Its liability, thereafter, becomes at most that of a warehouseman only.⁷⁴ A carrier of goods, and not the shipper, is liable for the mistakes of its agents or guide books on which it relies as to the proper place of delivery of the goods; and, where the testimony was conflicting as to which of two points a shipment was directed to, one being located on the carrier's line and the other not, it was for the jury

70. See Acts constituting delivery and acceptance, § 2, chap. 4.

93 Ill. 601; Stetler v. Chicago, etc., R. Co., 49 Wis. 609.

71. Vincent v. Chicago, etc., R. Co., 49 Ill. 33; Merchants' Despatch Transp. Co. v. Hallock, 64 Ill. 284, rule applied to a corporation of freighters owning a line of freight cars plying between the Atlantic Seaboard and the West; Coe v. Louisville, etc., R. Co., 3 Fed. Rep. 775.

73. Chicago, etc., R. Co. v. Stanbro, 87 Ill. 195, 18 Am. Ry. Rep. 180, a mere demand by the consignee at the place of destination that the grain be delivered at such place is not sufficient to subject the company to the penalties of the statute.

72. Hoyt v. Chicago, etc., R. Co.,

74. Denver, etc., R. Co. v. DeWitt, 1 Colo. App. 419, 29 Pac. 524.

to say what was the proper point of delivery at which the company should have stored the goods, and a finding for the plaintiff should not be disturbed.⁷⁵

§ 27. Time of delivery.—A contract for the shipment of goods, which does not specify any particular time for their delivery, requires them to be delivered within a reasonable time after they have been received for transportation, and this is the rule where there is no written contract; and an action may be maintained on the contract for unreasonable delay in its performance.⁷⁶ In the absence of special contract there is no absolute duty resting upon a carrier to deliver the goods intrusted to it within what, under ordinary circumstances, would be a reasonable time. The actual circumstances must all be considered, and what is a reasonable time is largely a question of fact dependent upon such circumstances; and the only duty resting upon the carrier is to use reasonable efforts and due diligence under all the circumstances to forward the goods to their destination.⁷⁷ Whether goods shipped are delivered by the carrier within a reasonable time is a question of fact for the jury, where the facts admit of more than one fair conclusion, and depends upon the circumstances of each case, including the time ordinarily required for carriage between the two points, the preparations made by the carrier, whether ample or not, the effort at despatch, the information given by the shipper of peculiar reasons for speedy transit and delivery, the character of the freight, and kindred circumstances. The mode of conveyance in use by the carrier, the distance the goods are to be transported, the season of the year, the character of the weather where it may interfere with transportation, the ordinary facilities for transportation, the obstacles, if any, interposed by natural causes or the conduct of men to be overcome, are facts to be considered.⁷⁸ The tender by a common carrier, to a consignee, of goods intrusted to its care, must be reasonable in respect to

75. Louisville, etc., R. Co. v. Bernheim, 113 Ala. 489, 21 So. 405.

140, 71 N. W. 967. See Liability for delay, chap. 8.

76. Gulf, etc., R. Co. v. Baugh (Tex. Civ. App.), 42 S. W. 245, 43 S. W. 557; Philadelphia, etc., R. Co. v. Lehman, 56 Md. 209, 6 Am. & Eng. R. Cas. 194, 40 Am. Rep. 415; Denman v. Chicago, etc., R. Co., 52 Neb.

77. Geismer v. Lake Shore, etc., R. Co., 102 N. Y. 563, 55 Am. Rep. 837, 26 Am. & Eng. R. Cas. 287, revg. 34 Hun (N. Y.), 50.

78. Columbus, etc., R. Co. v. Flourney, 75 Ga. 745; McGraw v. Balti-

time, place, and manner; and this is a question for the jury. If the goods are tendered after the hours of business, or when the consignee is unable to receive them, such tender will not discharge the carrier.⁷⁹ An offer to deliver freight, or passenger's baggage, if made at a proper time, discharges the carrier from its liability as a carrier, and, if the goods remain afterwards in its custody, it holds them as a bailee, and is accountable for them according to the terms, express or implied, of such bailment. An offer to deliver a money package or specie to a consignee need not be made during banking hours, unless such is the special engagement, or the established usage of the place, in order thus to change the carrier's responsibility.⁸⁰ Delivery may be made on Sunday or on a legal holiday, unless such delivery is made unlawful by statute or is contrary to established usage, and where there is an established usage or course of dealing the consignee is entitled to a reasonable time after that day to remove the goods.⁸¹

§ 28. When personal delivery is required.—In the absence of special contract or usage to the contrary, under the common law carriers by land are bound to deliver or tender goods to the consignee at his residence or place of business, and until this is done they are not relieved from responsibility as carriers, and this rule

more, etc., R. Co., 18 W. Va. 361, 9 Am. & Eng. R. Cas. 188, 41 Am. Rep. 696; Pittsburg, etc., R. Co. v. Hazen, 84 Ill. 36, 25 Am. Rep. 422; Pittsburgh, etc., R. Co. v. Hollowell, 65 Ind. 188, 32 Am. Rep. 63; Bennett v. Lake Shore, etc., R. Co., 6 Am. & Eng. R. Cas. 391.

79. Hill v. Humphreys, 5 W. & S. (Pa.) 123, 39 Am. Dec. 117; Eagle v. White, 6 Whart. (Pa.) 505, 37 Am. Dec. 434.

80. Young v. Smith, 3 Dana (Ky.), 92, 28 Am. Dec. 57; Marshall v. American Express Co., 7 Wis. 1, 73 Am. Dec. 381. See Merwin v. Butler, 17 Conn. 138; Pate v. Henry, 5 Stew. & P. (Ala.) 101.

81. Shelton v. Merchants' Despatch Transp. Co., 59 N. Y. 258; J. Russell Mtg. Co. v. New Haven Steamship

Co., 50 N. Y. 121; Sleade v. Payne, 14 La. Ann. 457; Richardson v. Goddard, 23 How. (U. S.) 28. Demurrage cannot be charged for Sunday and Labor day following the expiration of the time within which the consignee is required to unload. Gates v. Ryan, 37 Fed. 154.

Where Sunday and a holiday and two rainy days were part of the five days within which consignees might discharge the cargo, the question whether they used reasonable diligence in unloading was held to be one for the jury. Scheu v. Benedict, 116 N. Y. 510, 15 Am. St. Rep. 426. The owner of goods is entitled to recover for damages occasioned by delivery of the goods on a stormy day. The Grafton, 1 Blatchf. (U. S.) 173.

still obtains except in the case of railroads.⁸² Railroads are exempt from the duty of personal delivery and bound only to carry the goods to the depot or station to which they are destined, and there hold or place them in a warehouse ready for delivery whenever the consignee or owner calls for them after notifying the consignee or owner of their readiness to deliver.⁸³ Carriers by vessels and boats are likewise exempt from the duty of personal delivery and bound only to deliver upon a proper wharf.⁸⁴ But this exemption does not extend to express companies, although availing themselves of carriage by rail. Such companies were established for the purpose of extending to the public the advantages of personal delivery enjoyed in all cases of land carriage prior to the introduction of transportation by rail.⁸⁵ The same rule of

82. Fenner v. Buffalo, etc., R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Gibson v. Culver, 17 Wend. (N. Y.) 305, 31 Am. Dec. 297; Fisk v. Newton, 1 Den. (N. Y.) 45, 43 Am. Dec. 649; Schroeder v. Hudson River R. Co., 5 Duer (N. Y.), 55; Eagle v. White, 6 Whart. (Pa.) 505, 37 Am. Dec. 434; Graff v. Bloomer, 9 Pa. St. 114; Hemphill v. Cheine, 6 W. & S. (Pa.) 62; American Express Co. v. Hockett, 30 Ind. 250, 95 Am. Dec. 691; Brown v. Mott, 22 Ohio St. 149; Bartlett v. Steamboat Philadelphia, 32 Mo. 256; Evans v. Bristol, etc., R. Co., 10 W. R. 559; Hyde v. Trent Nav. Co., 5 T. R. 389; Birkett v. Willan, 2 B. & Ald. 356; Storr v. Crowley, 1 McClel. & Y. 129; Bansemmer v. Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367, but the rule does not apply to carriers by water or to railroads.

Where the consignee's place of business is on the upper floor of a building, delivery cannot properly be made to him by the carrier by leaving the goods on the ground floor and notifying the consignee of the fact. Haslam v. Adams Express Co., 6 Bosw. (N.Y.) 235; Mierson v. Hope, 2 Sweeny (N. Y.), 561.

83. Fenner v. Buffalo, etc., R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Witbeck v. Holland, 45 N. Y. 13, 6 Am. Rep. 23; Chalk v. Charlotte, etc., R. Co., 85 N. C. 423, 9 Am. & Eng. R. Cas. 106; South, etc., Alabama R. Co. v. Wood, 66 Ala. 167, 9 Am. & Eng. R. Cas. 419, 41 Am. Rep. 749; New Orleans, etc., R. Co. v. Tyson, 46 Miss. 729, 1 Am. Ry. Rep. 474; State v. Republican Valley R. Co., 17 Neb. 647, 22 Am. & Eng. R. Cas. 500, 52 Am. Rep. 424; Francis v. Dubuque, etc., R. Co., 25 Iowa, 60, 95 Am. Dec. 769; Evershed v. London, etc., R. Co., 2 Q. B. Div. 254, 26 W. R. 102, 46 L. J. Q. B. Div. 289.

Where a railway company delivered goods arriving at its depot to a carter, to be delivered by him only when the consignee did not furnish his own teams, or give directions to the contrary, and the company was not interested in the cartage of the goods, this did not establish a custom to deliver at the consignee's place of business. Cahn v. Michigan Cent. R. Co., 71 Ill. 96.

84. See § 29, *post*.

85. Witbeck v. Holland, 45 N. Y.

personal delivery applies to other carriers by rail when special charges have been made and collected for personal delivery.⁸⁶ And in all cases where a special contract or usage is shown to exist which relieves the carrier from personal delivery, unless the provisions of the contract are unreasonable, the carrier is not liable if delivery be made in accordance with such special contract or usage.⁸⁷

§ 29. Delivery by carriers by water.—Carriers by water like carriers by railroad, are not held to a personal delivery of the goods to the consignee or to a delivery at any other place than at the wharf of the vessel, and a notice to the consignee of the arrival of the goods, and of a readiness to deliver, takes the place of a personal delivery, so far as to release the carrier from the extraordinary and stringent liabilities incident to that class of bailees. By the general usages of commercial or maritime law, as established by judicial decisions, it is well settled that the carrier by water shall carry from port to port or from wharf to wharf, and that it is the duty of the carrier to deliver, and of the consignee to receive the goods, out of the ship or on the wharf.⁸⁸ The landing of goods upon a wharf is not a

13, 6 Am. Rep. 23; Baldwin v. American Express Co., 23 Ill. 197; American U. Express Co. v. Schier, 55 Ill. 140; American U. Express Co. v. Wolf, 79 Ill. 430; American Express Co. v. Robinson, 72 Pa. St. 274; Southern Express Co. v. Armstead, 50 Ala. 350; Sullivan v. Thompson, 99 Mass. 259; Marshall v. American Express Co., 7 Wis. 1.

So where it is the usual custom of a carrier, or the usual and known course of business of the carrier to deliver goods, or particular classes of goods, at the residence or place of business of the consignee, the carrier is bound to make actual delivery at such place. Taff Vale R. Co. v. Giles, 2 El. & Bl. 822, 88 E. C. L. 822; Golden v. Manning, 2 W. Bl. 916; Mitchell v. Lancashire, etc., R. Co., L. R. 10 Q. B. 256, 44 L. J. Q. B. 107;

Wise v. Great Western R. Co., 1 H. & N. 63, 25 L. J. Exch. 258; Bourne v. Gatliff, 11 Cl. & F. 45, 33 E. C. L. 364.

86. Cahn v. Mich. Cent. R. Co., 71 Ill. 96; Baltimore, etc., R. Co. v. Green, 25 Md. 72; Loomis v. Wabash, etc., R. Co., 17 Mo. App. 340. See also New York Cent., etc., R. Co. v. Standard Oil Co., 87 N. Y. 486, 6 Am. & Eng. R. Cas. 353.

87. Matter of Webb, 8 Taunt. 443, 4 E. C. L. 159; Richardson v. Goss, 3 B. & P. 119; Strong v. Nataly, 1 B. & P. N. R. 16.

88. Zinn v. New Jersey Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402, 3 Am. Ry. Rep. 340; Kilroy v. Delaware, etc., Canal Co., 121 N. Y. 22; Van Santvoord v. St. John, 6 Hill (N. Y.) 157; Davis v. Chautauqua Lake, etc., Assembly, 2 N. Y. St. Rep. 365;

delivery. To constitute a valid delivery on the wharf, the carrier is bound to give due and reasonable notice to the consignee of such landing, so as to afford him a fair opportunity of providing suitable means to remove the goods or put them under proper care and custody, and it remains liable as an insurer of the safety of the goods until after the lapse of a reasonable time from the giving of such notice, and is bound to store the goods in a safe and suitable warehouse to await the consignee or his agent.⁸⁹ If the carrier fail to give such notice, or if a reasonable and diligent effort is not made to find and notify the consignee, the carrier is liable for the consequences of such neglect and for any depreciation in

Union Steamboat Co. v. Knapp, 73 Ill. 506; Richardson v. Goddard, 23 How. (U. S.) 28; Chickering v. Fowler, 4 Pick. (Mass.) 371; Cope v. Cordova, 1 Rawle (Pa.) 203; Kohn v. Packard, 3 La. 224, 23 Am. Dec. 453; Scott v. Province, 1 Pittsb. (Pa.) 189; Farmers', etc., Bank v. Champlain Transp. Co., 16 Vt. 52, 42 Am. Dec. 491, 23 Vt. 186, 56 Am. Rep. 68; Hyde v. Trent Nav. Co., 5 T. R. 68; The Eddy, 5 Wall. (U. S.) 481.

89. Ostrander v. Brown, 15 Johns. (N. Y.) 39, 8 Am. Dec. 211; Rowland v. Miln, 2 Hilt. (N. Y.) 150; Pickering v. Weld, 159 Mass. 522; Blin v. Mayo, 10 Vt. 56, 33 Am. Dec. 175; Sleade v. Payne, 14 La. Ann. 457; Hemphill v. Chenie, 6 W. & S. (Pa.) 62; Warner v. Steamship Illinois, 17 Phila. (Pa.) 549; Galloway v. Hughes, 1 Bailey L. (S. C.) 553; Morgan v. Dibble, 29 Tex. 107, 94 Am. Dec. 264; Shenk v. Philadelphia Steam, etc., Co., 60 Pa. St. 109, 100 Am. Dec. 541.

The rule of the text may be varied by contract, or affected by well established, reasonable, and generally known local custom and usage of such uniformity, certainty, and notoriety as to warrant the jury in finding that it was known to the party sought to be affected. Huston

v. Peters, 1 Metc. (Ky.) 558; Gashweiler v. Wabash, etc., R. Co., 83 Mo. 112, 53 Am. Rep. 558, 25 Am. & Eng. R. Cas. 403.

A delivery of goods consigned to certain warehousemen, at the pier instead of the warehouse to which they were consigned, is not delivery according to the carrier's contract. Steamboat Sultan v. Chapman, 5 Wis. 454.

A delivery of goods consigned to a party at a particular landing, where there had been a warehousekeeper, at the usual place on the river bank, without any protection or guard, when the landing had been broken up by an inundation, and the washing away of the buildings, and the removal of the persons in charge, is not a good delivery. Stone v. Rice, 58 Ala. 95. Where it is in accordance with the local custom recognized by merchants and others, a carrier may notify a consignee of the arrival of the goods by postal card deposited in the mails. Roth Clothing Co. v. Maine Steamship Co., 44 Misc. Rep. (N. Y.) 237, 88 N. Y. Supp. 987; Friedman v. Metropolitan S. S. Co., 45 Misc. Rep. (N. Y.) 383, 90 N. Y. Supp. 401; Normile v. Northern Pac. Ry. Co., 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271.

the value of the goods from their value at the time and place they ought to have been delivered and their value at the time of their actual delivery.⁹⁰

§ 30. Delivery where consignee refuses to receive.—When goods are safely conveyed to the place of destination, and the consignee does not accept or refuses to receive the goods, the carrier may discharge itself from further responsibility, except as warehouseman, by storing the goods in its warehouse, or in that of some responsible third party, and the goods are then subject to its lien for storage as well as transportation charges.⁹¹ After notice sent to the consignor or owner and the goods being held in storage for a reasonable length of time, if the consignee still refuses to receive the goods, the lien may be enforced as provided by law, and the carrier will be discharged from further liability upon accounting for the proceeds.⁹² If the goods are of a perishable nature and it becomes a matter of necessity to sell to prevent a total loss, the carrier may sell them, after giving reasonable notice

90. Sherman v. Hudson River R. Co., 64 N. Y. 254; Zinn v. New Jersey Steamboat Co., 49 N. Y. 442, 3 Am. Ry. Rep. 340, 10 Am. Rep. 402.

The carrier is not responsible for injury to the goods due to the fault of the consignee. Goodwin v. Baltimore, etc., R. Co., 50 N. Y. 154, 10 Am. Rep. 457; The Mill Boy, 4 McCrack (U. S.) 383.

Personal notice may be excused where there are certain provisions in the bill of lading. Constable v. National Steamship Co., 154 U. S. 51.

What is a sufficient delivery, by carrier to consignee, of unusually bulky articles, such as a raft of logs. Hungerford v. Winnebago Tug Boat, etc., Co., 33 Wis. 303.

91. McAndrew v. Whitlock, 52 N. Y. 40, 11 Am. Rep. 657; Redmond v. Liverpool, etc., R. Co., 46 N. Y. 578, 7 Am. Rep. 390; Cook v. Erie R. Co., 58 Barb. (N. Y.) 312; Rowland v. Miln, 2 Hilt. (N. Y.) 150; Williams v. Holland, 22 How. Pr. (N. Y.) 137;

Fisk v. Newton, 1 Den. (N. Y.) 47, 43 Am. Dec. 649; American Sugar, etc., Co. v. McGhee, 96 Ga. 27; Illinois Cent. R. Co. v. Cobb, 64 Ill. 128; Gulliver v. Adams Express Co., 38 Ill. 502; Bartholomew v. St. Louis, etc., R. Co., 53 Ill. 227, 5 Am. Rep. 45; Cassilay v. Young, 4 B. Mon. (Ky.) 265, 39 Am. Dec. 505; Young v. Smith, 3 Dana (Ky.) 91, 28 Am. Dec. 57; Wood v. Crocker, 18 Wis. 345, 80 Am. Dec. 773; Steamboat Keystone v. Moies, 28 Mo. 243, 75 Am. Dec. 123; Lesinsky v. Great Western Dispatch, 13 Mo. App. 575; Crouch v. Great Western R. Co., 2 H. & N. 491, 3 Jur. N. S. 796; Great Western R. Co. v. Crouch, 3 H. & N. 183, 4 Jur. N. S. 457; Great Northern R. Co. v. Swaffield, L. R. 9 Exch. 132, 43 L. J. Exch. 89.

92. Cassilly v. Young, 4 B. Mon. (Ky.) 265; 39 Am. Dec. 505; Rankin v. Memphis, etc., Packet Co., 9 Heisk. (Tenn.) 569, 24 Am. Rep. 339. Proof of demand and tender of

of the time and place of sale, and retain its freight and charges from the proceeds. The sale in such case is not in virtue of its lien, but in the interest of the owner.⁹³ In order to relieve itself from liability, the carrier must deliver the goods in good condition, and is not justified in abandoning them or negligently exposing them to injury, even if the consignee neglects or refuses to accept or receive them after notice of their arrival.⁹⁴ A failure by the carrier to deliver goods within reasonable time constitutes a conversion and entitles the consignee to recover their full value, when the delay destroys the value of the goods entirely or renders them valueless to the consignee.⁹⁵ But otherwise such delay in delivery is merely a breach of contract, and not conversion, and the consignee cannot refuse to accept the goods and recover their full value.⁹⁶ The consignee is not warranted in refusing to receive goods on account of damage or depreciation in value resulting from delay in delivery, but, upon notice of their arrival, should receive the goods and dispose of them to the best advantage, and the measure of damages he is entitled to recover will be the difference between the amount he would have realized if prompt

charges are not necessary to sustain an action by a shipper against an express company for failure to return goods as directed, upon refusal of the consignee to accept them. *Hirsch v. Platt*, 89 N. Y. Supp. 362.

93. *Rankin v. Memphis, etc., Pack-et Co.*, 9 Heisk. (Tenn.) 568, 24 Am. Rep. 339; *Arthur v. The Schooner Cassius*, 2 Story (U. S.) 97. See Enforcement of lien, § 12, chap. 16.

94. *Scheu v. Benedict*, 116 N. Y. 510, 15 Am. St. Rep. 426. Where the carrier was in no way at fault, and notice was given to the consignor of the consignee's refusal to receive the goods because they were not such as he ordered, the carrier is not liable to the consignor. *Adams Express Co. v. McConnell*, 27 Kan. 238, 9 Am. & Eng. R. Cas. 240.

As to goods offered for delivery in a damaged and perishing condition from causes for which the carrier was not responsible, and which are refused

by the consignee, after reasonable notice and opportunity to remove given to the consignee, the carrier becomes a compulsory bailee bound only to the reasonable care of an involuntary custodian. *The Bobolink*, 6 Sawy. (U. S.) 146.

As to the cars of a connecting line in which goods are tendered for delivery the carrier, upon refusal of the consignee to receive, becomes liable only as warehouseman, no negligence being shown. *Missouri Pac. R. Co. v. Chicago, etc., R. Co.*, 25 Fed. 317, 23 Am. & Eng. R. Cas. 718.

95. *Mitchell v. Weir*, 19 App. Div. (N. Y.) 183, 45 N. Y. Supp. 1085.

96. *Ostrander v. Brown*, 15 Johns. (N. Y.) 39, 8 Am. Dec. 211; *Shaw v. South Carolina R. Co.*, 5 Rich. L. (S. C.) 462, 57 Am. Dec. 768; *Galveston, etc., R. Co. v. Watson*, 1 Tex. Civ. App. Cas., § 813; *Baumbach v. Gulf, etc., R. Co.*, 4 Tex. Civ. App. 650.

delivery had been made and the amount actually realized. He is entitled to recover only to the extent of the actual injury.⁹⁷ The consignee is not bound to accept goods when they are so damaged as to amount to practically a total loss.⁹⁸ If they are so damaged as to be unsafe for removal from the station, and the carrier fail to repair, if they are capable of repair, acceptance cannot be required of the consignee.⁹⁹ And in either case, full value of the goods may be recovered.¹ Where goods are tendered for delivery at an unreasonable time or place, or under unreasonable conditions, the consignee may refuse to accept under such circumstances, and his right to insist upon a subsequent delivery and the carrier's duty to care for the goods meanwhile will not be affected by his refusal.² So, he may demand the delivery of goods, after once refusing to receive them when duly tendered, where his refusal was due to mistake, and no other rights have intervened.³

97. Mills v. National Steamship Co., 5 N. Y. Supp. 258; Adams Express Co. v. McDonough, 6 Ohio Cir. Ct. Rep. 539; New Orleans, etc., R. Co. v. Tyson, 46 Miss. 729, 1 Am. Ry. Rep. 474; Howe v. Oswego, etc., R. Co., 56 Barb. (N. Y.) 121; Nettles v. South Carolina R. Co., 7 Rich. L. (S. C.) 190, 62 Am. Dec. 409.

The receipt of goods damaged, but yet of some value, will not be regarded as a waiver of claim for damages, and failure to receive such goods within a reasonable time will entitle the carrier to offset a claim for storage against the consignee's claim for damage. Gulf, etc., R. Co. v. Boston, 4 Tex. Civ. App. Cas., § 66; Galveston, etc., R. Co. v. Van Winkle, 3 Tex. Civ. App. Cas., § 442.

A shortage of goods does not justify a refusal to accept, and if they are sold for freight and storage charges, the consignee has no right of action. *Id.*

The consignee is not bound to accept where only a third of the goods are tendered and there is no evidence that

they are the original goods shipped. Chicago, etc., R. Co. v. Warren, 16 Ill. 502, 63 Am. Dec. 317.

Where only a part of the goods are damaged, the consignee cannot refuse to receive the portion uninjured, and hold the carrier liable for the entire shipment. Michigan Southern, etc., R. Co. v. Bivens, 13 Ind. 263.

98. Thomas, etc., Mfg. Co. v. Wabash, etc., R. Co., 62 Wis. 642, 51 Am. Rep. 725; Texas, etc., R. Co. v. Logan, 3 Tex. Civ. App. Cas., § 185; Gulf, etc., R. Co. v. Maetz, 2 Tex. Civ. App. Cas., § 630, 18 Am. & Eng. R. Cas. 613.

99. Breed v. Mitchell, 48 Ga. 533.

1. See notes 98 and 99.

2. Eagle v. White, 6 Whart. (Pa.) 505, 37 Am. Dec. 434; Hill v. Humphreys, 5 W. & S. (Pa.) 123, 39 Am. Dec. 117; Texas, etc., R. Co. v. Martin, 2 Tex. Civ. App. Cas., § 341.

3. Bacharach v. Chester Freight Line, 133 Pa. St. 414, 42 Am. & Eng. R. Cas. 362; Edwards v. Cheraw, etc., R. Co., 32 S. C. 117, 42 Am. & Eng. R. Cas. 453.

§ 31. Delivery of goods sent C. O. D.—Where goods are sent with instructions not to deliver them until they are paid for, the carrier, who accepts the goods with such instructions, undertakes not to deliver them unless the condition of payment is complied with. In addition to its obligations as a carrier, it becomes the agent of the consignor to collect and receive the price of the goods and return the money to the consignor. This obligation or duty is not one arising or implied from the nature of its business, but is based upon contract, express or implied.⁴ If the carrier accepts goods with such instructions, or if goods are so clearly marked as to show the intention of the consignor to make payment a condition of delivery, a contract is implied, and delivery under such circumstances without requiring payment, though to the consignee or to the right person, is a conversion, and the carrier is liable therefor to the consignor.⁵

4. American Express Co. v. Lesem, 39 Ill. 312; **Cox v. Columbus, etc., R. Co.,** 91 Ala. 392, 8 So. 824, 49 Am. & Eng. R. Cas. 112; **American Merchants', etc., Co. v. Wolfe,** 97 Ill. 430.

Undertaking to collect charges.—When a bill of lading, by fair construction, requires the carrier to collect charges upon the goods on delivery, if the carrier delivers the goods without collecting the sum due, he becomes liable therefor. **Meyer v. Lemeke,** 31 Ind. 208.

By simply marking package C. O. D., a consignor cannot charge a common carrier with any duty of collecting from the consignee the price or other charge against goods transmitted by the carrier. There must be some undertaking by the carrier to collect; either directly proved, or inferable from a usage. **Chicago, etc., R. Co. v. Merrill,** 48 Ill. 425.

Agent acting without authority.—To an action against a carrier for delivery, without payment of the price, of goods alleged to have been deliverable, by the bills of lading to the order of the plaintiff, who indorsed and delivered the bills to the

carrier, with the agreement that upon payment of the price they were to be delivered to a third person, it is a good defense that the agreement was made with the carrier's agent, and that he acted beyond his authority, and as plaintiff's agent in delivering the goods, and not as the carrier's agent. **Cox v. Columbus, etc., R. Co.,** 91 Ala. 392, 49 Am. & Eng. R. Cas. 112, 8 So. 824.

5. Tooker v. Gormer, 2 Hilt. (N. Y.) 71; **Feiber v. Manhattan Dist. Tel. Co.,** 3 N. Y. Supp. 116, 4 N. Y. Supp. 555; **Murray v. Warner,** 55 N. H. 546, 20 Am. Rep. 227; **Hutchings v. Ladd,** 16 Mich. 493; **Jellett v. St. Paul, etc., R. Co.,** 30 Minn. 265, 16 Am. & Eng. R. Cas. 246; **American Express Co. v. Lesem,** 39 Ill. 312; **American, etc., Express Co. v. Schier,** 55 Ill. 140; **Cox v. Columbus, etc., R. Co.,** 91 Ala. 392, 8 So. 824, 49 Am. & Eng. R. Cas. 112; **Lane v. Chadwick,** 146 Mass. 68, a consignee cannot maintain replevin against the carrier before payment and delivery. See also **Old Colony R. Co. v. Wilder,** 137 Mass. 536, 21 Am. & Eng. R. Cas. 41.

The letters "C. O. D." followed by an amount in dollars, marked upon the goods consigned for shipment, are well understood by the public to mean that the carrier accepting the goods for transportation shall collect the amount stated as a condition precedent to delivery;⁶ but their meaning may not be considered as judicially settled, or so well understood that judicial notice can be taken of the purpose for which they are used in all cases, or of the contract to be implied from them, although it is competent to explain them, and thus remove all ambiguity, by parol evidence.⁷ In some jurisdictions, however, it has been held that these letters have acquired a fixed and determinate meaning, which courts and juries will recognize from their general information, and that they import the carrier's liability to return to the consignor either the goods or the charges.⁸ Sending a bill of goods for collection, or with a request to collect, does not create an undertaking on the

Where a carrier by whom goods sold are shipped to be delivered to the vendee upon the payment of the purchase money negligently delivers the goods before such payment, neither the carrier nor the vendor can recover the goods from a bona fide purchaser from the vendee. Norfolk Southern R. Co. v. Barnes, 104 N. C. 25, 10 S. E. 83, 40 Am. & Eng. R. Cas. 121, 5 L. R. A. 611.

Where there is a verbal agreement as to delivery in addition to the shipper's receipt the contract of bailment must be ascertained by the jury from both the receipt and the verbal agreement. Union R., etc., Co. v. Riegel, 73 Pa. St. 72.

Where goods are sent over several connecting lines, the obligation as to the collection of the price, imposed by the acceptance of goods marked C. O. D., rests on the last carrier, and the other carrier cannot be made responsible for its default. Rennie v. Northern R. Co., 27 U. C. C. P. 153.

6. Collender v. Dinsmore, 55 N. Y. 205, 14 Am. Rep. 224. The letters C. O. D. placed upon a package shipped by express, means that the value or

price of the package will be collected on delivery and transmitted to the consignor. Those letters have nothing to do with the transportation charges. American, etc., Exp. Co. v. Schier, 55 Ill. 140; American Exp. Co. v. Lesem, 39 Ill. 312.

7. Collender v. Dinsmore, 55 N. Y. 205, 14 Am. Rep. 224. The court will not take judicial notice of the meaning of "C. O. D." Its meaning is a question for the jury. McNichol v. Pacific Express Co., 12 Mo. App. 401. See also American Merchants, etc., Co. v. Wolfe, 79 Ill. 430; American Express Co. v. Lesem, 39 Ill. 312.

8. United States Express Co. v. Keefer, 59 Ind. 263, the rule applied where the goods had been destroyed by the burning of the depot; State v. Intoxicating Liquors, 73 Me. 278, courts and juries, from their general information, may take the initials, "C. O. D.", when affixed to packages sent by common carriers from seller to buyer, to mean that delivery is to be made upon payment of the charges due the seller for the price, and the carrier for the carriage, of the goods.

part of the carrier not to deliver until the goods are paid for.⁹ An express company is not liable for failure to collect on delivery of a package sent to it for carriage with instructions so to collect, where the receipt given therefor was, to the knowledge of the sender, that used for ordinary packages, upon which only express charges are collected.¹⁰ After the carrier has tendered a package sent C. O. D. to the consignee and demanded the money, and after the consignee has had a reasonable time to call for and receive it, the carrier holds the package as warehouseman and not as a common carrier, and is thereafter responsible for the care of a warehouseman merely.¹¹ If the consignee refuses to receive and pay for the goods, or is unknown or cannot be found, the liability of the carrier becomes that of a warehouseman, but it should notify the consignor and hold the goods for further instructions, or subject to the consignor's order.¹² The acceptance by the carrier of the consignee's check, payable to the order of the consignor, for the amount to be collected, which the consignor accepts without objection, relieves the carrier from liability, even though the drawer had no funds in the bank when the check was drawn.¹³ So, the taking of the consignee's acceptance of a draft drawn against the shipment, after the consignor knew that the goods had been delivered without production of the bill of lading, and that

9. Tooker v. Gormer, 2 Hilt. (N. Y.) 71; Wells v. American Express Co., 44 Wis. 342.

10. Smith v. Southern Express Co., 104 Ala. 387, 61 Am. & Eng. R. Cas. 168.

11. Weed v. Barney, 45 N. Y. 344, 6 Am. Rep. 96; Zinn v. New Jersey Steamboat Co., 49 N. Y. 442; Gibson v. American, etc., Express Co., 1 Hun (N. Y.) 387; Marshall v. American Express Co., 7 Wis. 1, 73 Am. Dec. 381; Adams Express Co. v. Darnell, 31 Ind. 20; Storr v. Crowley, 1 McClel. & Y. 129. So where the carrier has limited its liability to that of a warehouseman for goods while they are waiting to be called for. Pacific Express Co. v. Wallace, 60 Ark. 100. 61 Am. & Eng. R. Cas. 170, 29 S. W. 32.

12. Hasse v. American Express Co., 94 Mich. 153, 53 N. W. 918, 47 Alb. L. J. 25; American Express Co. v. Greenhalge, 80 Ill. 68; American, etc., Express Co. v. Wolfe, 79 Ill. 430.

13. Rathbun v. Citizens Steamboat Co., 76 N. Y. 376, 32 Am. Rep. 321, 57 How. Pr. (N. Y.) 191. Compare Walker v. Walker, 5 Heisk. (Tenn.) 425.

The power of a factor to waive collection.—Where a commercial agent has sold goods on credit, which are forwarded by his principal by express, and marked "C. O. D." the expressman having no notice of any limitation of the agent's authority, may, upon the order of the agent, deliver the goods without payment of the price. Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 Am. Rep. 45.

his intention to prevent a delivery of the goods until payment of the purchase price had been thereby defeated, will operate as a waiver of the consignor's right of action against the carrier for conversion for such delivery.¹⁴ Where goods, in the usual course of business, are shipped on freight, to be sold by the owner for a certain freight or consigned to the master for sale and returns, the owner of the vessel is liable, as well for the payment of the proceeds to the shipper, as for the safe carriage of the goods.¹⁵ This is held to be the rule, although no special compensation, beyond the freight, is allowed for the sale of the goods and the return of the money.¹⁶ The carrier is not liable where the consignee retains a part of the goods and returns the others, paying for those retained, which amount and the goods not accepted are returned to the consignor,¹⁷ and where the carrier collects only part of the amount due, but remits all that is collected, such payment must be applied by the consignor to that particular shipment so as to relieve the carrier.¹⁸ The consignee is entitled to a reasonable time in which to call for the goods and pay the amount due, and the carrier is liable in damages for returning the goods to the consignor without allowing a reasonable time for payment to the consignee.¹⁹ The consignee has the right to a reasonable opportunity to examine the goods before accepting them, and a delivery to the consignee for the purpose of inspection, even though he pay the price conditioned upon its return to him if the goods on examination prove unsatisfactory, is not such a delivery as will render the carrier liable to the shipper for the amount directed to be collected on delivery.²⁰ If a carrier deliver a package

14. Southern R. Co. v. Kinchen, 103 Ga. 186, 29 S. E. 816.

15. Emery v. Hersey, 4 Greenl. (Me.) 407, 16 Am. Dec. 268; S. P.

Moseley v. Lord, 2 Conn. 389; Harrington v. McShane, 2 Watts (Pa.) 443, 27 Am. Dec. 321, where the boat was accidentally burned on her return, with the money received on the sale of the goods; Taylor v. Wells, 3 Watts (Pa.) 65, where the captain failed to account for the proceeds the owner was held not answerable without proof that he had given express authority to the captain to act as a

factor, or that he had implied authority by the usage of trade; Zollinger v. Steamer Emma, 3 Cent. L. J. 285.

16. Kemp v. Coughtry, 11 Johns. (N. Y.) 107.

17. Feiber v. Manhattan Dist. Tel. Co., 3 N. Y. Supp. 116, 4 N. Y. Supp. 555.

18. American Express Co. v. Lesem, 39 Ill. 312.

19. Great Western R. Co. v. Crouch, 3 H. & N. 183.

20. Aaron v. Adams Express Co., 27 Ohio L. J. 183; Lyons v. Hill, 46

marked "C. O. D." to the consignee, and receive payment, and the transaction turn out to be a fraud, and the package worthless, the consignee may reclaim his money, at any time before the carrier has paid it over to the fraudulent consignor.²¹ The consignee may likewise recover the price paid to the carrier for damaged goods received C. O. D., provided he has notified the carrier within a reasonable time that the goods were worthless and has offered to return the goods to it.²²

§ 32. Confusion of goods.—As a rule the consignee is entitled to the delivery of the identical goods shipped to him, and the carrier is liable for any damages caused by a delivery of other goods, by reason of an admixture or confusion of goods through mistake or otherwise.²³ The rule is not applied in the case of grain con-

N. H. 49, 88 Am. Dec. 189; Wilson v. Elliott, 57 N. H. 316; Avery v. Stewart, 2 Conn. 74, 7 Am. Dec. 240; Isherwood v. Whitmore, 11 M. & W. 347.

When carrier may refuse inspection.—The agents of an express company may, without rendering the company liable to any action in behalf of the consignee, refuse to permit him to examine the goods until he has paid express charges and accepted delivery; and on his refusal, return the goods to the consignor, if the consignor has specially instructed them to do so, or if the company took charge of the goods, subject to a general regulation, known to the consignor, prescribing this course. Wiltse v. Barnes, 46 Iowa, 210.

21. Herrick v. Gallagher, 60 Barb. (N. Y.) 566.

22. Hardy v. American Express Co., 182 Mass. 328, 65 N. E. 375, 59 L. R. A. 731.

23. The Augusta, 29 Fed. 334, where bails of corkwood shipped in good order were opened for storage, and in rebailing, different sizes and qualities were so mixed as to reduce the market value, and the consignee refused to receipt for them as in good

order, and they were sold by the ship-owner, it was held that the consignee could receive their sound value less freight; Rice v. Boston, etc., R. Corp., 98 Mass. 212, wherein it was held that the consignee was entitled to recover damages for coal being unloaded by the side of the railroad track without preparing the ground to receive the coal by laying down boards or otherwise, so that the different sorts and sizes of coal were mixed and soil mingled with it.

Default or negligence of carrier must be shown.—Consignees of iron whose agents assisted in selecting what was delivered, and accepted it as what they were entitled to by their bill of lading, and caused it to be sent away, must show satisfactorily that what was thus accepted was less than should have been delivered, and that their failure to receive all they should have received is attributable to some default on the part of the ship, in order to hold the latter liable for a deficiency, under a bill of lading stating that the vessel is not accountable for the number of pieces or weight. Eaton v. Neumark, 37 Fed. 375, affg. 33 Fed. 891.

signed to elevators, and where a warehouseman, without special agreement, but according to custom, mixes the grain of several depositors in a common mass, they become tenants in common of the entire amount of like quality, and the carrier may, in accordance with accepted usage, discharge his obligation by a delivery of grain of the same grade and kind as was shipped, and for the negligent destruction of the same each depositor can recover the value of his grain.²⁴ Where the consignment note and shipping receipt, constituting the contract between the parties, shows that such was the contract and intention of the parties, the consignee is entitled to demand the specific grain shipped and to recover damages for a failure to deliver it.²⁵

See also *Milligan v. Grand Trunk R. Co.*, 17 U. C. C. P. 115.

24. *Arthur v. Chicago, etc., R. Co.*, 61 Iowa, 648, 16 Am. & Eng. R. Cas. 285; *Sexton v. Graham*, 53 Iowa 181, where grain is delivered to a warehouseman and a receipt taken which provides that the grain may be stored with other grain of the same quality, the transaction constitutes a bailment and not a sale, even though the warehouseman is continually adding grain on his own account to the common mass, and shipping away therefrom; *Pratt v. Bryant*, 20 Vt. 333, if the owner of goods intentionally intermingle them with goods of the same kind belonging to another person, but through negligence merely, and not wilfully or fraudulently, his property in them is not lost; but his remedy is not by action of book account, even though his goods may have been used by the owner of the goods with which they were thus intermingled; *Cushing v. Breed*, 14 Allen (Mass.), 376, 92 Am. Dec. 777, where several parties store grain in a grain elevator, and it is put into one mass, according to the usage of the trade, they are tenants in common thereof, and a valid title to a quantity

of the grain will pass by a delivery from the vendor to the vendee of an order to deliver such quantity, directed to the owners of the elevator, and accepted by them in the usual manner by retaining the order and entering it on their books, although there is no separation of the quantity sold from the rest of the mass; *Keeler v. Goodwin*, 111 Mass. 490, no title passes on a sale of a part of goods lying in bulk until separation, and, on delivery to a carrier for transportation to the buyer, the seller may suspend such inchoate delivery, and revoke the authority of any intermediary to perfect it. See also *Bryant v. Clifford*, 13 Metc. (Mass.) 138; *Wingate v. Smith*, 20 Me. 287; *Stearns v. Raymond*, 26 Wis. 74; *Moore v. Erie R. Co.*, 7 Lans. (N. Y.) 39; *Nowlen v. Colt*, 6 Hill (N. Y.) 461; *Forbes v. Boston, etc., R. Co.*, 133 Mass. 154, 9 Am. & Eng. R. Cas. 80; *Roblin v. Jackson*, 13 Man. R. (Can.) 328. Compare *Stephenson v. Little*, 10 Mich. 433; *Ryder v. Hathaway*, 21 Pick. (Mass.) 298.

25. *Leader v. Northern R. Co.*, 3 Ont. Rep. 92, 16 Am. & Eng. R. Cas. 287.

§ 33. Statutory penalties for refusing to deliver promptly.—

A statute to compel railroads to deliver freight promptly on tender of proper charges is a valid exercise of the police power of a state, and not an unlawful attempt to regulate interstate commerce.²⁶ A statute providing that, on failure of a railroad company to deliver freight on tender of charges, it shall be liable to the owner to an amount equal to the freight charges for every day of detention, is a remedial and not a penal statute, and not unconstitutional, though providing a civil rather than criminal remedy, and allowing an excess of damages over what could be recovered in an ordinary action, such damages being exemplary.²⁷ The general rule is that a state cannot exclude, directly or indirectly, the subjects of interstate commerce, or, by the imposition of burdens thereon, regulate such commerce, without congressional permission;²⁸ but a statute imposing a penalty upon carriers for withholding freight from its consignees has been held not unconstitutional in its application to freight shipped from points without the state.²⁹ The penalty provided by such a statute applies only

26. Little Rock, etc., R. Co. v. Han-niford, 49 Ark. 291, 30 Am. & Eng. R. Cas. 67, applying to every member of a class,—to all railroads, for example, it is not special legislation; Gulf, etc., R. Co. v. Dwyer, 75 Tex. 572, 7 L. R. A. 478, 7 R. R. & Corp. L. J. 355, 12 S. W. 1001, 42 Am. & Eng. R. Cas. 503; Dwyer v. Gulf, etc., R. Co., *id.*; St. Louis, etc., R. Co. v. McKee, 4 Tex. App. Civ. Cas. § 7.

27. Houston, etc., R. Co. v. Harry, 63 Tex. 256, 18 Am. & Eng. R. Cas. 502. A bill of lading for through shipment of goods to a designated point, "subject to the published tariff of the company and its connections," makes a published local tariff rate for an intermediate point a part of the contract; and the company cannot, without rendering itself liable for the penalty prescribed by statute for every day's detention, refuse to deliver the goods at such intermediate point on a tender of the

local rate, on the ground that the bill of lading is controlled by the through tariff schedule, or on the ground that such tender was made under protest. Atchison, etc., R. Co. v. Roberts, 3 Tex. Civ. App. 370, 22 S. W. 183.

A carrier cannot justify an unjust or unreasonable charge by observing the classification and rates of a published schedule, under a statute prohibiting unjust discrimination in charges and the making of unjust and unreasonable charges. Little Rock, etc., R. Co. v. Bruce, 55 Ark. 65, 17 S. W. 363.

28. Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; Baird v. St. Louis, etc., R. Co., 41 Fed. 592, 42 Am. & Eng. R. Cas. 281, 7 R. R. & Corp. L. J. 516.

29. Fort Worth, etc., R. Co. v. Lillard (Tex. App.), 16 S. W. 654; Dwyer v. Gulf, etc., R. Co., *supra*.

to a company which has itself executed, authorized, or ratified the execution of the bill of lading, and a defendant carrier which refuses to deliver goods on tender of the charges shown by the bill of lading, claiming that it had paid to another carrier the charges shown by the waybill, which exceeded those in the bill of lading, is not liable to the statutory penalty where the evidence shows that the bill was executed by another carrier and had not been ratified by the defendant.³⁰ A violation of the statute is not excused by the fact that the plaintiff refused to exhibit or surrender the bill of lading.³¹ But the statute cannot be enforced when it conflicts with the Federal statute, since to enforce the penalty would be punishing for an obedience to the law of Congress, a disobedience of which would constitute a misdemeanor.³² Such a statute is penal, and one enforcing the penalty must bring himself strictly within its provisions.³³ The statute does not give validity to stipulations in a bill of lading which are the result of fraud or mistake, which may always be shown, as, for example, as to the weight of the goods. The material part of the bill of lading is that which fixes the charges per hundred pounds and the carrier

30. Dwyer v. Gulf, etc., R. Co., 75 Tex. 572, 7 L. R. A. 478, 7 R. R. & Corp. L. J. 355, 12 S. W. 1001, 42 Am. & Eng. R. Cas. 503; Gulf, etc., R. Co. v. Dwyer, 84 Tex. 194, 19 S. W. 470; Fordyce v. Johnson, 56 Ark. 430, 19 S. W. 1050; Loewenberg v. Arkansas, etc., R. Co., 58 Ark. 439, 19 S. W. 1051. This is held to be especially so where the excess is due to misrouting by one of the carriers. Id.

A declaration, which shows that the bill of lading was issued by a carrier other than the defendant, is insufficient unless it also avers that the two carriers were partners. Miller v. Texas, etc., R. Co., 83 Tex. 518. See also Gulf, etc., R. Co. v. Adair (Tex. App.), 14 S. W. 1076; St. Louis, etc., R. Co. v. McKee, 4 Tex. Civ. App. Cas. § 7.

31. Gulf, etc., R. Co. v. McCown (Tex. Civ. App.), 25 S. W. 435;

Gulf, etc., R. Co. v. Dwyer, *supra*; Dwyer v. Gulf, etc., R. Co., 69 Tex. 707, 32 Am. & Eng. R. Cas. 461.

32. Dillingham v. Fischl, 1 Tex. Civ. App. 546, 21 S. W. 554; Wright v. Howe (Tex. Civ. App.), 24 S. W. 314; Gulf, etc., R. Co. v. McCown (Tex. Civ. App.), 25 S. W. 435.

33. Schloss v. Atchison, etc., R. Co., 85 Tex. 601, 22 S. W. 1014; St. Louis, etc., R. Co. v. Johnson, 53 Ark. 282, 45 Am. & Eng. R. Cas. 381, the plaintiff is bound to tender the full amount of charges due on the entire shipment; Little Rock, etc., R. Co. v. Hanniford, 49 Ark. 291, 30 Am. & Eng. R. Cas. 67, it is the duty of the carrier to weigh the goods within a reasonable time after their receipt, where the weight is not stated in the bill of lading, and ascertain the amount of charges according to the rates specified in the bill of lading.

may recover for the whole amount actually carried at the rate stated in the bill.³⁴

§ 34. Demand of goods by consignee.—The general rule is that the carrier is bound to deliver goods to the owner or his agent, personally, and for that purpose, to seek him at the place of delivery, in the absence of a special contract, or proof of a general usage.³⁵ But the carrier of goods by railway or by water is not bound to seek out the consignee and make an offer to deliver them. It is the business of the consignee to repair to the depot to receive the goods and request a delivery of them, and if the carrier refuse to deliver them without valid excuse, an action will lie.³⁶ An action cannot be maintained against a common carrier for failure to carry and deliver goods intrusted to it, until a demand for the goods has been made.³⁷ But a demand is unnecessary, where, if made, it would be unavailing for the reason that it could not be complied with by the carrier, as where the goods were never carried to their destination, or the company had no office or agent there of whom a demand might be made,³⁸ or where the carrier has converted the goods by a wrongful delivery, or they have been lost or destroyed.³⁹ The carrier cannot be charged with conver-

34. Baird v. St. Louis, etc., R. Co., 41 Fed. 592, 42 Am. & Eng. R. Cas. 281; Johnson v. Fort Worth, etc., R. Co., 9 Tex. Civ. App. 619; Gulf, etc., R. Co. v. Loonie, 84 Tex. 259; Sabine, etc., R. Co. v. Cruse, 83 Tex. 460.

35. Schroeder v. Hudson River R. Co., 5 Duer (N. Y.), 55.

36. Michigan Southern R. Co. v. Bivens, 13 Ind. 263.

Insufficient demand.—An order addressed to a railway agent as such, who was agent for an express company at the same place, and who kept the freight and express matter in the same room, to deliver to bearer any "freight" of the drawer in his possession, is insufficient to charge the express company with liability for the agent's failure to deliver to the bearer goods which had been some time to the drawer's knowledge,

in the express office, there being nothing in the order calling the agent's attention to the fact that express matter was called for. Wells, Fargo & Co. v. Windham, 1 Tex. Civ. App. 267, 21 S. W. 402. See also Worden v. Canadian Pac. R. Co., 13 Ont. Rep. 652, 30 Am. & Eng. R. Cas. 127. Compare Morgan v. Dibble, 29 Tex. 107, 94 Am. Dec. 264.

37. Jarrett v. Great Northern R. Co., 74 Minn. 477, 77 N. W. 304; Rome R. Co. v. Sullivan, 14 Ga. 279; Bird v. Georgia R. Co., 72 Ga. 655; Gregg v. Illinois Cent. R. Co., 147 Ill. 556.

38. Schroeder v. Hudson River R. Co., 5 Duer (N. Y.), 55.

39. Lester v. Delaware, etc., R. Co., 92 Hun (N. Y.), 342, 36 N. Y. Supp. 907; Fulton v. Lydecker, 17 N. Y. Supp. 451; Ludwig v. Meyre, 5 W. & S. (Pa.) 435; Wiggin v.

sion for a delay, however long, until the goods have been demanded of the carrier and their delivery refused.⁴⁰ An inquiry of the carrier as to what had become of the goods is not a demand so as to render the carrier liable for conversion.⁴¹

§ 35. Waiver of right of action for wrongful delivery.—A common carrier's unauthorized delivery of goods may be ratified by the consignee.⁴² In the absence of notice to the contrary, any delivery which discharges the carrier, as between him and the consignee, is good as against the consignor.⁴³ The owner of goods, by waiving any of his rights touching the delivery, relieves the carrier from his liability, so far as the waiver extends, and if the consignee or consignor takes charge of the goods before they have arrived at the place of delivery, the carrier's risk then terminates.⁴⁴ A consignee, or his authorized agent, may receive goods

Boston, etc., R. Co., 120 Mass. 201; Missouri Pac. R. Co. v. Heidenheimer, 82 Tex. 195, 27 Am. St. Rep. 861; Louisville, etc., R. Co. v. Meyer, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44.

The owner of a chattel may maintain trover therefor against a carrier who, on demand, refuses to deliver it up until he shall receive for its transportation a greater amount than the price agreed upon, and he does not waive the effect of his demand by agreeing that the goods may remain in the depot until he can correspond with another agent about the overcharge. Northern Transp. Co. v. Sellick, 52 Ill. 249.

A judgment or receipt is competent evidence of a demand by the plaintiff in the judgment or the party who executed the receipt. McGill v. Monette, 37 Ala. 49.

40. Ryland & Rankin v. Chesapeake, etc., R. Co. (W. Va.), 46 S. E. 923.

41. St. Louis, etc., R. Co. v. Tyler Coffin Co. (Tex. Civ. App.), 81 S. W. 826.

42. Converse v. Boston, etc., R. Co., 58 N. H. 521; Gulf, etc., R. Co. v. Clark, (Tex.) 18 Am. & Eng. R. Cas. 628.

43. O'Dougherty v. Boston, etc., R. Co., 1 Sup. Ct. (N. Y.) 477. But the consignor does not ratify a delivery by corresponding with the consignee in reference to the subject of payment, where the former never assented to the delivery, and shortly afterwards called the carrier's attention to the matter, and insisted all the time on the liability of the carrier. McSwegan v. Pennsylvania R. Co., 7 App. Div. (N. Y.) 301, 40 N. Y. Supp. 51. See Sanquer v. London, etc., R. Co., 16 C. B. 163, 81 E. C. L. 163, 3 C. L. R. 811.

44. Stone v. Waitt, 31 Me. 409, 52 Am. Dec. 621; Cleveland, etc., R. Co. v. Sargent, 19 Ohio St. 438; Atkisson v. Steamboat Castle Garden, 28 Mo. 124, but the carrier will not be freed from the responsibility for damages incurred by a breach of his contract of affreightment.

addressed to him in the hands of a carrier, at any place, either before or after arrival at their place of destination, and such acceptance operates as a discharge of the carrier from his liability to the consignor.⁴⁵ An acceptance of a portion of the goods by the consignee or owner at a place other than that specified for their delivery, will not relieve the carrier from its obligation to deliver the remainder.⁴⁶ Where the carrier delivers goods to the wrong person, the fact that the owner receives payment from such person for a portion of the goods does not constitute a waiver of his claim against the carrier for the balance, if he does not intend such waiver.⁴⁷ Where a consignee, on being notified of the arrival of goods at a wrong destination, directs their forwarding to another place, and there receives them, such acceptance operates as a waiver of the carrier's liability for the erroneous delivery.⁴⁸

§ 36. Right of carrier to demand receipt upon delivery.—A carrier has the right to demand a receipt for goods carried by it before it will be bound to deliver the goods, and the consignee has the right to an opportunity to examine the condition of the goods before signing the receipt.⁴⁹ A regulation requir-

45. Sweet v. Barney, 23 N. Y. 335; Hotchkiss v. Artisans' Bank, 2 Abb. Ct. App. Dec. (N. Y.) 203, 2 Keyes (N. Y.), 564; Platt v. Wells, 26 How. Pr. (N. Y.) 442, 2 Robt. (N. Y.) 116; Haslam v. Adams Express Co., 6 Bosw. (N. Y.) 235; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; Goodwin v. Baltimore, etc., R. Co., 58 Barb. (N. Y.) 195; Jewell v. Grand Trunk R. Co., 55 N. H. 84; Hill v. Humphreys, 5 W. & S. (Pa.) 123, 39 Am. Dec. 117; The Propeller Mohawk, 8 Wall. (U. S.) 153; Dobbin v. Michigan Cent. R. Co., 56 Mich. 522, 21 Am. & Eng. R. Cas. 85. See also McAndrew v. Whitlock, 52 N. Y. 40; Sunderland v. Wescott, 40 How. (N. Y.) 469, 2 Sweeny (N. Y.), 263; Simmons v. Law, 3 Keyes (N. Y.), 220; Nelson v. Hudson River R. Co., 48 N. Y. 507; Robinson v. Chittenden, 69 N. Y. 533; Krulder v. Elli-

son, 47 N. Y. 37. Any right of the carrier to compel consignees to take goods shipped "from alongside" is waived by the carrier unloading the goods on to the deck. The Titania, 131 Fed. 229.

46. Bissel v. Campbell, 54 N. Y. 353; Home Ins. Co. v. Western Transp. Co., 51 N. Y. 93; Cox v. Peterson, 30 Ala. 608, 68 Am. Dec. 145.

But if the carrier delivered all he received, his liability is discharged, even though the bill of lading called for more. Abbe v. Eaton, 51 N. Y. 410.

47. Lester v. Delaware, etc., R. Co., 92 Hun (N. Y.), 342, 36 N. Y. Supp. 907.

48. Hayman v. Canadian Pac. Ry. Co., 43 Misc. Rep. (N. Y.) 74, 86 N. Y. Supp. 728.

49. Skinner v. Chicago, etc., R. Co., 12 Iowa, 191.

ing a consignee to receipt for grain weighed into a delivery bin, before taking the same from such bin, and before he can ascertain, except from the carrier's statement, whether the quantity of grain received for is there or not, is unreasonable and void.⁵⁰ Where freight is in the warehouse ready for delivery, the carrier is not bound to take receipts for it, part by part as it is taken away, but may require a receipt for the whole before delivering any.⁵¹ A consignee of goods cannot obtain possession of them from a carrier without producing the bill of lading or accounting for it, if the carrier require it as proof of the right of the person applying to receive the goods.⁵² But a common carrier may not refuse to deliver the goods to the consignee named in the bill of lading, on the ground that the consignee refuses to surrender the bill of lading, although he permits the carrier to inspect it.⁵³

A receipt required to be given for goods before they are examined is *prima facie* evidence of what it contains; but it does not conclude the party from showing the actual condition of his property. *Porter v. Chicago, etc., R. Co.*, 20 Iowa, 73.

A receipt given by a party to a common carrier for goods transported by it will not be set aside on the bare allegation that he never received such goods, with no explanation tending to explain how he came to make a formal admission of their receipt. *Chapman v. Railroad Co.*, 7 Phila. (Pa.) 204.

Where consignee of goods employed an express company to cart the goods to his home, and its agent at the depot looked at the box containing the goods, and signed a "Clear" receipt, making no complaint, this did not preclude the consignee from showing that the goods

were wet. *Mears v. New York, etc., R. Co.*, (Conn.) 52 Atl. 610, 56 L. R. A. 884.

In an action against a carrier for damages to a dog in transportation, that the consignee removed the dog at its destination in the agent's absence and receipted for it in good condition is not a conclusive defense against recovery, where the consignee had not examined the dog at the time of giving such receipt. *Southern Express Co. v. Ashford*, 126 Ala. 591, 28 So. 732.

50. Christian v. First Div. St. Paul, etc., R. Co., 20 Minn. 21.

51. Morris, etc., R. Co. v. Ayers, 29 N. J. L. 393, 80 Am. Dec. 215.

52. Bass v. Glover, 63 Ga. 746. See also *Delivery to Holder of Bill of Lading*, § 9, *ante*.

53. Dwyer v. Gulf, etc., R. Co., 69 Tex. 707.

CHAPTER VI.

CONVERSION BY CARRIER.

SECTION 1. Conversion by carrier.

2. Receiving goods from one in possession not conversion.
3. Carrier not liable in conversion for mere nonfeasance.

§ 1. **Conversion by carrier.**—Misdelivery by a carrier of an article intrusted to it to be carried is a conversion.¹ A common carrier is liable for the conversion of goods, where, having received them to be carried to a designated place, it transports them to another place for the purpose of preventing their coming to the possession of the consignee and depriving him of their use and disposition.² But to constitute a conversion of property subject

1. Security Trust Co. v. Wells, Fargo & Co. Express, 178 N. Y. 620, 70 N. E. 1109, affg. 81 App. Div. (N. Y.) 426, 80 N. Y. Supp. 830; St. Louis, etc., R. Co. v. Rose, 20 Ill. App. 670; Clafin v. Boston, etc., R. Co., 7 Allen (Mass.), 341; Forbes v. Boston, etc., R. Co., 133 Mass. 154; Gibbons v. Farwell, 63 Mich. 344, 6 Am. St. Rep. 301, 29 N. W. 855; Jellett v. St. Paul, etc., R. Co., 30 Minn. 265, 15 N. W. 237; Packard v. Getman, 4 Wend. (N. Y.) 613, 21 Am. Dec. 166; Erie Despatch v. Johnson, 87 Tenn. 490, 11 S. W. 441; Missouri, etc., R. Co. v. Seley, 31 Tex. Civ. App. 158, 72 S. W. 89. See also Carrier's liability for misdelivery, § 21, chap. 5.

A carrier of goods under a special contract fixing a conventional value thereon in consideration of a reduction of freight, but not including a loss by wrong delivery, is liable for their full value, where it negligently makes a wrong delivery.

Savannah, etc., R. Co. v. Sloat, 93 Ga. 803, 20 S. E. 219, 61 Am. & Eng. R. Cas. 207.

The conversion must be alleged in the complaint or declaration. Central R. Co. v. Cooper, 95 Ga. 406, 22 S. E. 549, 2 Am. & Eng. R. Cas. N. S. 688.

2. Baltimore, etc., R. Co. v. O'Donnell, 49 Ohio St. 489, 28 Ohio L. J. 318, 21 L. R. A. 117, 32 N. E. 476. Where goods were wrongfully delivered by a carrier to a steamship company instead of to the owner, and were carried to another place, the company, having notice of the ownership, had no lien on the goods for freight, and on selling them was liable for conversion; for, though it was the duty of such company to receive goods tendered to it for shipment by connecting carriers, it was not exempt from liability for goods shipped by one without authority. Liefert v. Galveston, etc., R. Co. (Tex. Civ. App.), 57 S. W.

to a bailment, there must be such an intention of deviation from the contract as would be tantamount to an assertion of right or dominion over the property, inconsistent with the bailor's rights of ownership.³ Tender of goods to the owner after conversion, and his refusal to accept them, will not cast on him the loss if they are subsequently stolen, and the motive by which a party was controlled in the conversion of property is of no avail as a defense, though it may be shown to prevent the recovery of exemplary damages.⁴ A common carrier is liable in an action of trover for the value of goods delivered to a person other than the one described in the bill of lading, upon his presentation of it without endorsement, notwithstanding the existence of a custom to deliver goods to any one in possession of the bill of lading.⁵ The carrier must bear the risk of delivering the goods to the person entitled to them under the bill of lading and its endorsements; and where the bill directs delivery to the vendor's order, or his assigns, the carrier is notified that he must not deliver to the consignee without the bill properly endorsed by the consignor, and if he delivers otherwise he will be liable.⁶ A failure to deliver to the next con-

899. A deviation from the route called for by the contract of shipment does not constitute a conversion by the carrier, but it becomes an insurer of the property, assuming the risk of any loss that may occur. *Southern Pac. R. Co. v. Booth* (Tex. Civ. App.), 39 S. W. 585.

3. *Direct Nav. Co. v. Davidson* (Tex. Civ. App.), 74 S. W. 790, holding that a bailee of a boat, who, when he had finished using the same, left her in the possession and under the dominion and control of the owner, and never afterwards asserted any control, ownership, or rights to the boat, could not be held liable for a conversion thereof, although the boat was not delivered to such owner at the place called for by the contract.

4. *Baltimore, etc., R. Co. v. O'Donnell*, *supra*.

5. *Louisville, etc., R. Co. v. Barkhouse*, 10 Ala. 543, 13 So. 534. A

carrier is not liable to a consignor as for a conversion of goods consigned to the latter's order, because it delivered the same to the purchaser of the goods whom it was directed to notify, without the surrender of the bill of lading contrary to the provisions thereof, where the purchaser subsequently paid the draft to which the bill of lading was attached to the bank which held it for collection, although the bank failed to remit the proceeds, and subsequently became insolvent. *Witt v. East Tennessee, etc., R. Co.*, 99 Tenn. 442, 41 S. W. 1064, 8 Am. & Eng. R. Cas. N. S. 380.

6. *Grayson County Nat. Bank v. Nashville, etc., R. Co.* (Tex. Civ. App.), 79 S. W. 1094.

Where bills of lading were pledged to secure advances made to the purchaser of the goods, and on bankruptcy of the purchaser a part of the property covered by the bills of lad-

necting carrier entitled to receive the consignment constitutes a conversion.⁷ The negligence of the consignee of goods to call for the same and pay freight, within a reasonable time after they reach their destination, will not justify the carrier in delivering the same to an unauthorized person, or to a person in violation of the written instructions of the owner.⁸ A failure or refusal to deliver goods to the party entitled to delivery, or to return them to the shipper, constitutes a conversion and renders the carrier liable.⁹ But unless there is an absolute denial by the carrier of the person's right to a delivery, or the shipper's right to a return of the goods, or unless the excuses for failure to deliver or return are unreasonable, inconsistent, or made in bad faith, there is no conversion by the carrier, even on clear proof of demand for the goods and failure or refusal to deliver or return.¹⁰ Where a sta-

ing was in possession of a carrier, its refusal to deliver the property to the pledgee of the bills of lading, except on surrender thereof, was a conversion of the property. *First Nat. Bank v. San Antonio, etc., R. Co. (Tex.), 77 S. W. 410.*

7. *Georgia R. Co. v. Cole, 68 Ga. 623.*

8. *Indianapolis, etc., R. Co. v. Herndon, 81 Ill. 143,* holding that where parties shipped fruit trees to a place to their own address, as consignees, the carrier was not authorized, either at common law or by statute, to place the trees in the hands of a stranger, with directions to him to sell enough of them to pay the charges of transportation; and, if it does so, it will be liable in trover to the owners.

9. *Loeffler v. Keokuk, etc., Packet Co., 7 Mo. App. 185,* a refusal to deliver except upon an unreasonable condition constitutes a conversion.

Trover against a carrier for goods damaged during transportation will lie without payment of the freight, if at all, only where the damages exceed or equal the amount of the freight. *Miami Powder Co. v. Port*

Royal, etc., R. Co., 38 S. C. 78, 16 S. E. 339, 55 Am. & Eng. R. Cas. 688, 20 L. R. A. 123.

The failure of an express company to deliver goods intrusted to it for carriage, or to return them on demand, because of their loss, does not constitute a conversion by it of the goods. *Goldbowitz v. Metropolitan Express Co., 91 N. Y. Supp. 318.*

10. *Rubin v. Wells, Fargo Express Co., 85 N. Y. Supp. 1108.*

Where a common carrier receives merchandise from a consignor to transport, and which, through delay in reaching destination, is refused by the consignee, there is no obligation on the part of the carrier to return it to the consignor unless ordered so to do, and its failure to so return it is not a conversion of the goods. *Louisville, etc., R. Co. v. Heilprin, 95 Ill. App. 402.*

Where goods were delivered to an express company for carriage, and the consignor, within two months after they were sent, refused to receive them back on the company's tender, made because the consignees could not be found, and the value of the goods at the time of the tender

tion agent had reasonable doubts as to whether a charge for detention of a car containing plaintiff's goods was lawful, and as to whether the railroad company would insist on payment, his refusal to deliver the goods to the owner before obtaining instructions did not constitute a conversion.¹¹ The refusal by a railroad company to deliver goods to the owner after they had been attached as the property of another did not constitute a conversion, where the company disclaimed dominion over them by informing him that the goods were not in its possession, but in the custody of the law.¹² An initial carrier who transports goods delivered for carriage to a wrong point where they are delivered to a person not entitled to receive them is liable in an action for conversion, as well as the last connecting carrier which made the delivery.¹³ Delay on the part of a carrier in delivering goods is not a conversion, no matter how long continued, so as to make it liable for their value, and, if the goods are safely kept, the carrier cannot be charged with conversion until they have been demanded of the carrier and their delivery refused.¹⁴ But a shipper who, after a

was the same as at the time the company received them, the consignor cannot recover back the goods and damages against the company for non-delivery. *Brookstone v. Westcott Express Co.*, 29 Misc. Rep. (N. Y.) 634, 61 N. Y. Supp. 72. See *Alabama Midland Ry. Co. v. Darby*, 119 Ala. 531.

Where the party entitled to delivery sustains no real damages, the recovery should be for only nominal damages. *Hiort v. London, etc., R. Co.*, 4 Exch. Div. 188, 48 L. J. Exch. 545, 40 L. T. 674, 27 W. R. 778.

11. *Hett v. Boston, etc., R. Co.*, (N. H.) 44 Atl. 910; *Robinson v. Burleigh*, 5 N. H. 225; *Fletcher v. Fletcher*, 7 N. H. 452; *Sargent v. Gile*, 8 N. H. 325, 331; *Vaughan v. Watt*, 6 M. & W. 492; *Hollins v. Fowler*, L. R. 7 H. L. 757, 766; *Cushing v. Breck*, 10 N. H. 111, 116; *Eastman v. Association*, 65 N. H. 176, 18 Atl. 745, 5 L. R. A. 712.

12. *Hett v. Boston, etc., R. Co.*,

(N. H.) 44 Atl. 910; *Fletcher v. Fletcher*, 7 N. H. 452; *Osgood v. Carver*, 43 Conn. 24, 30; *Stiles v. Davis*, 1 Black (U. S.) 101, 17 L. ed. 33. See *Western, etc., R. Co. v. Trust Co.*, 107 Ga. 512; *Thomas v. Northern Pac. Express Co.*, 73 Minn. 185; *Coos Bay, etc., R. Co. v. Siglin*, 34 Or. 80.

13. *St. Louis, etc., R. Co. v. Larned*, 103 Ill. 293, 6 Am. & Eng. R. Cas. 436.

An initial carrier whose contract exempts it from liability "for anything beyond its line, . . . excepting to protect the through rate of freight named therein," is not liable for a conversion because of the failure of the connecting carrier to deliver the property at the place of destination. *Little Rock, etc., R. Co. v. Odom*, 63 Ark. 326, 38 S. W. 339.

14. *Ryland & Rankin, v. Chesapeake, etc., R. Co.*, (W. Va.) 46 S. E. 923, also holding that a carrier is not liable for conversion for goods

wrongful delivery of the goods by a carrier to a third person, agrees to wait for their delivery until the return of the station agent, may treat the goods as converted and maintain an action for their value, where the carrier fails for seven days after the return of the agent to recover and deliver the goods, and a tender made after notice to the carrier of the shipper's election to treat the goods as converted is too late.¹⁵ Where a railroad company delivered a consignment of wheat to another than the consignee, subject to the consignor's order, such erroneous delivery constituted a technical conversion, rendering the railroad company immediately liable for the price of the wheat; so that it was not relieved by its subsequent destruction in the hands of such third person by an unprecedented storm.¹⁶ Where a carrier delivers goods to the person to whom they are consigned, after notice by the real owner not to do so except on his written order, no further demand is necessary to entitle such owner to maintain an action against the carrier for conversion.¹⁷ Where a carrier delivers goods at their destination, he is not guilty of conversion, and the shipper should receive the same and sue for negligence or for breach of contract for their injured condition; and the measure of damages in either action would be the same.¹⁸

in his possession while they remain in specie, but the shipper can only recover the damages sustained by delay. See also Liability for delay, chap. 8.

Where a consigner having heard nothing from the goods shipped, asked the carrier what had become of the goods, and was told that he did not know, there was no demand, so as to render the carrier guilty of conversion. *St. Louis, etc., R. Co. v. Tyler Coffin Co.*, (Tex. Civ. App.) 81 S. W. 826. Where, upon refusal of the consignee to accept the goods, they are stored by the carrier, and upon a claim being made for the goods several months afterward, the carrier informs the consignor of the facts and inquires as to what disposition it shall make of the goods, it is liable only for delay in sending notice of

the consignee's refusal and not for conversion. *Fishman v. Platt*, 90 N. Y. Supp. 354.

15. *Hamilton v. Chicago, etc., R. Co.*, 103 Iowa, 325, 72 N. W. 536, 8 Am. & Eng. R. Cas. N. S. 526.

16. *Missouri, etc., R. Co. v. Seley*, 31 Tex. Civ. App. 158, 72 S. W. 89.

17. *Lester v. Delaware, etc., R. Co.*, 92 Hun (N. Y.) 342, 36 N. Y. Supp. 907, where the consignee had been plaintiff's agent and the goods were delivered after termination of the agency and notice by the owner not to do so, it is no defense that such person had a lien on the goods for freight paid, where it appears that he at the time owed the owner of the goods a larger sum.

18. *Redmon v. Chicago, etc., R. Co.*, 90 Mo. App. 68.

§ 2. Receiving goods from one in possession not conversion.

—A common carrier must accept freight from every one offering the same, and is not guilty of conversion in accepting freight from a party in possession thereof, unless the true owner intervenes before the goods are delivered and demands them.¹⁹ A carrier is not guilty of conversion where he, in good faith, takes goods from the possession of the owner by direction of another having apparent control of the goods and the present capacity of investing himself with actual possession, and delivers them to such other person in another place.²⁰ Where the conditions of a valid chattel mortgage have been broken, and the mortgagee is entitled to possession, a common carrier is not liable to the mortgagor for a diversion of the shipment of such property and delivery to the mortgagee, demanding possession, while it is still in the carrier's hands.²¹

§ 3. Carriers not liable in conversion for mere non-feasance.—

The general rule is that a common carrier is not liable in conversion for mere non-feasance, although he may be liable for negligence. So, on the contrary, he may be held in trover when he is guilty of mis-feasance, although the wrong may have been unintentional.²² A conversion implies a wrongful act, a misdelivery,

19. Robert C. White Live Stock Commission v. Chicago, etc., R. Co., 87 Mo. App. 330.

20. Gurley v. Armstead, 148 Mass. 267, 19 N. E. 389, 2 L. R. A. 80, wherein the court said: "It is conceded that whoever receives goods from one in actual, though illegal, possession thereof, and restores the goods to such person, is not liable for a conversion by reason of having transported them; Strickland v. Barrett, 20 Pick. (Mass.) 415; Leonard v. Tidd, 3 Metc. (Mass.) 6. And this would be so apparently, even if the goods thus received were restored to the wrongful possessor after notice of the claim of the true owner. Loring v. Mulcahy, 3 Allen (Mass.) 575; Metcalf v. McLaughlin, 122 Mass. 84."

21. Johnston v. Chicago, etc., R. Co., (Neb.) 97 N. W. 479.

22. Wamsley v. Atlas Steamship Co., 168 N. Y. 533, 61 N. E. 896, revg. 50 App. Div. (N. Y.) 199, 63 N. Y. Supp. 761; Hawkins v. Hoffman, 6 Hill (N. Y.) 588, 41 Am. Dec. 767; Packard v. Getman, 4 Wend. (N. Y.) 615, 21 Am. Dec. 166; Briggs v. New York, etc., R. Co., 28 Barb. (N. Y.) 515; Gillet v. Roberts, 57 N. Y. 28; Richards v. Pitts Agricultural Works, 37 Hun (N. Y.) 1; Pamenter v. American Box Machine Co., 162 N. Y. 648, affg. 44 App. Div. (N. Y.) 47; Spooner v. Manchester, 133 Mass. 270; Pacific Express Co. v. Shearer, 160 Ill. 215, 43 N. E. 816, 43 Cent. L. J. 35.

A steamship company is not liable in action of conversion for the value of a package delivered to it by a

a wrongful disposition, or withholding of the property. A mere non-delivery will not constitute a conversion, nor will a refusal to deliver on demand, if the goods have been lost through negligence, or have been stolen. There must be proof of a wrongful disposition or a wrongful withholding.²³ If, at the time of the demand a reasonable excuse be made in good faith for the non-delivery, the goods being evidently kept with a view to deliver them to the true owner, there is no conversion.²⁴ Where goods are sent by a sealed railroad car to be delivered unbroken at the place of destination, if the goods are removed for the convenience of the carrier, and are afterwards delivered without loss of quantity and without injury, the carrier is not liable in trover.²⁵ A carrier is not liable for the conversion of goods which, because of packages being broken before delivery to the consignee, he refused to receive, because the agent caused the goods all to be unpacked and inventoried, in order to ascertain their character and condition, and then repacked them.²⁶ Where part of a consignment of goods is damaged in the transportation but capable of being repaired and the consignee refuses to receive them, the carrier is not liable as for a conversion of such damaged goods.²⁷ Where a

passenger on one of its steamships and placed in the storeroom by one of its servants, and which could not be found prior to the commencement of the action, where, although subsequently found on the vessel in circumstances raising a presumption that it had not been removed therefrom, there is no evidence showing the circumstances of its removal from the storeroom, and it may have been stolen by a fellow passenger or have been removed and misplaced by some one for whose acts the defendant was not responsible, in an action for conversion, although possibly liable for negligence; and the refusal of the court to charge that "in such case the carrier can only be made liable upon proof of actual conversion" is reversible error. *Wamsley v. Atlas Steamship Co.*, 168 N. Y. 533, 61 N. E. 896, revg. 50 App. Div. (N. Y.) 199, 63 N. Y. Supp. 761.

23. *Magnin v. Dinsmore*, 70 N. Y. 410, 26 Am. Rep. 608, affg. 40 N. Y. Super. Ct. 512, 42 Id. 16; *Scovill v. Griffith*, 12 N. Y. 509.

A railroad company properly refuses to deliver property consigned to designated persons to another person, although the latter is the real owner, where he has the power to produce evidence of his authority to receive such property and fails to produce it, and the company does not know that he is the owner. *Gulf, etc., R. Co. v. Fowler*, 12 Tex. Civ. App. 683, 34 S. W. 661.

24. *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 35, 6 Am. Rep. 28; *Rome R. Co. v. Sullivan*, 14 Ga. 277; *The Hattie Palmer*, 63 Fed. 1015.

25. *Tucker v. Housatonic R. Co.*, 39 Conn. 447.

26. *Silverman v. St. Louis, etc., R. Co.*, 51 La. Ann. 1785, 26 So. 447.

27. *St. Louis, etc., R. Co. v.*

suit of clothes is manufactured to order, to be inspected by the purchaser before acceptance, and the carrier tenders the goods, and the consignee refuses to accept them, but states that he will shortly call for them, and the carrier stores them for several weeks, when the consignee absolutely rejects them, and the consignor refuses to order their return, on being informed of the rejection, on the ground that they are no longer of any use to him, the consignor cannot recover of the carrier for conversion.²⁸ The forcible removal of parcels from a passenger whose ticket does not entitle him to carry them, and the transfer of them to an express car, with orders to carry them onward, constitute a conversion.²⁹ That a railway company's act in appropriating to its own use coal belonging to a consignee was through an honest mistake, does not affect the consignee's right to redress for the conversion.³⁰ A refusal to deliver goods, where they are retained by virtue of the carrier's lien for charges of transportation, does not constitute a conversion.³¹ The rule that a consignee must pay or tender to a carrier the legal charges for transportation in order to entitle him to the possession of his goods, or to sustain an action for failure or refusal of the carrier to deliver the goods,³² has no application in an action for the conversion of the goods.³³

Johnson, 53 Ark. 282, 45 Am. & Eng. R. Cas. 381.

28. Levy v. Weir, 38 Misc. Rep. (N. Y.) 361, 77 N. Y. Supp. 917.

29. Bullock v. Delaware, etc., R. Co., 60 N. J. L. 24, 36 Atl. 773, 7 Am. & Eng. R. Cas. N. S. 370, 37 L. R. A. 417.

30. Frazier v. Atchison, etc., R. Co., (Mo. App.) 78 S. W. 679.

31. See Carrier's lien for charges, chap. 16.

32. St. Louis, etc., R. Co. v.

Johnson, 53 Ark. 282, 45 Am. & Eng. R. Cas. 381; Henderson v. Three Hundred Tons of Iron Ore, 38 Fed. 36; White v. Canadian Pac. R. Co., 6 Manitoba L. R. 169.

A shipper is not bound to prepay charges in order to maintain an action for failure to furnish cars. Cleveland, etc., R. Co., v. Perishow, 61 Ill. App. 179.

33. Baltimore, etc., R. Co. v. O'Donnell, 49 Ohio St. 489, 28 Ohio L. J. 318, 32 N. E. 476, 21 L. R. A. 117.

CHAPTER VII.

LIABILITY FOR LOSS OR DAMAGE.

- SECTION**
- 1. Liability of carrier for loss or damage.
 - 2. Loss or damage by act of God, vis major, or inevitable accident.
 - 3. Proximate cause of loss or injury.
 - 4. Loss or injury by the public enemy.
 - 5. Seizure under legal process.—Attachment.
 - 6. Seizure under legal process.—Garnishment.
 - 7. Seizure under police regulations.
 - 8. Duty of carrier after disaster.
 - 9. Loss or injury from inherent nature of goods.
 - 10. Care required of carrier in general.

§ 1. **Liability of carrier for loss or damage.**—The liability of a carrier of goods is that of a common carrier, which is that of an insurer; and in cases of loss of or injury to goods intrusted to it for transportation no excuse avails such carrier, except that such loss or injury was occasioned by the act of God, or the public enemies of the state, or the sole fault of the owner or his agent.¹ The exceptions to this rule of liability are given in the chapter on common carriers and are considered in the subsequent sections of this chapter. For example, a common carrier is liable for the loss of goods by fire, unless the fire was caused by the act of God, the public enemy, or the inherent quality of the goods.² Usually in an action for the loss of or injury to goods shipped to be delivered in another state, the law of the place of shipment is held

1. McCarthy v. Louisville, etc., R. Co., 102 Ala. 193, 48 Am. St. Rep. 29, 14 So. 370, 61 Am. & Eng. R. Cas. 178; Central of Ga. R. Co. v. Lippman, 110 Ga. 665, 36 S. E. 202, distinguishing Phillips v. Railroad Co., 93 Ga. 356, 29 S. E. 247; Boyd v. Spencer, 103 Ga. 828, 30 S. E. 841; Southern Ry. Co. v. Barlow, 104 Ga.

213, 30 S. E. 732; Central of Ga. R. Co. v. Ricks, 34 S. E. 570, 109 Ga. 339.

See Liability of the common carrier, § 2, chap. 2.

2. Farley v. Lavary, (Ky.) 54 S. W. 840. See Common Carriers, chap. 2.

to govern,³ unless the parties contracted with reference to some other law.⁴ But it has been held otherwise in some jurisdictions.⁵

§ 2. Loss or damage by act of God, vis major, or inevitable accident.—A common carrier, to exempt itself from liability for loss of or injury to goods received for transportation, must show that no act or neglect of it concurred in or contributed to the loss or injury; if in consequence of its departure from the line of its duty, the goods be lost or injured by the act of God, it is not excused.⁶ Where the results or natural consequences of an act of God may be foreseen and guarded against, by the exercise of reasonable diligence, prudence, and foresight, a failure to do so would be negligence, and subject the carrier to damages, although the original cause was an act of God.⁷ A flood which no human

3. Liverpool, etc., Steam Co. v. Insurance Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469; Hale v. New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; McDaniel v. Railway Co., 24 Iowa 412; Talbott v. Transportation Co., 41 Iowa 247; Fairchild v. Railroad Co., 148 Pa. 527, 24 Atl. 79; Cantu v. Bennett, 39 Tex. 303.

4. *In re Missouri Steamship Co.*, L. R. 42 Ch. Div. 321.

5. Where a package is delivered to a carrier in New York to be delivered in Ohio, and is negligently lost, in an action for such loss the place of delivery is the place of the performance of the contract, and the law of Ohio governs. Jacobson v. Adams' Express Co., 1 O. C. D. 212.

6. Michaels v. New York Cent. R. Co., 30 N. Y. 564; Read v. Spaulding, 30 N. Y. 630, 5 Bos. (N. Y.) 395; Dunson v. New York Cent. R. Co., 3 Lans. (N. Y.) 265; Wing v. New York, etc., R. Co., 1 Hilt. (N. Y.) 235; Jones v. Minneapolis, etc., R. Co., (Minn.) 97 N. W. 893.

The carrier has the burden of proof to show that it used every reasonable effort to avoid the effects of an inevitable accident. Richmond, etc., R.

Co. v. White, 88 Ga. 805, 55 Am. & Eng. R. Cas. 682; Columbus, etc., R. Co. v. Kennedy, 78 Ga. 646.

7. Lang v. Pennsylvania R. Co., 154 Pa. St. 342, 32 W. N. C. (Pa.) 205, 2 Pa. Dist. Rep. 125, the loss of whiskey on a train wrecked by a flood cannot be attributed to an inevitable accident, so as to relieve the carrier from liability, where the whiskey was not destroyed by the flood, but part of it was stolen without any attempt of the trainmen to prevent it, and the remainder destroyed by a volunteer guard of citizens in order to prevent it from falling into the hands of the dangerous class of men who were determined to capture it. Adams Express Co. v. Jackson, 92 Tenn. 326, 21 S. W. 666, an express company which, knowing of the interruption of its route by the act of God, such as an unprecedented flood, undertakes to carry out its prior contract to transport horses, is liable for injuries to them while they are being transported by another express company to which it delivers them at the point of interruption, caused by delay and their being frightened and

power could stay and no foresight or prudence anticipate is an act of God which will relieve a carrier who is free from negligence from liability for damage by the flood to goods in his custody.⁸ A snow storm of such violence as to prevent the moving of trains is an act of God which will exempt a carrier from liability for loss of or damage to property shipped, occasioned thereby without the carrier's fault.⁹ But an injury is not attributable to an act of God, but to neglect, where, for example, it is caused by the fall of a sign in a wind such as might be expected in the regular course of the seasons,¹⁰ or by a landslide caused by a rain of not unusual violence.¹¹ But the mere fact that a railroad was constructed close to a highway, and the injury was caused by that proximity, did not constitute negligence, although defendant might have built another road farther off, which would have been perfectly safe.¹² An extraordinary or unprecedeted storm, flood, or other unavoidable casualty caused by the hidden forces of nature unknown to common experiences, and which could not have reasonably been anticipated by that degree of engineering skill and experience required in the prudent construction of a railroad, or which the ordinary safeguards provided by the carrier are wholly insufficient to withstand the effects of, must be regarded as an unavoidable or inevitable accident, *vis major*, or an act of God, which will not render the carrier liable for the damages, where such unprecedeted storm is the proximate cause of the injury.¹³ In order to

thrown down by the backing and switching of cars in which they are carried, especially where it could have procured ample facilities for rapid and safe transit over other lines. *Ladd v. Foster*, 31 Fed. 827, where through the negligence of those in charge of a ferry boat, it turned over on its side, and then righted with the cabins full of water and a passenger jumped out of a window and struck a cable, which, but for the negligence aforesaid, would not have been in the way, the facts were held to justify a recovery in an action by the passenger's administrator.

8. *Smith v. Western R. Co.*, 91 Ala. 455, 8 So. 754, 24 Am. St. Rep.

929, 49 Am. & Eng. R. Cas. 210, 11 L. R. A. 619.

9. *Black v. Chicago, etc., R. Co.*, 1 Neb. L. J. 30, 46 N. W. 428.

10. *St. Louis, etc., R. Co. v. Hopkins*, (Ark.) 15 S. W. 610, 12 L. R. A. 189.

11. *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 35 L. Ed. 458, 11 Sup. Ct. Rep. 859, 44 Alb. L. J. 33.

12. *Beatty v. Central Iowa R. Co.*, 58 Iowa 242, 8 Am. & Eng. R. Cas. 210.

13. *Libby v. Maine Central R. Co.*, (Me.) 26 Atl. 943, where an extraordinary unprecedeted storm which came suddenly and lasted about two hours, caused the washout of a rail-

charge the carrier with goods lost in an unprecedented storm, plaintiff must show that by ordinary prudence it could have protected the goods after becoming aware of the impending danger.¹⁴ Interruption to navigation by frost or ice, the freezing up of canals, rivers, or other means of water transportation, is an act of God which will exonerate the carrier from losses occurring from such causes, where no fault is imputable to the carrier.¹⁵ The carrier is not responsible for a loss caused by the breaking of a rail caused by the exceeding cold weather which is the result of a *vis major* against which no prudence could have guarded.¹⁶ The freezing of goods of a perishable nature while en route is the act of God, for which the carrier is not liable, unless caused by unnecessary delay in transporting them, or their careless exposure to the cold.¹⁷ To render a common carrier liable for the destruc-

road culvert which was insufficient to carry off one-third of the water which fell, although it had proved sufficient for more than forty years; *Herring v. Chesapeake, etc., R. Co., (Va.) 45 S. E. 322; Columbus, etc., R. Co. v. Bridges, 86 Ala. 448, 11 Am. St. Rep. 58, 38 Am. & Eng. R. Cas. 136; The Thomas Newton, 41 Fed. 106; American Express Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561; Philadelphia, etc., R. Co. v. Anderson, 94 Pa. St. 351, 39 Am. Rep. 787; Chicago, etc., R. Co. v. Manning, 23 Neb. 552, 35 Am. & Eng. R. Cas. 618; Withers v. North Kent R. Co., 3 H. & N. 969; Louisville, etc., R. Co. v. Thompson, 107 Ind. 442, 57 Am. Rep. 120, 27 Am. & Eng. R. Cas. 88; Coosa River Steamboat Co. v. Barclay, 30 Ala. 120.* See also *Excuses for delay, § 8, chap. 8.*

14. *International, etc., R. Co. v. Bergman, (Tex. Civ. App.) 64 S. W. 999,* where it appeared that the place of storage was safe under usual conditions, and that, though possible to have delivered them on the morning of the storm, the bad weather deterred the drayman, and it did not appear that there was any safer

place after the danger became apparent, the company was not liable.

What is not a sufficient defense.—Where the motion to set aside a default judgment in an action against a carrier for goods destroyed in transportation did not state that the flood causing the damage was unprecedented, but that it was an extraordinary and unusual rainfall or flood, it was properly overruled, since it did not state a sufficient defense; it being the duty of railroads in constructing their roadbeds to guard against floods which may be anticipated, though some may be extraordinary and unusual. *Missouri, etc., R. Co. v. Davidson, (Tex. Civ. App.) 60 S. W. 278.*

15. *West v. The Berlin, 3 Iowa 552; Bork v. Norton, 2 McLean (U. S.) 422; Bowman v. Teall, 23 Wend. (N. Y.) 306; Parsons v. Hardy, 14 Wend. (N. Y.) 215; Harris v. Rand, 4 N. H. 259; Crosby v. Fitch, 12 Conn. 410.*

16. *McPadden v. New York Cent. R. Co., 44 N. Y. 478, 4 Am. Rep. 705.*

17. *Vail v. Pacific R. Co., 63 Mo. 230,* and the burden was held to be

tion of goods by freezing while in transit, under a bill of lading exempting it from damages for freezing, it must not only be guilty of unreasonably delaying transportation, but the goods must have been frozen during the delay and because of it.¹⁸ The carrier is liable where the goods are frozen owing to its negligence in shipping promptly at a season of the year when a freezing spell might reasonably be anticipated,¹⁹ but it is not liable, where fruit, for example, was delivered to it for shipment when the temperature was below freezing point, for negligence in forwarding the fruit on the day of receipt, instead of retaining it in storage until warmer weather.²⁰ A carrier is liable for loss by freezing where the goods are detained for excessive charges.²¹ A carrier which receives cars which it knows, or should know, contain perishable goods, and, on account of the impassable condition of its own road, which runs through a warm section, without notifying the ship-

on the owner to show such careless exposure; *Wolf v. American Express Co.*, 43 Mo. 422, 97 Am. Dec. 406; *Swetland v. Boston, etc., R. Co.*, 102 Mass. 276, a conductor whose freight train is obstructed by a snow storm so that he must leave a part of the cars without shelter, is not bound as a matter of law to take forward a car that he knows contains articles which will be injured by freezing, rather than other cars of whose contents he is ignorant; *Wing v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 235.

18. *Siebrecht v. Pennsylvania R. Co.*, 21 Misc. Rep. (N. Y.) 615, 48 N. Y. Supp. 3, affg. 20 Misc. Rep. (N. Y.) 730, 46 N. Y. Supp. 1100.

19. *Hewett v. Chicago, etc., R. Co.*, 63 Iowa 611, 18 Am. & Eng. R. Cas. 568; *Fox v. Boston, etc., R. Co.*, 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702; *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188.

Proof of negligent delay by a subsequent carrier, and that without it the injury would have been

avoided, is a complete answer to an action seeking to hold the first carrier responsible, by reason of his delay, for the injury to fruit by freezing while in custody of such subsequent carrier. *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6.

20. *Tucker v. Pennsylvania R. Co.*, 11 Misc. Rep. (N. Y.) 366, 32 N. Y. Supp. 1, wherein the court said: "As carrier, it agreed to transport the goods, and its duty with regard to their shipment called for reasonable expedition in forwarding them after their receipt, with perhaps some duty of greater expedition in the case of perishable goods, and unreasonable delay rendered it liable for resulting damages, (*Tierney v. New York Cent., etc., R. Co.*, 76 N. Y. 305), but it is no part of the law of this state that a carrier should, in the course of his duty as such, assume the functions of a warehouseman for the purpose of delaying transit of goods after the consignor has himself selected the time of shipment."

21. *Milton v. Denver, etc., R. Co.*, 1 Colo. App. 307, 29 Pac. 22.

per, ships them in the dead of winter by a northern route, during transit on which the goods are frozen and destroyed, is liable in damages for the value of the goods.²² A common carrier is not as a matter of law, free from negligence for the loss by freezing of fruit carried over its road, although it does what is usual and customary for other carriers to do under similar circumstances.²³ An action will lie against a carrier for non-delivery, although the goods are partially injured, and that by the act of God, and it can have no deduction from the value of goods lost by it and never delivered, for damages caused by the act of God.²⁴ Such a defense, if the goods had been tendered and delivered, would only go in mitigation of damages.²⁵

§ 3. Proximate cause of loss or injury.—The act of God which would excuse a common carrier for loss of or injury to goods, must be the immediate or proximate, and not the remote, cause of the loss.²⁶ But it is not essential to the exemption of a carrier from liability for the loss of or injury to goods during their transportation, that the damages result solely from any one of the exceptional causes, such as the act of God or a public enemy, or the sole fault of the owner, it not being liable if two or all of such causes combine to produce the injury, if the carrier itself is without fault.²⁷ Where a common carrier merely fails to make prompt delivery of goods, and they are thereby lost in an unprecedented storm, it will be protected from liability, the act of God, and not its negligence, being the proximate cause.²⁸ A common carrier is

22. Pierce v. Southern Pac. R. Co., 120 Cal. 156, 47 Pac. 874, 40 L. R. A. 350, 7 Am. & Eng. R. Cas. N. S. 564, affd. 52 Pac. 302, 40 L. R. A. 354, 10 Am. & Eng. R. Cas. N. S. 83.

23. Hinton v. Eastern R. Co., 72 Minn. 339, 75 N. W. 373, 11 Am. & Eng. R. Cas. N. S. 125.

24. Charlotte, etc., R. Co. v. Wootten, 87 Ga. 203, 13 S. E. 509.

25. Houston, etc., R. Co. v. Harn, 44 Tex. 628.

26. King v. Shepherd, 3 Story (U. S.) 349; Missouri Pac. R. Co. v. Barnes, 2 Tex. App. Civ. Cas., § 574; Lepford v. Charlotte, etc., R. Co., 7

Rich. L. (S. C.) 409, a carrier is not liable for a loss occasioned by delay attributable to the act of God, but is liable for the injury to and depreciation of the goods caused by bad handling, which was not a necessity or unavoidable consequence.

27. McCarthy v. Louisville, etc., R. Co., 102 Ala. 193, 48 Am. St. Rep. 29, 61 Am. & Eng. R. Cas. 178, 14 So. 370, the carrier is liable for a loss resulting from the combined fault of the carrier and owner.

28. International, etc., R. Co. v. Bergman, (Tex. Civ. App.) 64 S. W. 999.

not liable for injury to a shipper's goods by a fire, for which it was not responsible, although the goods were exposed to injury by negligent delay in transmission, as the delay cannot be deemed the proximate cause of the injury.²⁹ Whether the loss of goods, intrusted to a common carrier, is to be attributed to inevitable necessity, not arising from the intervention of man, and which no human prudence could have avoided, is a question of fact for the jury.³⁰

§ 4. Loss or injury by the public enemy.—The common law liability of a common carrier, as an insurer of goods carried, did not extend to losses caused by the acts of public enemies; and the term enemies was understood to mean the public enemies of the country of the carrier, and not of the owner of the goods, and did not include thieves, robbers, or those who engaged in mobs, riots or insurrections. The reasons of the rule were that it would impose upon the carrier a great hardship to compel him to pay for losses for which there was no remedy against those who brought the loss upon him, and that there could be little if any danger of his combining with the common enemy to defraud the owner of the goods; and the reasons for the exception from the rule of robbers, rioters, insurgents, or irresistible mobs, were that the carrier might have a remedy against them, and that there was great danger of collusion between them and the carrier for defrauding the owner or shipper of the goods. Losses by thieves or robbers, mobs or riots, were, therefore, to be borne by the carrier unless by contract he had absolved himself from such liability. Pirates, how-

Where wheat shipped by plaintiff over the defendant railroad was damaged, and a part of it totally destroyed, in an unprecedented storm, which occurred while the wheat was still in the possession of the railroad company, the railroad had been guilty of negligence in failing to place the wheat on the proper elevator tracks promptly, so that it could be unloaded, and in other ways; and, but for its negligence, the cars would probably have been unloaded when the storm occurred, it was held, that

the storm was the proximate and the company's negligence the remote, cause of the injury to the wheat, and the company was not liable. *Hunt Bros. v. Missouri, etc., R. Co., (Tex. Civ. App.) 74 S. W. 69.*

29. *Yazoo, etc., R. Co. v. Millsaps, 76 Miss. 855, 25 So. 672, 71 Am. St. Rep. 542; Thomas v. Lancaster Mills, 34 U. S. App. 404, 71 Fed. 481, 19 C. C. A. 88; Morrison v. Davis, 20 Pa. St. 171, 57 Am. Dec. 701, note.*

30. *Elliott v. Russell, 10 Johns. (N. Y.) 1, 6 Am. Dec. 306.*

ever, were regarded as the common enemy of all mankind and, therefore, within the term public enemies.³¹ The general rule is still maintained that a capture by public enemies of the property entrusted to a common carrier releases him from all further obligations respecting it, since such acts puts it out of his power to do what he engaged to do.³² But the carrier is bound to use due precaution against capture and due diligence to rescue property that has been captured, since, although it is not an insurer against such losses, it is bound to reasonable and ordinary care as a bailee.³³ Where goods were taken from a carrier by an officer or an armed force of the Confederate government in the civil war, it was held in a number of cases that the carrier was not liable because it had been deprived of them by an act of the public enemy.³⁴ So where goods were taken by United States troops from a Confederate carrier, the carrier was exonerated on the

31. Russell v. Neiman, 17 Com. B. (N. S.) 163; Coggs v. Bernard, 2 Ld. Raym. 909, 3 Salk. 11; Lewis v. Ludwick, 6 Coldw. (Tenn.) 368; Morse v. Slue, 1 Ventris 190; Pickering v. Barkley, Style, 132; Forward v. Pittard, 1 T. R. 27; Barclay v. Cuculla of Gana, 3 Doug. 389, 26 E. C. L. 157.

32. Spaids v. New York, etc., Steamship Co., 3 Daly (N. Y.) 139; Clark v. Pacific R. Co., 39 Mo. 184, 90 Am. Dec. 458.

33. Caldwell v. Southern Express Co., 1 Flipp. (U. S.) 85; Spaids v. New York, etc., Steamship Co., 3 Daly (N. Y.) 139; Cheviot v. Brooks, 1 Johns. (N. Y.) 369.

34. Hubbard v. Harnden Express Co., 10 R. L. 244; Lewis v. Ludwick, 6 Coldw. (Tenn.) 368; Bland v. Adams Express Co., 1 Duv. (Ky.) 232, 85 Am. Dec. 623; Wallace v. Sanders, 42 Ga. 486, 50 Ga. 134; Philadelphia, etc., R. Co. v. Harper, 29 Md. 330; Keppel v. Petersburg R. Co., Chase's Dec. (U. S.) 167; Porcher v. North Eastern R. Co., 14 Rich. L. (S. C.) 181.

That Confederates were not pirates, but public enemies, was held in Dole v. N. E. Insurance Co., 88 Mass. 373, and as to Confederate cruisers, the court, in Gage v. Tirrell, 91 Mass. 299, said: "If they can be regarded as agents of a *de facto* government engaged in an actually existing war with the United States, then the loss happened in consequence of a seizure by a public enemy. If not, they are pirates, and pirates are perils of the seas within the exception of the bill of lading."

Where goods were seized or destroyed by Confederate troops, within Confederate lines, it was held in Nashville, etc., R. Co. v. Estes, 10 Lea (Tenn.) 749, 3 Am. & Eng. R. Cas. 492, that the carrier was not liable, although the court declined to hold that it was the act of the public enemy. It was said to be a loss caused by *vis major*, analogous to the case of goods taken from the carrier by attachment. See also Nashville, etc., R. Co. v. Estis, 7 Heisk. (Tenn.) 622.

ground that they were taken by the public enemy.³⁵ An order issued by a regularly constituted military authority protected the citizen or corporation obeying it, as where a railroad company was commanded by a Confederate general to transport cotton, which was lost.³⁶ It has been held that delay in the transportation of goods which is caused solely by a mob, or the interference of strikers and their confederates with the operation of the road, will not render the carrier liable at common law to make good losses arising from a decline in the market price, or from deterioration in their quality on account of their perishable nature, during time of transit.³⁷ In Arkansas it has been held that a mob of rioters is not a public enemy within the exception to the rule that makes a common carrier an insurer of goods carried.³⁸ In Indiana it has been held that rioters are not public enemies, that to make a public enemy the government of a foreign country must be at war with the United States, but the strict liability of common carriers, where they are without fault or negligence, does not seem to extend to losses from delay in transporting live stock and perishable property, though such delays are not caused by the act of God or the public enemies.³⁹ In New York the rule has been laid down,

35. *Southern Express Co. v. Womack*, 1 Heisk. (Tenn.) 267; *McCranie v. Wood*, 24 La. Ann. 406; *Patterson v. North Carolina R. Co.*, 64 N. C. 147. See also *Caldwell v. Southern Express Co.*, 1 Flipp. (U. S.) 85.

36. *Railroad v. Hurst*, 11 Heisk. (Tenn.) 625. But even where a railroad company is not in the free exercise of its franchises, and receives property for transportation, and gives the ordinary shipping receipt, without limiting its liability or undertaking, it is still liable as a common carrier, notwithstanding military or other control. *Illinois Cent. R. Co. v. Ashmead*, 58 Ill. 487.

37. *Missouri Pac. R. Co. v. Levi*, 4 Tex. App. Civ. Cas., § 8, 14 S. W. 1062; *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, 18 Am. St. Rep. 45, 42 Am. & Eng. R. Cas. 439, revg. (Tex.) 12 S. W. 677, 40 Am. & Eng. R. Cas.

115. See also *Southern Express Co. v. Glenn*, 16 Lea (Tenn.) 472; *Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489, 55 Am. & Eng. R. Cas. 667.

38. *Missouri Pac. R. Co. v. Nevill*, 60 Ark. 375, 30 S. W. 425, 28 L. R. A. 80. See also *Pacific Express Co. v. Wallace*, 60 Ark. 100, 61 Am. & Eng. R. Cas. 170, holding that a common carrier of goods, who has limited his liability to that of a warehouseman for goods while they are waiting to be called for, is not liable for the loss of liquors taken from its storeroom by a mob.

39. *Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281, 18 Am. & Eng. R. Cas. 549; *Pittsburgh, etc., R. Co. v. Hollowell*, 65 Ind. 193. See also *Lake Shore, etc., R. Co. v. Bennett*, 89 Ind. 457; *White v. Missouri Pac. R. Co.*, 19 Mo. App. 400.

in respect to the liability of a railroad company for delay in the transportation and delivery of goods, that the carrier is not liable for a delay in the delivery of freight caused by the unlawful and violent conduct of strikers, after they have abandoned the service of the carrier. There is no absolute duty resting upon the carrier to deliver goods within what is, under ordinary circumstances, a reasonable time. The actual circumstances must all be considered, and all that can be required of it is the exercise of due care to forward and deliver promptly.⁴⁰ In Illinois it has been held that where the employes of a carrier suddenly refuse to work, and are discharged, and delay results from the failure of the carrier to promptly supply their places, the carrier is responsible for any damage caused by such delay; but where the places of the recusant employes are promptly supplied by other competent men, and the "strikers" then prevent the new employes from doing duty by lawless and irresistible violence, the carrier is not responsible for delay caused solely by such lawless violence.⁴¹ It has been held in the Federal courts that where goods were shipped under a bill of lading exempting the carrier from loss or damage by fire and they were destroyed by a mob, in the absence of proof of negligence of the carrier or its agents, the carrier was not liable.⁴² Later cases have held that where a carrier received freight for shipment, it is not liable for delay in its delivery which is caused by a strike of its employes, accompanied by violence and intimidation of such character as cannot be overcome by the company or controlled by the civil authorities when called upon.⁴³ These cases, while seemingly an exception to the rule that mere mobs, riots or insurrections are not acts of public enemies, are rather based upon the ground that such acts form reasonable grounds for

40. Geismer v. Lake Shore, etc., R. Co., 102 N. Y. 563, 55 Am. Rep. 837, 26 Am. & Eng. R. Cas. 287, revg. 34 Hun (N. Y.) 50.

41. Pittsburgh, etc., R. Co. v. Hazen, 84 Ill. 36, 25 Am. Rep. 422. See also Blackstock v. New York, etc., R. Co., 20 N. Y. 48; Indianapolis, etc., R. Co. v. Jungten, 10 Ill. App. 295.

42. Wertheimer v. Pennsylvania R. Co., 17 Blatchf. (U. S.) 421; Hall v. Pennsylvania R. Co., 1 Fed. 226, 3 Am. & Eng. R. Cas. 274.

43. Haas v. Kansas City, etc., R. Co., (Ga.) 7 S. E. 629; International, etc., R. Co. v. Tisdale, (Tex.) 4 L. R. A. 545, 11 S. W. 900; Little v. Fargo, 43 Hun (N. Y.), 233, and the same defense is available to a transportation company which has undertaken to move goods over the railway company's line where such railroad was the known agency for the transportation of such goods. (Wibert v. New York, etc., R. Co., 12 N. Y. 245.)

excusing the carrier from losses occasioned by delay in transportation due to causes over which it had no control, and must be distinguished from the cases where an absolute loss of or injury to goods, in which delay is not a factor, has been sustained.

§ 5. Seizure under legal process.—Attachment.—Where goods are taken out of the carrier's possession under valid legal process, such as attachment or execution, or the carrier is obliged to and does deliver them to the lawful authorities of the place where the goods are, either in transit, or waiting delivery, or the carrier fails to transport and deliver them because of the lawful order of a court having jurisdiction of the subject-matter, the carrier is not liable for non-delivery, the process or order of the court being within the term *vis major*.⁴⁴ But a carrier cannot relieve itself from responsibility for failure to deliver property consigned, by

44. U. S.—Robinson v. Memphis, etc., R. Co. 16 Fed. 57; Stiles v. Davis, 1 Black (U. S.) 101; The M. M. Chase, 37 Fed. 708; The Idaho, 93 U. S. 575; Wells v. Maine S. S. Co., 4 Cliff. (U. S.) 232; Post v. Koch, 30 Fed. 208.

N. Y.—Speigel v. Pacific Mail Steamship Co., 26 Misc. Rep. (N. Y.) 414, 56 N. Y. Supp. 171; Bliven v. Hudson River R. Co., 36 N. Y. 403; Scranton v. Bank, 24 N. Y. 424; Western Transportation Co. v. Barber, 56 N. Y. 544; Roberts v. Stuyvesant Safe Deposit Co., 123 N. Y. 57, 25 N. E. 294; Van Winkle v. U. S. Mail Steamship Co., 37 Barb. (N. Y.) 122; Livingston v. Miller, 48 Hun (N. Y.) 232; Rogers v. Weir, 34 N. Y. 463; Barnard v. Kobbe, 54 N. Y. 516; Bates v. Stanton, 1 Duer (N. N.) 79; Edson v. Weston, 7 Cow. (N. Y.) 78; Mierson v. Hope, 2 Sweeny (N. Y.) 561.

Ga.—Savannah, etc., R. Co. v. Wilcox, 48 Ga. 432, 11 Am. Ry. Rep. 375; Wallace v. Matthews, 39 Ga. 617, 99 Am. Dec. 473.

Cal.—Hayden v. Davis, 9 Cal. 573.

Ind.—Indiana, etc., R. Co. v. Doremeyer, 20 Ind. App. 605, 67 Am. St. Rep. 264; Ohio, etc., R. Co. v. Yohe, 51 Ind. 181, 19 Am. Rep. 727.

Mass.—Adams v. Scott, 104 Mass. 164. But see Edwards v. White Line Transit Co., 104 Mass. 163; French v. Star Union Co., 134 Mass. 288.

Mich.—Pingree v. Detroit, etc., R. Co., 66 Mich. 143, 11 Am. St. Rep. 479, although the writ does not specify the particular property levied on.

Mo.—Landa v. Holck, 129 Mo. 663.

N. Mex.—MacVeagh v. Atchison, etc., R. Co., 3 N. Mex. 205, 18 Am. & Eng. R. Cas. 654.

Or.—Jewett v. Olsen, 18 Or. 419, 17 Am. St. Rep. 745, 42 Am. & Eng. R. Cas. 435.

Pa.—Baltimore, etc., R. Co. v. Davis, (Pa.) 12 Atl. 335, 32 Am. & Eng. R. Cas. 563.

Vt.—Burton v. Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

Eng.—Verrall v. Robinson, 5 Tyr. 1069, 4 D. P. C. 242; Wilson v. Anderton, 1 B. & Ad. 450, 2 E. C. L. 426; Sheridan v. New Quay Co., 4 C. B. N. S. 618, 93 E. C. L. 618.

simply showing that it was taken from its custody under valid legal process; but must also show that it promptly gave notice of that fact to the owner.⁴⁵ A seizure under legal process will excuse a common carrier from delivering to the owner goods intrusted to its care for shipment, although the owner was not the attachment defendant.⁴⁶ But a seizure of property in the hands

45. Speigel v. Pacific Mail Steamship Co., 26 Misc. Rep. (N. Y.) 414, 56 N. Y. Supp. 171; Bliven v. Hudson River R. Co., 36 N. Y. 403, affg. 35 Barb. (N. Y.) 188; and other N. Y. cases cited under preceding note; Robinson v. Memphis, etc., R. Co., 16 Fed. 57; Ohio, etc., R. Co. v. Yohe, 51 Ind. 181, 19 Am. Rep. 727; Jewett v. Olsen, 18 Or. 419, 17 Am. St. Rep. 745, 42 Am. & Eng. R. Cas. 435; Baltimore, etc., R. Co. v. O'Donnell, 49 Ohio St. 489; Lemont v. New York, etc., R. Co., 28 Fed. 920; The M. M. Chase, 37 Fed. 708; MacVeagh v. Atchison, etc., R. Co., 3 N. Mex. 205, 18 Am. & Eng. R. Cas. 655; Frank v. Central R. Co., 9 Pa. Super. Ct. 129.

A common carrier in whose hands goods shipped are attached discharges its duty to the consignor by giving notice of the attachment to the latter's husband, having the bill of lading in his possession, since the carrier has the right to presume from such possession that the husband is the agent of the consignor, without further inquiry as to how or by what means he acquired such possession. Furman v. Chicago, etc., R. Co., 81 Iowa 540, 46 N. W. 1049, 45 Am. & Eng. R. Cas. 385; Id., 57 Iowa 42, 6 Am. & Eng. R. Cas. 280; 62 Iowa 395, 23 Am. & Eng. R. Cas. 730; 68 Iowa 219.

46. Indiana, etc., R. Co. v. Doremeyer, 20 Ind. App. 605, 67 Am. St. Rep. 264, 50 N. E. 497; Landa v. Holck, 129 Mo. 663; Stiles v. Davis, 1 Black (U. S.) 101; Furman v. Chi-

cago, etc., R. Co., 81 Iowa 540, 46 N. W. 1049, 45 Am. & Eng. R. Cas. 345. It might be otherwise, if the sheriff had merely levied an attachment, but not taken possession of the goods. Rogers v. Weir, 34 N. Y. 463.

It has been held in Massachusetts and some other jurisdictions that it is no defense to an action against a common carrier for breach of his contract to deliver goods, that they were taken from him by an officer under an attachment against a person who was not their owner. Edwards v. White Line Transit Co., 104 Mass. 159, 6 Am. Rep. 213. See also Wells v. American Express Co., 55 Wis. 23, 6 Am. & Eng. R. Cas. 298, 42 Am. Rep. 695; Walker v. Detroit, etc., R. Co., 49 Mich. 446, 9 Am. & Eng. R. Cas. 251; The Mary Ann Guest, 1 Blatchf. (U. S.) 358. The Massachusetts decision above cited seems to have been affected somewhat by the form of the action since the court admitted that the seizure of the goods by the sheriff was not a conversion by the carrier, but that it was liable on its contract for failure to deliver.

It is a good defense to an action against a common carrier for preventing the levy of an attachment upon property in his hands, that the property does not belong to the defendant in the attachment. Simpson v. Dufour, 126 Ind. 322, 26 N. E. 69, 22 Am. St. Rep. 590; State v. Intoxicating Liquors, 83 Me. 158.

of a carrier by an officer without valid legal process, or without any warrant or other legal process, does not excuse a carrier for non-delivery, the goods being unlawfully taken from him.⁴⁷ If the goods attached while in a carrier's charge for transportation are not taken from its custody, and the attachment is afterwards dissolved, the levy furnishes no defence to the carrier for failing to transport and deliver them.⁴⁸ Goods in the custody of a carrier within the territorial jurisdiction of the court are subject to attachment, but the service of an attachment on a carrier creates no lien on property not within the territorial jurisdiction of the court issuing the writ at the time of the service, but which is in transit and beyond the limits of the court's jurisdiction.⁴⁹ There must be an actual seizure of the goods intended to be attached.⁵⁰ The liability of the carrier ceases when the goods are taken from its custody by legal process and it discharges its duty to the consignor and consignee by giving notice of the attachment, which gives them timely knowledge of the situation of the goods.⁵¹ Receiving no reply, it has a right to presume that they have abandoned the prop-

47. Bennett v. American Express Co., 83 Me. 236, 22 Atl. 159, 23 Am. St. Rep. 774, 49 Am. & Eng. R. Cas. 56; Gibbons v. Farwell, 63 Mich. 344, 6 Am. St. Rep. 301; Kiff v. Old Colony, etc., R. Co., 117 Mass. 591, 19 Am. Rep. 429; Faust v. South Carolina R. Co., 8 S. C. 118; Nickey v. St. Louis, etc., R. Co., 35 Mo. App. 79.

But the carrier is not bound to know that a statute under which the process was issued is unconstitutional, and need only look to the face of the writ. McAlister v. Chicago, etc., R. Co., 74 Mo. 351, 7 Am. & Eng. R. Cas. 373. See also Robinson v. Memphis, etc., R. Co., 16 Fed. 57.

The carrier cannot defend by showing that the real title to the property is in a third party, who bailed them to the consignor, unless the property has been taken from the carrier's possession by the bailor without injury to the consigner. Great Western R. Co. v. McComas, 33 Ill. 185.

48. Faust v. South Carolina R. Co., 8 S. C. 118.

49. Santa Fe Pac. R. Co. v. Bos-
sut, (N. M.) 62 Pac. 977; Sutherland v. Peoria Second Nat. Bank, 78 Ky. 250, 6 Am. & Eng. R. Cas 368; Western R. Co. v. Thornton, 60 Ga. 300; Lawrence v. Smith, 45 N. H. 533, 86 Am. Dec. 183; Illinois Cent. R. Co. v. Cobb, 48 Ill. 402; Wheat v. Platte City, etc., R. Co., 4 Kan. 370; Bonner v. Marsh, 10 Smed. & M. (Miss.) 376, 48 Am. Dec. 754.

50. Pennsylvania R. Co. v. Pen-
nock, 51 Pa. St. 244.

51. Furman v. Chicago, etc., R. Co., 81 Iowa 540, 46 N. W. 1049, 15 Am. & Eng. R. Cas. 385; MacVeagh v. Atchison, etc., R. Co., 3 N. M. 205, 5 Pac. 457, 18 Am. & Eng. R. Cas. 651; Savannah, etc., R. Co. v. Wilcox, 48 Ga. 432, 11 Am. Ry. Rep. 375; Robinson v. Memphis, etc., R. Co., 16 Fed. 57.

erty, as subject to the legal process which seized it.⁵² An officer who has made a valid attachment of any property may maintain trover against a carrier who removes such property, after notice of the attachment.⁵³ But a demand of goods in the hands of a carrier, by virtue of a chattel mortgage after condition broken, but without any legal process, made by a constable acting merely as agent of the mortgagee, will not make the carrier liable for conversion if it refuses to surrender them, where the goods were received from a third person who has a bill of lading therefor.⁵⁴

§ 6. Seizure under legal process,—Garnishment.—A common carrier is subject to garnishment by the shipper's creditor of property delivered to it for transportation, which is in the carrier's depot or yard and in actual transit at the time of garnishment, and which is within the territorial jurisdiction of the garnishing court.⁵⁵ But a common carrier cannot be charged as a garnishee for goods consigned to defendant, when it does not know whether they belong to the defendant or not.⁵⁶ Where a carrier, to whom goods have been entrusted for transportation is summoned as garnishee and remains in possession of the goods which have been attached as the property of a third person, his refusal to deliver them will not render him liable for a conversion.⁵⁷ And garnishment after transportation has ended and the goods are stored in a warehouse, while it remains in force, excuses the carrier from delivering the property to the shipper or consignee.⁵⁸ But a common carrier cannot be held as garnishee for property in actual transit at the time of the service of the process,⁵⁹ nor for property which is

52. *Savannah, etc., R. Co. v. Wilcox, supra.*

53. *Johnson v. Grand Trunk R. Co.*, 44 N. II. 626.

54. *Kohn v. Richmond, etc., R. Co.*, 37 S. C. 1, 16 S. E. 376, 47 Alb. L. J. 71, 34 Am. St. Rep. 726.

55. *Illinois Cent. R. Co. v. Cobb*, 48 Ill. 402; *Landa v. Missouri, etc., R. Co.*, (Mo.) 31 S. W. 900; *Landa v. Holck*, 129 Mo. 663; *Adams v. Scott*, 104 Mass. 164.

56. *Walker v. Detroit, etc., R. Co.*, 49 Mich. 446, 9 Am. & Eng. R. Cas. 251.

57. *Stiles v. Davis*, 1 Black (U. S.) 101; *Adams v. Scott*, 104 Mass. 164.

58. *Cooley v. Minnesota Transfer Co.*, 53 Minn. 327, 55 Am. & Eng. R. Cas. 616, 55 N. W. 141.

59. *Bates v. Chicago, etc., R. Co.*, 60 Wis. 298, 50 Am. Rep. 369; *Illinois Cent. R. Co. v. Cobb*, 48 Ill. 402; *Michigan Cent. R. Co. v. Chicago, etc., R. Co.*, 1 Ill. App. 399; *Western R. Co. v. Thornton*, 60 Ga. 300; *Pennsylvania R. Co. v. Pennock*, 51 Pa. St. 254, disapproving *Childs v. Digby*, 24 Pa. St. 23; *Stevenson v.*

beyond the territorial limits of the jurisdiction of the court issuing the process.⁶⁰ These exceptions to the general rule are founded upon considerations of public policy, it being considered unreasonable that a carrier should under such circumstances be subjected to the costs, inconvenience and burden of such process merely because it had received to be carried that which the law compelled to be received and carried.⁶¹

§ 7. Seizure under police regulations.—A common carrier of goods is excused from liability to the shipper or owner, where the goods are taken from its custody by legal process other than attachment or execution, as, for example, by warrant for being stolen or embezzled property,⁶² or being property liable to seizure and destruction, or forfeiture, under the laws of the State, because of being intoxicating liquors or other articles intended for sale or for use in violation of law, or because of being infected with a contagious disease.⁶³ Where goods are taken from the car-

Eastern R. Co., 61 Minn. 104. *Compare* Adams v. Scott, 104 Mass. 164, holding that in an action against a resident of another state who appears and answers, common carriers, having in their possession, in Massachusetts, in course of transportation to the defendant, at his place of residence, a sealed package of money belonging to him, may be summoned as his trustees.

60. Illinois Cent. R. Co. v. Cobb, 48 Ill. 402; Bates v. Chicago, etc., R. Co., 60 Wis. 298, 50 Am. Rep. 369; Sutherland v. Peoria Second Nat. Bank, 78 Ky. 250, 6 Am. & Eng. R. Cas. 368. See also Pennsylvania R. Co. v. Pennock, 51 Pa. St. 244; Clark v. Brewer, 6 Gray (Mass.) 320; Lawrence v. Smith, 45 N. H. 533, 86 Am. Dec. 183; Wheat v. Platt City, etc., R. Co., 4 Kan. 378. *Compare* Childs v. Digby, 24 Pa. St. 23.

61. See cases cited in last two preceding notes.

62. Bliven v. Hudson River R. Co., 36 N. Y. 407; Tyler v. London, etc.,

R. Co., 1 C. & E. 285, where the carrier had been intrusted with such goods by the police, who had taken possession of them for the purpose of prosecuting a person charged with theft.

63. Wells v. Maine Steamship Co., 4 Cliff. (U. S.) 228; State v. Creedon, 78 Iowa, 556, 43 N. W. 673, 7 R. A. 295, 40 Am. & Eng. R. Cas. 31; Baltimore, etc., R. Co. v. O'Donnell, 49 Ohio St. 489, 55 Am. & Eng. R. Cas. 672; Atkinson v. Ritchie, 10 East 534; Indianapolis, etc., R. Co. v. Juntgen, 10 Ill. App. 295; Nashville, etc., R. Co. v. Estes, 10 Lea. (Tenn.) 755, 3 Am. & Eng. R. Cas. 492; McAlister v. Chicago, etc., R. Co., 74 Mo. 351, 4 Am. & Eng. R. Cas. 210.

A common carrier is liable, however, for the value of fish shipped over its line which were seized by a game warden on the ground that the fish were illegally caught, where such warden had neither legal nor apparent legal right to seize the same.

rier under such circumstances it must appear that prompt notice of the seizure was given to the owner of the goods, and that they were taken from the carrier without its connivance, procurement or collusion, and that the proceeding and process under which the seizure was made was apparently regular and valid.⁶⁴ The motive by which a carrier was controlled is of no avail as a defense, however, though it may be shown to prevent recovery of exemplary damages.⁶⁵

§ 8. Duty of carrier after disaster.—It is the duty of a carrier, when goods in his care are injured, to make reasonable exertions to repair the injury or arrest its progress. Hence, if packages of fur become wet, he should have them opened and dried.⁶⁶ But the master of a steamboat carrying wheat, which was wet by inevitable accident, is not liable for damages because he did not dry the wheat.⁶⁷ Where an express company, on receiving a package for transportation, is not informed that it contains gold, the company is not negligent in failing to search the ruins of the express car after a fire in order to recover the property. Negligence can not be predicated on the company's omission under such circumstances.⁶⁸ The consignor of goods by railway, who is also consignee, may not recover of the company because the car containing the goods was left over night, unguarded, on the track, broken into, cases of goods opened, and the goods scattered, although he abandons the consignment to the carrier, when he is unable to

Merriman v. Great Northern Express Co., 63 Minn. 543, 65 N. W. 1080; Bennett v. American Express Co., 83 Me. 236, 23 Am. St. Rep. 774, 49 Am. & Eng. R. Cas. 57; Edwards v. White Line Transit Co., 104 Mass. 163, 6 Am. Rep. 213.

64. Robinson v. Memphis, etc., R. Co., 16 Fed. 57; Gibbons v. Farwell, 63 Mich. 344, 6 Am. St. Rep. 301; Kiff v. Old Colony, etc., R. Co., 117 Mass. 591, 19 Am. Rep. 429; Harker v. Dement, 9 Gill (Md.) 7, 52 Am. Dec. 670.

65. Baltimore, etc., R. Co. v. O'Donnell, 49 Ohio St. 489, 55 Am. & Eng. R. Cas. 667.

Where the declaration charges a non-delivery of the goods by the carrier, a plea by the defendant that the goods had, prior to their delivery to the defendant, been forfeited to the government for non-payment of customs, states no valid defense. White v. Canadian Pac. R. Co., 6 Man. L. Rep. 169.

66. Chouteaux v. Leech, 18 Pa. St. 224.

67. Steamboat Lynx v. King, 12 Mo. 272.

68. Rowan v. Wells, Fargo & Co., 80 App. Div. (N. Y.) 31, 80 N. Y. Supp. 226.

prove that any of the goods were damaged thereby, or that any were lost.⁶⁹

§ 9. Loss or injury from inherent nature of goods.—A carrier is not liable for losses or injuries resulting from the inherent nature of the goods, which would not have been prevented by the exercise of ordinary care on its part;⁷⁰ or for loss or injury to goods caused by an inherent defect in the goods themselves, the existence of which was unknown both to the sender and the carrier.⁷¹ A carrier is not liable for loss due to the bursting of a hogshead of molasses by reason of fermentation, as this results from the operation of natural laws which a common carrier does not insure against.⁷² The general rule above stated has its most frequent application in determining the liability of carriers in the carrying of live stock.⁷³

§ 10. Care required of carrier in general.—A carrier is not bound to provide against an unprecedented emergency, such as a greater flood than was ever known before in the locality, unless it has reason to suspect that such emergency is about to arise; then it is bound to take such precautionary measures as prudent and skillful men in the same business under like circumstances might fairly be expected to use.⁷⁴ A common carrier is liable for all losses which it could have prevented by skill and foresight; and the

69. Silverman v. St. Louis, etc., R. Co., 51 La. Ann. 1785, 26 So. 447.

70. American Express Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561, if, while perishable goods are in transit, an unavoidable delay occurs, the carrier must exercise sound discretion and reasonable diligence in forwarding them to their destination, but, if it does not appear that a change of route would prevent the loss attendant upon delay, he is not bound to divert the goods to a route over which he has no control, but may sell the goods for the best price he can obtain, in order to convert what would inevitably be a total loss into one that is partial merely. See also § 4, chap. 2.

71. Lister v. Lancashire & Y. Ry., 72 L. J. K. B. 385, 1 K. B. 878, 88 L. T. 561, 52 Wkly. Rep. 12.

72. Faucher v. Wilson, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431.

73. See § 3, chap. 2.

74. Nashville, etc., R. Co. v. David, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594, 12 Am. Ry. Rep. 9; Craig v. Childress, Peck (Tenn.) 270, 14 Am. Dec. 751; Dillard v. Louisville, etc., R. Co., 2 Lea (Tenn.) 299.

Under Georgia statutes a carrier is bound to use extraordinary diligence. Richmond, etc., R. Co. v. White, 88 Ga. 805, 12 Ry. & Corp. L. J. 273, 15 S. E. 802. See also Lamont v. Nashville, etc., R. Co., 9 Heisk. (Tenn.) 59.

onus is on it to show that the loss was such as it could not have prevented.⁷⁵ It is the duty of a carrier, when goods in its care are injured, to make reasonable exertions to repair the injury or arrest its progress.⁷⁶ If the means of conveyance has become disabled, it is bound to use its utmost exertions to transport or send forward the goods to the place of delivery, even though it have to hire or provide other means for that purpose, or send them by another route.⁷⁷ Whether a carrier has discharged the duty of using care and diligence in the transportation of goods intrusted to it, is to be judged with reference to the nature of the services and the circumstances and exigencies under which it is to be performed. Where skill and capacity are required to accomplish the undertaking it is negligence not to employ persons having those qualifications.⁷⁸ A common carrier is relieved from liability if it can show that it has provided all reasonable means of transportation, and exercised that degree of care which the nature of the property requires.⁷⁹ A common carrier which has an option as to the mode

75. Baltimore, etc., R. Co. v. Morehead, 5 W. Va. 293, if access to the consignee and delivery of the goods at the end of the route is prevented by a state of war, it is the carrier's duty to take care of the goods for the consignor, and notify him within a reasonable time of its inability to make the delivery, after whch its liability is only that of a bailee. See also Baltimore, etc., R. Co. v. Keedy, 75 Md. 320, 23 Atl. 643, 49 Am. & Eng. R. Cas. 124.

76. Chouteaux v. Leech, 18 Pa. St. 224, 57 Am. Dec. 602; Pearce v. The Thomas Newton, 41 Fed. 106.

77. The Maggie Hammond, 9 Wall. (U. S.) 435; Chicago, etc., R. Co. v. Manning, 23 Neb. 552.

78. Holladay v. Kennard, 12 Wall. (U. S.) 254. See also Memphis, etc., R. Co. v. Reeves, 10 Wall. (U. S.)

176. Compare Shoemaker v. Kingsbury, 12 Wall. (U. S.) 369.

The carrier's liability for loss of goods transported over connecting routes, in cases depending on special

circumstances, determined; Woodward v. Illinois Cent. R. Co., 1 Biss. (U. S.) 403, 447; Cohen v. Southern Express Co., 45 Ga. 148; Gray v. Jackson, 51 N. H. 9; Pennsylvania R. Co. v. Berry, 68 Pa. St. 272.

79. Burke v. United States Express Co., 87 Ill. App. 505. The liability of a common carrier as such does not attach to goods which were taken to and placed in its warehouse by the owner or his agent after the closing hours and when no one representing the carrier was there to receive them, notwithstanding that its "bill clerk" was informed at his residence, which was about 100 feet from the warehouse, that the goods had been left, and was requested to bill and ship them early the next morning. Spofford v. Pennsylvania R. Co., 11 Pa. Super. Ct. 97.

80. Stewart v. Comer, 100 Ga. 754, 62 Am. St. Rep. 353, 28 S. E. 461; Blitz v. Union S. B. Co., 51 Mich. 588.

of shipment must exercise it reasonably under the circumstances for the best interest of the consignee, and it is a breach of the contract to exercise it to his disadvantage unless it is done in good faith and under circumstances which seem to require it.⁸⁰ A railroad company is not, as matter of law, free from negligence in permitting a carload of strawberries received by it to remain for about seven hours without re-icing, at which time the ice is about two-thirds gone, where it is necessary that the ice box should be filled for complete refrigeration.⁸¹ A shipper of apples assumes the risk of their decay during transit owing to lack of ventilation, where he knew there was no practicable means of ventilating the cars in which they were shipped while in transit.⁸² A railroad company will not be required to place its cars containing inflammable materials, when temporarily standing on side tracks, in such situation that they can be watched by policemen, or be within reach of fire engines or other means for extinguishing fires.⁸³ A railroad will be liable for loss caused by defects in tank cars which it hires from a third person for the transportation of property of a shipper of oil.⁸⁴ On refusal of the consignee to accept goods, it devolves on the master of the carrier to have them placed, at the expense of the consignee, in a place where they will not be exposed to loss.⁸⁵ A common carrier of goods is excused from liability to a shipper when the goods are taken from him by legal process and he immediately notifies the shipper.⁸⁶ If transportation is delayed or the goods endangered by the acts of a mob, it is the duty of the carrier to use all reasonable efforts and diligence to protect the goods from injury, to overcome the obstacles thus interposed, and to forward the goods to their destination.⁸⁷

81. Lamb v. Chicago, etc., R. Co., 101 Wis. 138, 76 N. W. 1123.

82. Densmore Commission Co. v. Duluth, etc., R. Co., 101 Wis. 563, 77 N. W. 904.

83. Insurance Co. of N. A. v. Lake Erie, etc., R. Co., 152 Ind. 333, 1 Repr. 819, 4 Chic. L. J. Wkly. 201.

84. Cincinnati, etc., R. Co. v. N. K. Fairbanks & Co., 90 Fed. 467, 33 C. C. A. 611, 62 U. S. App. 231, 13 Am. & Eng. R. Cas. N. S. 179.

85. Sonia Cotton Oil Co. v. The Red River, 106 La. 42, 30 So. 303.

86. Bliven & Mead v. Hudson River R. Co., 36 N. Y. 403. See Seizure by legal process, § 5, *ante*.

87. Geismer v. Lake Shore, etc., R. Co., 102 N. Y. 563, 55 Am. Rep. 837; Lang v. Pennsylvania R. Co., 154 Pa. St. 342, 32 W. N. C. (Pa.) 205. See Loss or injury by public enemy, § 4, *ante*.

CHAPTER VIII.

LIABILITY FOR DELAY.

- SECTION
1. Liability for delay in transportation.
 2. Liability where there is a special contract.
 3. Liability where there are special instructions by the shipper.
 4. Liability under statutes requiring prompt forwarding of freight.
 5. Delay in delivering perishable freight.
 6. Delay must have been the proximate cause of injury.
 7. Waiver of right of action for delay.
 8. Excuses for delay generally.
 9. Unusual floods and storms.
 10. Accumulation of cars and freight.
 11. Low water or freezing of water-way.
 12. Strikes by employees.
 13. Limitation of liability for delay.
 14. Carrier's duty during delay.
 15. Delay concurring with inevitable accident.

§ 1. **Liability for delay in transportation.**—The general rule in reference to the liability of a carrier for a delay in the transportation and delivery of goods is that it is required to exercise due care and diligence to guard against delay, and to forward the goods to their destination with all convenient dispatch and deliver them promptly, and the carrier is liable for its failure to do so.¹

1. *N. Y.*—Geismer v. Lake Shore, etc., R. Co., 102 N. Y. 563, 55 Am. Rep. 837; Waite v. New York Cent., etc., R. Co., 110 N. Y. 635, 35 Am. & Eng. R. Cas. 576, affg. 17 St. Rep. (N. Y.) 162, 17 N. E. 730; Stedman v. Western Transp. Co., 48 Barb. (N. Y.) 97; Little v. Fargo, 43 Hun (N. Y.), 237.

U. S.—Missouri Pac. R. Co. v. Hall, 66 Fed. 868, 32 U. S. App. 60; Thomas v. Wabash, etc., R. Co., 63 Fed. 200.

Ala.—Louisville, etc., R. Co. v. Touart, 97 Ala. 514.

Ark.—St. Louis, etc., R. Co. v.

Heath, 41 Ark. 477, 18 Am. & Eng. R. Cas. 557.

Cal.—Palmer v. Atchison, etc., R. Co., 101 Cal. 187.

La.—Berje v. Texas, etc., R. Co., 37 La. Ann. 468.

Mo.—Dawson v. Chicago, etc., R. Co., 79 Mo. 296, 18 Am. & Eng. R. Cas. 521; Rankin v. Pacific R. Co., 55 Mo. 167; Schwab v. Union Line, 13 Mo. App. 159.

Neb.—Denman v. Chicago, etc., R. Co., 52 Neb. 140, 71 N. W. 767; Gates v. Chicago, etc., R. Co., 42 Neb. 379, 61 Am. & Eng. R. Cas. 218.

N. C.—Purcell v. Richmond, etc.,

There is no rule of law which requires a carrier to transport and deliver goods within any definite time after receiving them for transportation, except where there is an express contract to do so within a certain time. In the absence of a special contract there is no absolute duty resting upon a common carrier, implied from the delivery to or receipt by it of goods for transportation, to transport and deliver them within what would be, under ordinary circumstances, a reasonable time. The actual circumstances in each case must be taken into consideration in determining what is a delivery with reasonable promptness in that case.² A carrier is

R. Co., 108 N. C. 414; Branch v. Wilmington, etc., R. Co., 88 N. C. 570.

Ohio.—Baltimore, etc., R. Co. v. O'Donnell, 49 Ohio St. 489.

Pa..—Clark v. Needles, 25 Pa. St. 338.

Tex..—International, etc., R. Co. v. Ritchie, (Tex. Civ. App.) 26 S. W. 840.

Va..—Spence v. Norfolk, etc., R. Co., 92 Va. 102, 22 S. E. 815, 29 L. R. A. 578, 2 Am. & Eng. R. Cas. N. S. 708, and a consignor of the goods who delivers them to a carrier for shipment subject to a lien for the purchase price, retaining the right to possession until the drafts therefor are accepted by the consignee, and who makes a special contract with the company for their shipment, guaranteeing the payment of freight, may sue for damages for failure to deliver within a reasonable time.

The person who contracts with the carrier for the transportation may maintain an action in his own name, although other parties have an interest in the goods. Galveston, etc., R. Co. v. Barnett, (Tex. Civ. App.) 26 S. W. 782. He may likewise sue in his own name, where the contract was made in the name of commission merchants to whom he consigns property, but for his own

benefit and signed with his own name. Cincinnati, etc., R. Co. v. Case, 122 Ind. 310, 23 N. E. 797, 42 Am. & Eng. R. Cas. 537; Ohio, etc., R. Co. v. Emrich, 24 Ill. App. 245.

That it received the stock on Sunday is no excuse for the delay of a railroad company in forwarding the stock. Guinn v. Wabash, etc., R. Co., 20 Mo. App. 453.

2. Carrier must deliver with reasonable promptness or without unreasonable delay.

N. Y..—Geismer v. Lake Shore, etc., R. Co., 102 N. Y. 563, 55 Am. Rep. 837; Little v. Fargo, 43 Hun (N. Y.), 137; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; Wibert v. New York, etc., R. Co., 19 Barb. (N. Y.) 36, 12 N. Y. 245; Stedman v. Western Transp. Co., 48 Barb. (N. Y.) 97.

Del..—Truax v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 233.

Ga..—Johnson v. East Tennessee, etc., R. Co., 90 Ga. 810; Smith v. Cleveland, etc.; R. Co., 92 Ga. 539; Rome R. Co. v. Sullivan, 14 Ga. 277, 32 Ga. 400.

Ill..—Michigan Cent. R. Co. v. Curtis, 80 Ill. 324; Wabash, etc., R. Co. v. McCasland, 11 Ill. App. 491; Illinois Cent. R. Co. v. Waters, 41 Ill. 73; Michigan Southern, etc., R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278;

bound to deliver goods within a reasonable time, under ordinary circumstances. Accidents, temporary interruptions or obstructions, which could not, by ordinary prudence, be provided against, excuse delay, but do not absolve from the duty to carry and deliver as soon as it becomes practicable, or as soon as the impediment to the transportation is removed or can reasonably be overcome.³ In determining what is a reasonable time under any given circumstances, the mode of conveyance, the nature of the goods, the season of the year, the character of the weather, and the ordinary

Galena, etc., R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574.

Ind.—Pennsylvania Co. v. Clark, 2 Ind. App. 146.

Mass.—Fox v. Boston, etc., R. Co., 148 Mass. 220, 37 Am. & Eng. R. Cas. 632; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106.

Miss.—Illinois Cent. R. Co. v. Haynes, 64 Miss. 604, 30 Am. & Eng. R. Cas. 38; *Vicksburg, etc., R. Co. v. Ragsdale*, 46 Miss. 458; *Water Valley Bank v. Southern Express Co.*, 71 Miss. 741.

Mo.—Dawson v. Chicago, etc., R. Co., 79 Mo. 296, 18 Am. & Eng. R. Cas. 521; *Leonard v. Chicago, etc., R. Co.*, 57 Mo. App. 366; *Read v. St. Louis, etc., R. Co.*, 66 Mo. 208; *Gregory v. Wabash R. Co.*, 46 Mo. App. 574; *Schwab v. Union Line*, 13 Mo. App. 159.

N. C.—Boner v. Merchants' Steamboat Co., 1 Jones L. (N. C.) 211; *Harrell v. Owens*, 1 Dev. & B. L. (N. C.) 273.

Ohio.—American Express Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561.

Pa.—Eagle v. White, 6 Whart. (Pa.) 505, 37 Am. Dec. 434; *Hill v. Humphreys*, 5 W. & S. (Pa.) 123, 39 Am. Dec. 117; *Ludwig v. Meyre*, 5 W. & S. (Pa.) 438.

S. C.—Nettles v. South Carolina R. Co., 7 Rich. L. (S. C.) 190, 62 Am. Dec. 409.

Tenn.—Nashville, etc., R. Co. v. Jackson, 6 Heisk. (Tenn.) 271, 12 Am. Ry. Rep. 54; *East Tennessee, etc., R. Co. v. Nelson*, 1 Coldw. (Tenn.) 276.

Tex.—Missouri Pac. R. Co. v. Weisman, 2 Tex. Civ. App. 86; *Atchison, etc., R. Co. v. Bryan* (Tex. Civ. App.), 28 S. W. 98.

Vt.—Mann v. Birchard, 40 Vt. 326.

Wis.—McLaren v. Detroit, etc., R. Co., 23 Wis. 138; *Nudd v. Wells*, 11 Wis. 407.

Eng.—Taylor v. Great Northern R. Co., L. R. 1 C. P. 385, 12 Jur. N. S. 372, 35 L. J. C. P. 210, 14 W. R. 639; *Hughes v. Great Western R. Co.*, 14 C. B. 637, 78 E. C. L. 637, 25 Eng. L. & Eq. 347; *D'Arc v. London, etc., R. Co.*, L. R. 9 C. P. 325; *Hales v. London, etc., R. Co.*, 4 B. & S. 66, 116 E. C. L. 66; *Donohoe v. London, etc., R. Co.*, 15 W. R. 792; *Raphael v. Pickford*, 5 M. & G. 558, 44 E. C. L. 295; *Great Western R. Co. v. Redmayne*, L. R. 1 C. P. 329; *Robinson v. Great Western R. Co.*, 1 H. & R. 97, 14 W. R. 206.

3. Baltimore, etc., R. Co. v. O'Donnell, 49 Ohio St. 489; *Vicksburg, etc., R. Co. v. Ragsdale*, 46 Miss. 477; *Briddon v. Great Northern R. Co.*, 28 L. J. Exch. 51, 32 L. T. 94; *Michigan Cent. R. Co. v. Curtis*, 80 Ill. 324.

facilities for transportation under the control of the carrier are to be considered.⁴ Likewise, the character of the freight, whether articles not liable to decay or damage by a brief delay, such as iron, wool, cotton, grain, and things of like character, or articles by reason of their nature and inherent character liable to loss or damage by the delay of a day, such as live stock, fish, oysters, fruits, vegetables and things of similar character, must be taken into consideration.⁵ Ordinarily, what is a reasonable time within which delivery should be made and what is unreasonable delay in transportation is a question of fact for the jury to determine under all the circumstances attending the particular case.⁶ That the time occupied in transportation and delivery is within common knowledge unusual and unnecessary may be sufficient to justify a finding of unreasonable delay attributable to the negligence of the carrier, unless explained by circumstances showing the causes of delay to have been such as the carrier was not liable for and which furnish a valid excuse. But difficulties in the way of transportation known to the carrier at the time of accepting the shipment cannot excuse such delay.⁷ An action for delay in transporting

4. McGraw v. Baltimore, etc., R. Co., 18 W. Va. 361, 9 Am. & Eng. R. Cas. 188, 41 Am. Rep. 696; Cobb v. Illinois Cent. R. Co., 38 Iowa, 601; Illinois Cent. R. Co. v. Haynes, 64 Miss. 604; Galveston, etc., R. Co. v. Tuckett (Tex. Civ. App.), 25 S. W. 150; Richmond, etc., R. Co. v. Benson, 86 Ga. 203, 22 Am. St. Rep. 446; Hales v. London, etc., R. Co., 4 B. & S. 66, 116 E. C. L. 66, 32 L. J. Q. B. 292; Wren v. Eastern Counties R. Co., 1 L. T. N. S. 5.

5. Cantwell v. Pacific Exp. Co., 58 Ark. 487, 61 Am. & Eng. R. Cas. 206, note; Dixon v. Chicago, etc., R. Co., 64 Iowa, 531, 18 Am. & Eng. R. Cas. 526, 52 Am. Rep. 460; McGraw v. Baltimore, etc., R. Co., *supra*; Louisville, etc., R. Co. v. Brinley (Ky.), 29 S. W. 305; International, etc., R. Co. v. Ritchie (Tex. Civ. App.), 26 S. W. 840. A carrier must exercise reasonable care in selecting a route by which a corpse is shipped, and is

liable for damages in sending it by a route which is very much longer than is necessary. Wells, etc., Express v. Fuller, 13 Tex. Civ. App. 610, 35 S. W. 824.

6. Waite v. New York Cent., etc., R. Co., 110 N. Y. 635, 35 Am. & Eng. R. Cas. 576; Regan v. Grand Trunk R. Co., 61 N. H. 579; Davis v. Jacksonville S. E. Line, 126 Mo. 69; Baltimore, etc., R. Co. v. Pumphrey, 59 Md. 390, 9 Am. & Eng. R. Cas. 331; International, etc., R. Co. v. Server, 3 Tex. App. Civ. Cas. § 440; Bell v. Windsor, etc., R. Co., 24 Nova Scotia, 521; Hunter v. Borst, 13 U. C. Q. B. 141; Hawes v. Southeastern R. Co., 54 L. J. Q. B. Div. 174, 52 L. T. N. S. 514; Hales v. London, etc., R. Co., 4 B. & S. 66, 116 E. C. L. 66, 32 L. J. Q. B. 292.

7. St. Clair v. Chicago, etc., R. Co., 80 Iowa, 304; Chicago, etc., R. Co. v. Simms, 18 Ill. App. 68; St. Louis, etc., R. Co. v. Heath, 41 Ark.

freight is not maintainable where the goods reached their destination in the time usually occupied in the journey, and there was no special undertaking for delivery in a fixed time.⁸ Where goods are sent by the usual route, the carrier must use reasonable diligence, and whether he has done so is a question of fact.⁹ The specification of a certain time as a reasonable time for the transportation of property by a common carrier is not conclusive upon the shipper, and does not relieve the common carrier from injuries resulting from delay caused by its negligence, although the property is delivered within the specified time.¹⁰ A common carrier cannot relieve itself by contract from liability for its own negligence.¹¹

§ 2. Liability where there is a special contract.—It is a well settled rule that where the law creates a duty or charge, and the party is disabled from performing it without any default in himself, and has no remedy over, then the law will excuse him; but where the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident or delay by inevitable necessity, because he might have provided against it by contract.¹² Where a carrier, therefore, undertakes, by special contract, to transport and deliver goods within a specified time, it is bound to do so, and is liable for a failure to deliver within the prescribed time, and is not excused by an inevitable accident or other contingency, although not foreseen by

476, 18 Am. & Eng. R. Cas. 557; Illinois Cent. R. Co. v. Cobb, 64 Ill. 128; Illinois Cent. R. Co. v. McClellan, 54 Ill. 58, 5 Am. Rep. 83; Michigan Southern, etc., R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278; Texas, etc., R. Co. v. Boggs, (Tex. Civ. App.) 30 S. W. 1089; Ormsby v. Union Pac. R. Co., 4 Fed. 706, 2 McCrary (U. S.) 48; Mann v. Birchard, 40 Vt. 326; Ruddy v. Midland Great Western R. Co., L. R. 8 Ir. 224.

8. Lowe v. East Tennessee, etc., R. Co., 90 Ga. 85, 15 S. E. 692; Atlantic, etc., R. Co. v. Texas Grate Co., 81 Ga. 602.

9. Schwab v. Union Line, 13 Mo. App. 159; Hales v. London, etc., R.

Co., 4 B. & S. 70, 116 E. C. L. 20; Johnson v. Midland R. Co., 4 Exch. 367; Blakemore v. Lancashire, etc., R. Co., 1 F. & F. 76.

10. Leonard v. Chicago, etc., R. Co., 54 Mo. App. 293.

11. Armstrong v. United States Express Co., 159 Pa. St. 640, 28 Atl. 448; Union Pac. R. Co. v. Rainey, (Colo.) 34 Pac. 986; Leonard v. Chicago, etc., R. Co., 54 Mo. App. 293; Galveston, etc., R. Co. v. Parsley, 6 Tex. Civ. App. 150, 23 S. W. 64; Atchison, etc., R. Co. v. Lawler, (Neb.), 58 N. W. 968; Atchison, etc., R. Co. v. Grant, 6 Tex. Civ. App. 674, 26 S. W. 286.

12. Beebe v. Johnson, 19 Wend.

or within the control of the carrier. The fault of the complaining party only will excuse it.¹³ No temporary obstruction, or even the absolute impossibility of complying with the engagement will be a defense to an action for failure in performing the contract.¹⁴

(N. Y.) 500; *Shubrick v. Salmond*, 3 Burr. 1637; *Hadley v. Clarke*, 8 T. R. 259; *Hand v. Baynes*, 4 Whart. (Pa.) 204, 33 Am. Dec. 54.

13. N. Y.—*New York Cent. etc., R. Co. v. Standard Oil Co.*, 87 N. Y. 487, 492; *McPherson v. Cox*, 86 N. Y. 479; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Van Buskirk v. Roberts*, 31 N. Y. 661; *Nelson v. Odiorne*, 45 N. Y. 489; *Place v. Union Express Co.*, 2 Hilt. (N. Y.) 19.

U. S.—*The Harriman*, 9 Wall. (U. S.) 161.

Ill.—*Illinois Cent. R. Co. v. Simmons*, 49 Ill. App. 443; *Chicago, etc., R. Co. v. Thrapp*, 5 Ill. App. 502.

Ind.—*Pittsburgh, etc., R. Co. v. Racer*, 5 Ind. App. 209.

Iowa.—*Wood v. Chicago, etc., R. Co.*, 68 Iowa, 491, 24 Am. & Eng. R. Cas. 91, 56 Am. Rep. 861.

Mass.—*Knowles v. Dabney*, 105 Mass. 437; *Higginson v. Weld*, 14 Gray (Mass.), 165; *Tirrell v. Gage*, 4 Allen (Mass.), 251; *Wareham Bank v. Burt*, 5 Allen (Mass.), 113; *Gage v. Tirrell*, 9 Allen (Mass.), 299.

Miss.—*Jemison v. McDaniel*, 25 Miss. 83.

Mo.—*Myres v. Diamond Joe Line*, 58 Mo. App. 199; *Harrison v. Missouri Pac. R. Co.*, 74 Mo. 364, 41 Am. Rep. 318, 7 Am. & Eng. R. Cas. 382; *Collier v. Swinney*, 16 Mo. 484; *Miller v. Chicago, etc., R. Co.*, 1 Mo. App. Rep. 474.

N. H.—*Deming v. Grand Trunk R. Co.*, 48 N. H. 455, 2 Am. Rep. 267.

Pa.—*Hand v. Baynes*, 4 Whart. (Pa.) 204, 33 Am. Dec. 54.

Tex.—*Gulf, etc., R. Co. v. McCord* quodale, 71 Tex. 41, 35 Am. & Eng. R. Cas. 653; *Gulf, etc., R. Co. v. Hodge* (Tex. Civ. App.), 30 S. W. 829; *Texas Pac. R. Co. v. Nicholson*, 61 Tex. 491, 21 Am. & Eng. R. Cas. 133.

Eng.—*Denton v. Great Northern R. Co.*, 5 El. & Bl. 860, 85 E. C. L. 860, 2 Jur. N. S. 185; *Hawcroft v. Great Northern R. Co.*, 16 Jur. 196, 21 L. J. Q. B. 178; *Robinson v. Dunmore*, 2 B. & P. 416.

14. *Harrison v. Missouri Pac. R. Co.*, *supra*; *Miller v. Chicago, etc., R. Co.*, *supra*; *Harmony v. Bingham*, *supra*, where a public canal was rendered impassable by an unusual freshet; *Parmelee v. Wilks*, 22 Barb. (N. Y.) 539; *Hodgdon v. New York, etc., R. Co.*, 46 Conn. 277, 33 Am. Rep. 21, where a harbor was frozen; *Aylward v. Smith*, 2 Lowell (U. S.) 192; *Parker v. Winslow*, 7 El. & Bl. 942, 90 E. C. L. 942, low water no defense.

Effect of stipulations.—In a contract of a common carrier for the transportation of perishable goods, a stipulation by the consignee to pay a sum in addition to the regular freight, if the property should be delivered by a certain date, does not constitute an agreement to deliver the goods by that date. *Carr v. Schafer*, 15 Colo. 48, 24 Pac. 873.

Where the carrier agrees to deduct a certain sum from the freight for each day's delay beyond the time specified for delivery, this is not an alternative covenant to that for the transportation of the property, but is in the nature of liquidated damages

A carrier cannot avoid liability for breach of its contract to receive and transport cattle at a certain time, by reason of its freedom from negligence in respect to the delay, in the absence of a proviso to that effect.¹⁵ But a carrier is not liable for breach of its contract to deliver a car at a certain place at a specified time, the delay being caused by the shipper's failure to comply with the requirement of the contract that the car be loaded in time to be sent out on a certain day;¹⁶ or by some other act of the complaining party without fault of the carrier.¹⁷ Ordinarily the bill of lading constitutes the contract of shipment and the party alleging a contract to transport by a certain day must prove the contract.¹⁸ Whether there was such a special contract may be a question for the jury under the circumstances of a given case.¹⁹ Where a bill of lading provides for shipment upon one of two vessels, the carrier is not liable for delay because of a shipment on the vessel departing later, where, upon the undisputed facts, the goods were not presented for transportation within such reasonable time as to make it the carrier's duty to ship by the vessel going earlier, and a receipt for the goods, which is a mere acknowledgment that the property has passed into the custody of the carrier, and is to be surrendered upon the receipt of the bill of lading, cannot vary the contract or change the rights of the parties as fixed by the bill of lading.²⁰ A written transportation contract which is silent as to the time of shipment contains an implied obligation to ship within a reasonable time after the goods are delivered, and can-

for the non-performance of the covenant for transportation. *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142.

Rescission of contract.—Where one contracted with the freight agent of a railroad company, for the transportation of goods upon a particular day and train, it is no evidence of subsequent rescission of such contract, that he was subsequently informed by another person "in the employ of the company," that the goods could not be sent by that train if the cars should be full, it not appearing that such person was a freight agent of the company. Cur-

tis v. Chicago, etc., R. Co., 18 Wis. 312.

15. *Gann v. Chicago, etc., R. Co.*, 72 Mo. App. 34.

16. *Stoner v. Chicago, etc., R. Co.*, 109 Iowa, 551, 80 N. W. 569.

17. *Thompson v. Midland R. Co.*, 122 Ala. 378, 24 So. 931.

18. *Bedell v. Richmond, etc., R. Co.*, 94 Ga. 22.

19. *Pickford v. Grand Junction R. Co.*, 12 M. & W. 766; *International, etc., R. Co. v. Wentworth*, 87 Tex. 311.

20. *Fowler v. Liverpool, etc., Steam Co.*, 87 N. Y. 190, 9 Am. & Eng. R. Cas. 235, 37 Fed. 434.

not be modified by parol evidence of an undertaking to ship on a certain train.²¹

§ 3. Liability where there are special instructions by the shipper.—If the common carrier receives goods with orders to “ship immediately,” or to “forward presently,” and the goods are stored in its warehouse or depot on account of the obstruction to navigation or transportation, or for the convenience of the carrier, and while there consumed by fire, it is liable for their value.²² Where a cartman, without authority from the owner of the goods, gives the carrier directions in regard to them, different from instructions previously given by the owner, the company is not protected by them.²³ An agreement by a shipper to permit his goods to be sent to a destination different from that agreed upon in a bill of lading, after a failure on the part of the carrier to comply with its contract, will not prevent him from recovering the damages which may have resulted from the breach of the contract made by the carrier.²⁴

§ 4. Liability under statutes requiring prompt forwarding of freight.—Statutes relating to railroad companies as carriers which require them to furnish suitable cars, on reasonable notice, when within their power to do so, are merely declaratory of the common law duty of the carrier, though providing better for the enforcement of it.²⁵ In a suit under such a statute to recover for a delay in furnishing cars, the complaint must aver reasonable notice, and that it was within the power of the company, at the time, to furnish suitable cars.²⁶ In the exercise of its general police power, the legislature can constitutionally impose on railroads within the State a penalty for each day's delay to transport goods duly delivered to them for the purpose,²⁷ and such a statute is not an

21. Pennsylvania Co. v. Clark, 2 Ind. App. 146, 28 N. E. 208, 27 N. E. 586.

22. Clark v. Needles, 25 Pa. St. 338; Moses v. Boston, etc., R. Co., 24 N. H. (4 Fost.) 71.

23. Moses v. Boston, etc., R. Co., *supra*.

24. Skellie v. Central, etc., R. Co., 81 Ga. 56, 6 S. E. 811.

25. Houston, etc., R. Co. v. Smith, 63 Tex. 322, 23 Am. & Eng. R. Cas. 421. See also § 10, chap. 3.

26. Richardson v. Chicago, etc., R. Co., 61 Wis. 596, 18 Am. & Eng. R. Cas. 530.

27. Branch v. Wilmington, etc., R. Co., 77 N. C. 347; McGowan v. Wilmington, etc., R. Co., 95 N. C. 417, 27 Am. & Eng. R. Cas. 64; White-

unconstitutional regulation of interstate commerce as to freight for shipment out of the State, as it does not tend to trammel or obstruct, but to expedite, such commerce.²⁸ The five days within which, under the North Carolina statute, a railroad company must forward freight or answer in damages, are five full running days, exclusive of the day of delivery and the day of shipment, and including Sunday when it intervenes.²⁹ It is not a good defence to an action under the statute for failure to ship promptly, or to an action for breach of contract to furnish cars for shipment of goods at a certain date, that the accumulation of freight or the shipment of goods over the line at that time was so great that the carrier did not have or was unable to secure the necessary cars for shipment.³⁰ But where the bill of lading contained a clause that the goods were to be shipped "at the company's convenience," the carrier was held not liable to the penalty under similar circumstances, which the company could not have been expected to provide against.³¹

§ 5. Delay in delivering perishable freight.—Under the common law the obligation of a common carrier receiving perishable freight for transportation was to forward it immediately to its destination. In New York there was a statute in force imposing this duty (Chap. 140, § 36, Laws 1850), which was repealed by the Railroad Act of 1892, but the common law obligation still remains to receive and transport the freight within a reasonable time, considering its character, to the place of destination.³²

head v. Wilmington, etc., R. Co., 87 N. C. 255, 9 Am. & Eng. R. Cas. 168;
Katzenstein v. Raleigh, etc., R. Co., 84 N. C. 688, 6 Am. & Eng. R. Cas. 464.

28. Bagg v. Wilmington, etc., R. Co., 109 N. C. 279, 26 Am. St. Rep. 569, 49 Am. & Eng. R. Cas. 46;
Keeter v. Wilmington, etc., R. Co., 86 N. C. 346, 9 Am. & Eng. R. Cas. 167.

29. Branch v. Wilmington, etc., R. Co., 88 N. C. 570.

30. Keeter v. Wilmington, etc., R. Co., *supra*; **Gulf, etc., R. Co. v. Hume, 6 Tex. Civ. App. 653, 27 S. W. 140.**

31. Whitehead v. Wilmington, etc., R. Co., 87 N. C. 255, 9 Am. & Eng. R. Cas. 168.

32. Tierney v. New York Cent. etc., R. Co., 76 N. Y. 308; Aetna Insurance Co. v. Wheeler, 49 N. Y. 616; Mills v. Michigan Cent. R. Co., 45 N. Y. 622; Livingston v. New York Cent., etc., R. Co., 76 N. Y. 631; Cartwright v. Rome, etc., R. Co., 85 Hun (N. Y.), 517, 33 N. Y. Supp. 147; Cantwell v. Pacific Express Co., 58 Ark. 487, 61 Am. & Eng. R. Cas. 206, note; McAndrew v. Whitlock, 52 N. Y. 40.

Where the goods are perishable or are peculiarly liable to injury from delay, the carrier is bound to take reasonable means to guard against such injuries and to use special diligence to avoid delay in its transportation.³³ The carrier is not liable for injuries caused by intrinsic defects or inherent qualities in such goods.³⁴ And the owner of such goods who chooses to ship them under circumstances where they are apt to be exposed to risks, in the absence of a special contract otherwise, assumes the risks incident to ordinary transportation.³⁵ Generally it is the duty of a carrier to forward perishable property as speedily as the exigencies of its freight traffic will permit, even to the exclusion of other general freight not of a perishable nature.³⁶ There is no invariable rule requiring freight to be carried in the order in which it is received, without regard to its character or condition, or its liability to perish, and it is quite generally held that the carrier may and should give preference in transportation to perishable goods over non-perishable goods, if it is unable to forward both at once.³⁷ If an unavoidable delay occurs, the carrier must exercise sound discretion and reasonable diligence in forwarding perish-

33. Michigan Cent. R. Co. v. Curtis, 80 Ill. 324; Missouri Pac. R. Co. v. Cornwall, 70 Tex. 611, 8 S. W. 312; Sherman v. Inman Steamship Co., 26 Hun (N. Y.), 107; St. Clair, etc., R. Co. v. Chicago, etc., R. Co., 80 Iowa, 304, 42 Am. & Eng. R. Cas. 414; Central, etc., R. Co. v. Avant, 80 Ga. 195, 32 Am. & Eng. R. Cas. 475; Blodgett v. Abbot, 72 Wis. 516, 7 Am. St. Rep. 873, carriage over connecting line; McGraw v. Baltimore, etc., R. Co., 18 W. Va. 361, 9 Am. & Eng. R. Cas. 188, 41 Am. Rep. 696; Hewett v. Chicago, etc., R. Co., 63 Iowa, 611, 18 Am. & Eng. R. Cas. 568; Wood v. Chicago, etc., R. Co., 68 Iowa, 491, 56 Am. Rep. 861, 24 Am. & Eng. R. Cas. 91, the carrier is bound by the oral contract of a station agent having express authority.

34. American Express Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561; Evans v. Fitchburg R. Co., 111

Mass. 142; Brown v. Clayton, 12 Ga. 580; Ship Howard v. Wissman, 18 How. (U. S.) 231; The Brig Collenberg, 1 Black (U. S.), 170; Warden v. Greer, 6 Watts (Pa.), 424.

35. Swetland v. Boston, etc., R. Co., 102 Mass. 276.

36. Dixon v. Chicago, etc., R. Co., 64 Iowa, 531, 18 Am. & Eng. R. Cas. 526, 52 Am. Rep. 460; Ballentine v. North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315.

37. Marshall v. New York Cent. R. Co., 45 Barb. (N. Y.) 502, affd. 48 N. Y. 660; Tierney v. New York Cent., etc., R. Co., 76 N. Y. 305, affg. 10 Hun (N. Y.), 569, 67 Barb. (N. Y.) 538; Cooper v. Kane, 19 Wend. (N. Y.) 386, 32 Am. Dec. 512; Peet v. Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446; Michigan Cent. R. Co. v. Burrows, 33 Mich. 6; Great Western R. Co. v. Burns, 60 Ill. 284.

able goods to their destination. If it does not appear, in the exercise of such discretion, that a change of route would prevent the loss attendant upon delay, it is not bound to divert the goods to a route over which it has no control. It may sell the goods for the best price it can obtain, and thus convert what would be inevitably a total loss to the shipper into one that is partial merely.³⁸

§ 6. Delay must have been the proximate cause of injury.— A common carrier is not liable to a shipper or consignee for loss or injury resulting from delay in the shipment or transportation of goods, unless the delay was the proximate cause of the loss or injury, as, for example, where the goods were destroyed or injured by fire, for which the carrier was not responsible, although the goods were exposed to loss or injury by negligent delay in transmission, the delay not being shown to be the proximate cause of the loss or injury.³⁹ But the carrier is liable in all cases where the delay is shown to have been the proximate cause, as, where the carrier negligently allowed compressed cotton to accumulate in large quantities and failed to transport it promptly, or permitted it to lie on the platform where engines were constantly passing, the negligent delay in removing the cotton from a place of necessary danger being the proximate cause of loss.⁴⁰ So, if a common carrier negligently fails to transport merchandise within a reasonable time, and the market price falls, the negligent delay, although it does not cause the decline in the general market, deprives the

38. American Express Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561.

39. Yazoo, etc., R. Co. v. Millsaps, 76 Miss. 855, 71 Am. St. Rep. 542, 25 So. 672; Thomas v. Lancaster Mills, 34 U. S. App. 404, 71 Fed. 481, 19 C. C. A. 88; Morrison v. Davis, 20 Pa. St. 171, 57 Am. Dec. 701, note; Scott v. Baltimore, etc., Steamboat Co., 19 Fed. 56.

A railroad company is not liable for injury to freight resulting from exposure to mud and rain, in consequence of the company's violation of its contract with the road over which the freight was shipped to maintain a narrow gauge track for the benefit

of that road, as the exposure and not the failure to maintain the track is the proximate cause of injury. St. Louis, etc., R. Co. v. Neel, 56 Ark. 279, 55 Am. & Eng. R. Cas. 428, 19 S. W. 963, 12 Ry. & Corp. L. J. 110.

But a common carrier is liable for the loss of a shipment by fire which would not have occurred if it had shipped the property immediately as it agreed to do. Hernsheim v. Newport News, etc., R. Co., 18 Ky. L. Rep. 227, 35 S. W. 1115.

40. Marine Ins. Co. v. St. Louis, etc., R. Co., 41 Fed. 643, 43 Am. & Eng. R. Cas. 79, 19 Ins. L. J. 379, 695; Missouri, etc., R. Co. v. McFadden, 89 Tex. 138, 33 S. W. 853.

owner of his right to the higher market price, and thus is the proximate cause of this loss to him.⁴¹ A verdict against a carrier for delay in transporting perishable merchandise will be sustained where it is admitted that the goods were in good condition when placed in the car, but were worthless when the car was opened after it arrived at its destination, and the evidence is conflicting on other points.⁴² It is not error to submit to the jury the question whether a delay of three days was the cause of the loss of perishable goods, where three witnesses experienced in shipping, testified that when the car was opened the goods indicated that decay had commenced within two or three days.⁴³

§ 7. Waiver of right of action for delay.—A delay probably injurious being shown, it is admissible to show that, before starting, the plaintiff consented to a delay, if necessary, and such consent will constitute a waiver of any right of action against the carrier for negligent delay in the transportation.⁴⁴ A demand for or acceptance of the goods after the accrual of a right of action for delay is not a waiver of the right of action for damages for the delay.⁴⁵

§ 8. Excuses for delay generally.—In the absence of a special contract, the carrier is liable only for negligent delay, and is not liable for delay resulting from a cause not due to its own want of

41. Ward v. New York Cent. R. Co., 47 N. Y. 29, 7 Am. Rep. 405; Zinn v. New Jersey Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402; Sherman v. Hudson River R. Co., 64 N. Y. 259; Dunham v. Boston, etc., R. Co., 70 Me. 164, 35 Am. Rep. 314; Kent v. Hudson River R. Co., 22 Barb. (N. Y.) 278; Medbury v. New York, etc., R. Co., 26 Barb. (N. Y.) 564 overruling Wibert v. New York, etc., R. Co., 19 Barb. (N. Y.) 36; Jones v. New York, etc., R. Co., 29 Barb. (N. Y.) 633; Kirkland v. Leary, 2 Sw. (N. Y.) 677. And the measure of damages is the difference in value at the place of delivery at the time when it

ought to have been delivered and at the time of actual delivery. *Id.* Louisville, etc., R. Co. v. Heilprin, 95 Ill. App. 402.

42. St. Clair v. Chicago, etc., R. Co., 80 Iowa, 304, 45 N. W. 570, 42 Am. & Eng. R. Cas. 414.

43. Ruppel v. Alleghany Valley R. Co., 167 Pa. St. 166, 25 Pitts. L. J. N. S. 403, 36 W. N. C. 210, 31 Atl. 478, 46 Am. St. Rep. 666.

44. Johnson v. Lightsey, 34 Ala. 169, 73 Am. Dec. 450.

45. Nudd v. Wells, 11 Wis. 407; Norfolk, etc., R. Co. v. Shippers Compress Co., 83 Va. 272, 2 S. E. 139, 30 Am. & Eng. R. Cas. 57.

care or diligence. It is the duty of a common carrier to convey the goods without an unnecessary delay or deviation; but it may be necessary for the safe carriage of the goods that it should either delay, or deviate in its course, and it is then justified in so doing. In respect to the time to be occupied in transporting property, the carrier is not held to the extraordinary liability to which it is held for its safety while in its custody, and it may excuse delay in its delivery by proof of misfortune or accident, although not inevitable or produced by the act of God.⁴⁶ Where there is a special contract for delivery within a fixed time, as we have seen, the only excuse for delay that is valid is that the delay was due to the fault of the party with whom the contract was made.⁴⁷ A carrier is not responsible for failure to deliver in due time, if prevented by inevitable accident, such as a railroad collision or blockade occurring on the line of another company, or without fault or negligence on the part of the carrier.⁴⁸ Proof by the consignee of a delay in delivery establishes a *prima facie* case, and puts the burden on the carrier to prove circumstances excusing the delay, by showing that it was due to causes for which it was not responsible.⁴⁹

46. Geismer v. Lake Shore, etc., R. Co., 102 N. Y. 563, 55 Am. Rep. 837, 26 Am. & Eng. R. Cas. 287, revg. 34 Hun (N. Y.), 50; Livingston v. New York Cent., etc., R. Co., 5 Hun (N. Y.), 562, a railroad company is not liable for delay caused by the breaking down of a freight car on another line; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; Lowe v. East Tennessee, etc., R. Co., 90 Ga. 85; Johnson v. East Tennessee, etc., R. Co., 90 Ga. 810; Truax v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 233; Kinnick v. Chicago, etc., R. Co., 69 Iowa, 665, 27 Am. & Eng. R. Cas. 55; Dixon v. Chicago, etc., R. Co., 64 Iowa, 531, 52 Am. Rep. 460, 18 Am. & Eng. R. Cas. 425; International, etc., R. Co. v. Hynes, 3 Tex. Civ. App. 20; Gerhard v. Neese, 36 Tex. 635; Conkey v. Milwaukee, etc., R. Co., 31 Wis. 619, 2 Am. Ry. Rep. 353, 11 Am. Rep. 630; American Express Co. v. Smith, 33 Ohio

St. 511, 31 Am. Rep. 561; Nashville, etc., R. Co. v. Jackson, 6 Heisk. (Tenn.) 271, 12 Am. Ry. Rep. 54; Lamont v. Nashville, etc., R. Co., 9 Heisk. (Tenn.) 58, 19 Am. Ry. Rep. 284; Whitworth v. Erie R. Co., 87 N. Y. 413, 6 Am. & Eng. R. Cas. 349, a carrier is not liable for delay caused by the neglect of a succeeding carrier to receive the goods when tendered; Wallace v. Dublin, etc., R. Co., 8 Ir. R. C. L. 341; Taylor v. Great Northern R. Co., L. R. 1 C. P. 386, 12 Jur. N. S. 372, 14 W. R. 639; Davis v. Garrett, 6 Bing. 716, 19 E. C. L. 212; Hadley v. Clarke, 8 T. R. 259.

47. Harrison v. Missouri Pac. R. Co., 74 Mo. 364, 7 Am. & Eng. R. Cas. 382, 41 Am. Rep. 318. See also cases cited under § 2, *ante*.

48. Conger v. Hudson River R. Co., 6 Duer (N. Y.), 375; Taylor v. Great Northern R. Co., *supra*.

49. Place v. Union Express Co., 2 Hilt. (N. Y.) 19; St. Clair v. Chi-

§ 9. Unusual floods and storms.—Where there is no special contract, an unavoidable delay resulting from an unusual flood, or a storm of such magnitude as to obstruct traffic, excuses the carrier from liability for such delay, provided it has exercised proper care to avoid the obstructions occasioned thereby, and proceeds with the transportation and delivery as soon as traffic is practicable.⁵⁰ A sudden snow storm occurring about as a shipment begins is a sufficient excuse for a delay in transportation which is caused thereby.⁵¹ But the carrier is not relieved from liability for a delay by showing that it was due to an extraordinary and unprecedented flood, where it might have avoided the effects of the flood by the exercise of reasonable diligence and care,⁵² as, for example, where it might have carried a shipment of live stock past the place of a washout, if it had been shipped promptly, or might have shipped the stock over another route.⁵³ It is the duty of the carrier, in such cases, to notify the shipper of the obstruc-

cago, etc., R. Co., 80 Iowa, 304, 42 Am. & Eng. R. Cas. 414; Mann v. Birchard, 40 Vt. 326. See also Burden of proof, chap. 14.

50. Palmer v. Atchison, etc., R. Co., 101 Cal. 187, 61 Am. & Eng. R. Cas. 235; American Express Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561; St. Louis, etc., R. Co. v. Jones, (Tex. Civ. App.) 29 S. W. 695; San Antonio, etc., R. Co. v. Barnett, (Tex. Civ. App.) 27 S. W. 676; Vicksburg, etc., R. Co. v. Ragsdale, 46 Miss. 458, 1 Am. Ry. Rep. 407; Norris v. Savannah, etc., R. Co., 23 Fla. 182, 28 Am. & Eng. R. Cas. 66, 11 Am. St. Rep. 355; Chicago, etc., R. Co. v. Manning, 23 Neb. 552; Nashville, etc., R. Co. v. King, 6 Heisk. (Tenn.) 269; Nashville, etc., R. Co. v. David, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594, 12 Am. Ry. Rep. 9; Briddon v. Great Northern R. Co., 32 L. T. 94, 28 L. J. Exch. 51.

Where a railway company received a car load of wheat for transportation, and, owing to a delay in carriage and delivery at the point of

destination, it was still in possession of the company, when a large part of it was destroyed by an unusual storm the company is not liable for the conversion of the wheat so destroyed; but if the company recovered a portion of the wheat and retained it an unreasonable time, the company is liable for the conversion of the wheat so recovered and retained. Gulf, etc., R. Co. v. Darby (Tex. Civ. App.), 67 S. W. 129.

51. Cunningham v. Wabash R. Co., 79 Mo. App. 524, 2 Mo. A. Repr. 465. A heavy dew, delaying a railway train, is not the act of God, relieving the railway company from liability for delay in shipment of cattle. Missouri, etc., Ry. Co. v. Truskett (Ind. T.), 53 S. W. 444.

52. St. Louis, etc., R. Co. v. Bland (Tex. Civ. App.), 34 S. W. 675.

53. Gulf, etc., R. Co. v. McCorquodale, 71 Tex. 41, 35 Am. & Eng. R. Cas. 653; Guinn v. Wabash, etc., R. Co., 20 Mo. App. 453; Missouri, etc., R. Co. v. Olive (Tex. Civ. App.), 23 S. W. 526.

tions to traffic, so that he may, if he choose, take a different course, and the carrier is liable if loss is sustained which might have been averted by shipping the goods over another line.⁵⁴ The carrier's knowledge of the interruption to its route at the time of its acceptance of the goods for transportation, if not made known to the shipper, may preclude the defense that delay was due to such interruption by the act of God, especially where rapid and safe transportation could have been made over other lines.⁵⁵ But such knowledge must be shown to have been of a definite character.⁵⁶ Mere failure to give notice of a detention by a flood will not render the carrier liable, however, where delivery was made as soon as possible, and notice would not have benefited the consignor or consignee by avoiding the loss or injury of goods which followed.⁵⁷

§ 10. Accumulation of cars and freight.—An accumulation of cars and freight at the place of delivery will not exonerate a carrier from liability for loss by delay upon such railroad, where the carrier had power to remove such obstruction.⁵⁸ The temporary obstruction of the carrier's warehouse by an accumulation of freight does not excuse its delay in delivering goods, where it was within its power, by the exercise of reasonable effort, to have cleared away the obstruction and to have delivered the goods long before it did.⁵⁹ But common carriers are not liable for a delay in the delivery of goods occurring in consequence of an unusual quantity of freight being offered for transportation, and without fault on their part, unless they have expressly contracted to deliver the same within a limited time. They must not, however, be at fault in providing sufficient accommodations for the general traffic of their roads under ordinary circumstances.⁶⁰

54. Alabama, etc., R. Co. v. Brichetto, 72 Miss. 891; Schwab v. Union Line, 13 Mo. App. 159.

55. Adams Express Co. v. Jackson, 92 Tenn. 326, 21 S. W. 666.

56. Palmer v. Atchison, etc., R. Co., 101 Cal. 187, 61 Am. & Eng. R. Cas. 235.

57. Norris v. Savannah, etc., R. Co., 23 Fla. 182, 28 Am. & Eng. R. Cas. 66, 11 Am. St. Rep. 355; Regan v. Grand Trunk R. Co., 61 N. H. 579.

58. Illinois Cent. R. Co. v. Mc-

Clellan, 54 Ill. 58, 5 Am. Rep. 83.

59. Klass Commission Co. v. Wabash R. Co., 80 Mo. App. 164, 2 Mo. A. Repr. 545.

60. Wibert v. New York, etc., R. Co., 12 N. Y. 245, affg. 19 Barb. (N. Y.) 36, 29 Barb. (N. Y.) 635, 2 Sweeny (N. Y.), 683. This rule was held to be true, notwithstanding the general railroad act of 1850, chap. 140, § 36, requiring such companies to furnish sufficient facilities for the transportation of all freight offered.

When the facilities are inadequate to meet the unusual demands for transportation, the shipper should be informed at the time the goods are offered for transportation, or as soon thereafter as the fact becomes known to the carrier, and if the carrier receives goods for shipment, knowing its lack of adequate facilities to meet the unusual press of business, without informing the shipper of the fact, or is at fault in its duty to have and provide proper and sufficient facilities for transportation, it is liable for all damages sustained by delay in delivery of the goods.⁶¹

§ 11. Low water or freezing of water-way.—Where goods are to be transported by water, and, owing to the state of the river, cannot be taken by water to their destination, the carrier is not bound to forward them overland, and, if there has been no want of diligence, is not answerable for delay, if the goods finally arrive safely.⁶² Where transportation by water was impeded in mid-voyage by low water and the carrier was obliged to land and store the goods at an intermediate port, the carrier was not liable for delay, and, if the owner accepts them at the latter place and pays all charges for freight and storage, the carrier is discharged from all subsequent liability on account of its contract.⁶³ The freezing

See also *Blackstock v. New York, etc., R. Co.*, 20 N. Y. 50, 75 Am. Dec. 272; *Ballantine v. North Missouri R. Co.*, 40 Mo. 491, 93 Am. Dec. 315; and other cases cited under Facilities for transportation, § 8, chap. 3.

61. *Bussey v. Memphis, etc., R. Co.*, 4 *McCravy* (U. S.), 405, 13 Fed. 330; *McLaren v. Detroit, etc., R. Co.*, 23 Wis. 138; *Great Western R. Co. v. Burns*, 60 Ill. 284, 12 Am. Ry. Rep. 309. See also Facilities for transportation, § 8, chap. 3.

62. *Silver v. Hale*, 2 Mo. App. 557. Compare *Sumner v. Charlotte, etc., R. Co.*, 78 N. C. 289.

63. *Bennett v. Byram*, 38 Miss. 20, 75 Am. Dec. 90. See also *Vicksburg, etc., R. Co. v. Ragsdale*, 46 Miss. 477.

The words "privilege of reshipping" in a bill of lading, are intended

for the carrier's benefit, but do not limit his responsibility, and where the waters of the Ohio fell so that the boat had to wait at the falls, and a custom was clearly shown of so waiting for a month or more, the words mentioned imposed no obligation to reship, and waiting was justifiable. *Broadwell v. Butler & Co.*, 6 *McLean* (U. S.), 296.

But under a written contract, by which the owners of a steamboat bound themselves, as common carriers, to deliver certain goods at a specified point, the loss of the goods by fire, after having been deposited in a warehouse at the highest point to which, on account of the low stage of the water, the boat could ascend the river, does not excuse the defendant's failure to deliver the goods at the specified point, and the ac-

of a water-way, such as a canal, is such an act of intervention of the *vis major* as will excuse performance until the obstruction is removed, but a contract to carry goods, made by a canal boatman shortly before the period when the canal might be expected to freeze, requires him to make a special effort to perform the contract, and where, by failure to exercise due diligence, the carrier is able to transport the goods only part of the way, it is liable for the damages occasioned by the delay.⁶⁴

§ 12. Strikes by employes.—A carrier is not liable for delay in the shipment and delivery of freight which is caused by a strike of its employes and workmen, accompanied by violence and intimidation by the strikers, with a view of preventing the carrier from employing new agents or preventing those who did not strike and who were ready and willing to work from working, of such a character as cannot be overcome by the company or controlled by the civil authorities when called upon, when such acts are done by persons after they have abandoned the service of the company.⁶⁵ But the mere refusal of the carrier's employes to work,

ceptance of a portion by the consignee, at a place different from that specified in the contract, though admissible in mitigation of damages, does not discharge the carrier from liability for the residue. *Cox v. Peterson*, 30 Ala. 608, 68 Am. Dec. 145.

Evidence by a carrier that goods lost by burning in a warehouse could not be moved before the fire on account of the water being so low is competent to rebut the presumption of negligence arising from delay in reshipping the goods, where the bill of lading exempted the carrier from liability except ordinary neglect in case of fire. *Hornthall v. Roanoke, etc., Steamboat Co.*, 107 N. C. 76, 11 S. E. 1049.

64. *Spann v. Erie Boatman's Transp. Co.*, 11 Misc. Rep. (N. Y.) 680, 33 N. Y. Supp. 566, and the shipper's measure of damages is the difference between the contract price of transportation and the increased

costs necessary to secure the delivery of the property at its destination, and such further increased expense as was necessarily incurred as a consequence of the delay. *Ogden v. Marshall*, 8 N. Y. 340; *Briggs v. New York, etc., R. Co.*, 28 Barb. (N. Y.) 515; *Farwell v. Davis*, 66 Barb. (N. Y.) 73. See also *Parsons v. Hardy*, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521.

Where a carrier was delayed in the transportation of goods by the freezing of a canal owing to the lateness of the season and without any fault on the part of the carrier, and the goods were stored and the shipper notified, the carrier was entitled to recover the expense of unloading and storing the goods. *Beckwith v. Fribbie*, 32 Vt. 559.

65. *Geismer v. Lake Shore, etc., R. Co.*, 102 N. Y. 563, 55 Am. Rep. 837; *Little v. Fargo*, 43 Hun (N. Y.), 233; *Hall v. Pennsylvania R. Co.*, 1 Fed.

thus depriving the carrier, for the time, of the ability to forward the property, where there is no unlawful violence or active interference with the carrier's trains, is no defence to an action for delay in transportation, as the excuse arises wholly out of the misconduct of the carrier's servants who wrongfully refused to perform their duties.⁶⁶ When the places of the recusant employes have been promptly filled with other competent men, and the strikers then by lawless and irresistible violence prevent the new employes from doing duty, the carrier is not responsible for any delay caused solely by such lawless violence.⁶⁷ Where an uncontrollable mob prevents a railroad company from fulfilling its contract to deliver freight, the company is not liable, although had the company not reduced wages, or insisted upon maintaining the reduction, there would have been no mob.⁶⁸

§ 13. Limitation of liability for delay.—The general rule is that common carriers may limit their common law liability only by stipulation or contract,⁶⁹ and that such contract or stipulation

226, 3 Am. & Eng. R. Cas. 274, 14 Phila. (Pa.) 414; Haas v. Kansas City, etc., R. Co., 81 Ga. 792, 35 Am. & Eng. R. Cas. 572; Louisville, etc., R. Co. v. Queen City Coal Co. (Ky.), 35 S. W. 626; Bartlett v. Pittsburgh, etc., R. Co., 94 Ind. 281, 18 Am. & Eng. R. Cas. 549; Hamilton v. Western North Carolina R. Co., 96 N. C. 398; International, etc., R. Co. v. Tisdale, 74 Tex. 8; Gulf, etc., R. Co. v. Levi, 76 Tex. 337, 42 Am. & Eng. R. Cas. 439; Southern Pac. R. Co. v. Johnsen (Tex. App.), 15 S. W. 121, 45 Am. & Eng. R. Cas. 338; Gulf, etc., R. Co. v. Gatewood, 79 Tex. 89; Indianapolis, etc., R. Co. v. Juntgen, 10 Ill. App. 295; White v. Missouri Pac. R. Co., 19 Mo. App. 400; Budgett v. Binnington, 1 Q. B. 35. Compare Missouri Pac. R. Co. v. Levi, 4 Tex. App. Civ. Cas. § 8.

66. Blackstock v. New York, etc., R. Co., 20 N. Y. 48, 75 Am. Dec. 372; People v. New York Cent., etc., R. Co., 28 Hun (N. Y.), 543, 9 Am. &

Eng. R. Cas. 1; Weed v. Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474; International, etc., R. Co. v. Server, 3 Tex. App. Civ. Cas. § 440; Pittsburgh, etc., R. Co. v. Hazen, 84 Ill. 36, 25 Am. Rep. 422; Central, etc., R. Co. v. Georgia Fruit, etc., Exch., 91 Ga. 389, 55 Am. & Eng. R. Cas. 606.

The shipper must be notified, in case of a delay due to a strike. Alabama, etc., R. Co. v. Brichetto, 72 Miss. 891.

67. Geismer v. Lake Shore, etc., R. Co., 102 N. Y. 563, 55 Am. Rep. 837; Pittsburgh, etc., R. Co. v. Hollowell, 65 Ind. 188, 32 Am. Rep. 63; Lake Shore, etc., R. Co. v. Bennett, 89 Ind. 457; Pittsburgh, etc., R. Co. v. Hazen, 84 Ill. 36, 25 Am. Rep. 422; International, etc., R. Co. v. Server, 3 Tex. App. Civ. Cas. § 441.

68. Lake Shore, etc., R. Co. v. Bennett, 89 Ind. 454.

69. Mynard v. Syracuse, etc., R. Co., 71 N. Y. 180; Magnin v. Dins-

can in no event exempt the carrier from liability for loss occasioned by its own negligence.⁷⁰ The general rules governing contracts limiting the liability of carriers generally, as discussed herein later on, apply to the limitation of liability for delay.⁷¹

§ 14. Carrier's duty during delay.—In any emergency where there is a delay in the delivery of goods, the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles interposed, to protect the goods from injury, and to forward the goods to their destination.⁷²

§ 15. Delay concurring with inevitable accident.—The rule in New York and some other states is that a common carrier, in order to claim exemption from liability for damage done to goods in its hands in the course of transportation, though injured by what is deemed the act of God, must be without fault itself; its act or neglect must not concur and contribute to the injury. If it departs from the line of duty and violates its contract, and while thus in fault, and in consequence of the fault, the goods are injured by the act of God, which would not have otherwise caused the injury, it is not protected. Where a common carrier therefore receives goods for transportation, but unreasonably delays shipping them and meanwhile they are injured by an inevitable accident, the carrier is liable.⁷³ The United States courts, the

more, 56 N. Y. 168; Cragin v. New York Cent. R. Co., 51 N. Y. 61. See also Limitation of Liability, chap 10.

70. Nicholas v. New York Cent., etc., R. Co., 89 N. Y. 370, 9 Am. & Eng. R. Cas. 103; Leonard v. Chicago, etc., R. Co., 54 Mo. App. 293; Branch v. Wilmington, etc., R. Co., 88 N. C. 573, 18 Am. & Eng. R. Cas. 621; White v. Great Western R. Co., 2 C. B. N. S. 7, 89 E. C. L. 7, 26 L. J. C. P. 158.

71. See Limitation of Liability, chap. 10.

72. Geismer v. Lake Shore, etc., R. Co., 102 N. Y. 563, 55 Am. Rep. 837; Regan v. Grand Trunk R. Co., 61 N.

H. 579. See also Carrier's liability as warehouseman, chap. 9.

73. Mynard v. Syracuse, etc., R. Co., 71 N. Y. 80; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426; Michaels v. New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Heyl v. Inman Steamship Co., 14 Hun (N. Y.), 564; Bostwick v. Baltimore, etc., R. Co., 45 N. Y. 712; Dunson v. New York Cent. R. Co., 3 Lans. (N. Y.) 265; Merritt v. Earle, 29 N. Y. 115; Wing v. New York, etc., R. Co., 1 Hilt. (N. Y.) 235; Condict v. Grand Trunk R. Co., 54 N. Y. 500; Rawson v. Holland, 59 N. Y. 611, 18 Am. Rep. 394; Dunham v. Boston,

courts of Massachusetts, Pennsylvania and some other states, maintain the contrary view that the carrier is not liable, since the negligent delay is the remote and not the proximate cause of the injury, and the carrier is responsible only for the proximate and not for the remote consequences of its actions.⁷⁴ But the latter rule is qualified, when it appears that the carrier unnecessarily exposed the property to such accident by any culpable act or omission of its own, or neglected to make provision for those dangers which ordinary skill and foresight is bound to anticipate, and the carrier in such cases is held liable.⁷⁵

etc., R. Co., 70 Me. 164, 30 Am. Rep. 314; New Brunswick, etc., T. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394; Forward v. Pittard, 1 T. R. 27; Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745; Pruitt v. Hannibal, etc., R. Co., 62 Mo. 527; Wolf v. American Express Co., 43 Mo. 421, 97 Am. Dec. 406; Armentrout v. St. Louis, etc., R. Co., 1 Mo. App. 158; Davis v. Wabash, etc., R. Co., 89 Mo. 340, 26 Am. & Eng. R. Cas. 315; Richmond, etc., R. Co. v. Benson, 86 Ga. 203, 22 Am. St. Rep. 446. See also Clark v. Pacific R. Co., 39 Mo. 184, 90 Am. Dec. 458; Gilkerson v. Pacific R. Co., 39 Mo. 354.

74. Memphis, etc., R. Co. v. Reeves, 10 Wall. (U. S.) 176; Wertheimer v. Pennsylvania R. Co., 17 Blatchf. (U. S.) 421; Denny v. New York Cent. R. Co., 13 Gray (Mass.), 481, 74 Am. Dec. 645; Morrison v. Davis, 20 Pa. St. 171, 57 Am. Dec. 695; Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; Clark v. Needles, 25 Pa. St. 338; Haverly v. State Line, etc., R. Co.,

135 Pa. St. 50, 43 Am. & Eng. R. Cas. 31, 20 Am. St. Rep. 848; McCarthy v. Louisville, etc., R. Co., 102 Ala. 193, 48 Am. St. Rep. 29, 61 Am. & Eng. R. Cas. 182; O'Brien v. McGlinchy, 68 Me. 557; Michigan Cent. R. Co. v. Burrows, 33 Mich. 6; McClary v. Sioux City, etc., R. Co., 3 Neb. 44, 19 Am. Rep. 631; MacVeagh v. Atchison, etc., R. Co., 3 N. M. 205, 18 Am. & Eng. R. Cas. 651; Daniels v. Ballentine, 23 Ohio St. 532, 13 Am. Rep. 264; Lamont v. Nashville, etc., R. Co., 9 Heisk. (Tenn.) 58; White v. Conly, 14 Lea (Tenn.), 51, 52 Am. Rep. 154; Davis v. Central Vermont R. Co., 66 Vt. 290, 44 Am. St. Rep. 852, 61 Am. & Eng. R. Cas. 201; Beckwith v. Frisbie, 32 Vt. 559.

75. McGraw v. Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188, citing Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235; Morrison v. Davis, 20 Pa. St. 171, 57 Am. Dec. 695; Hewett v. Chicago, etc., R. Co., 63 Iowa, 611, 18 Am. & Eng. R. Cas. 568.

CHAPTER IX.

LIABILITY AS WAREHOUSEMAN.

- SECTION**
- 1. Carrier's liability as warehouseman before transportation.
 - 2. Carrier's liability as warehouseman during transportation.
 - 3. Carrier's liability as warehouseman as to goods awaiting delivery.—Massachusetts rule.
 - 4. The New Hampshire rule.—English rule.—Origin of different rules.
 - 5. Conflict of laws.
 - 6. What is reasonable time for removal of goods generally.
 - 7. Time extended by failure or refusal to deliver.
 - 8. Notice to consignee held not essential.
 - 9. Necessity of notice maintained.
 - 10. Sufficiency of notice.
 - 11. Notice to consignor.
 - 12. Liability of connecting carriers.
 - 13. The burden of proof.
 - 14. Effect of special contract or usage on rule.
 - 15. Duty of carrier as warehouseman to store safely.
 - 16. Carrier's liability as warehouseman for negligence,
 - 17. Statute making railroad company liable for losses by fire.

§ 1. Carrier's liability as warehouseman before transportation.

—Whether the carrier's relation is that of a common carrier or a warehouseman must often be determined in order to determine the extent of its liability, its liability in the first relation being that of an insurer, and in the second relation it being liable for ordinary negligence only and held only to ordinary diligence, as we have already seen.¹ The principle is well settled that a carrier is responsible as such only when goods are delivered to and accepted by it for immediate transportation in the usual course of business. If delivered awaiting further orders from the shipper before carriage, it is, while they are in its custody, responsible only as warehouseman.² The test whether the carrier's relation

1. See §§ 2 and 33, chap. 2. Y. 262; Moses v. Boston, etc., R. Co.,

2. O'Neil v. New York Cent., etc., 24 N. H. 71, 55 Am. Dec. 222. See R. Co., 60 N. Y. 138, 10 Am. Ry. Rep. 121; Rogers v. Wheeler, 52 N.

is that of a common carrier or a warehouseman is generally stated to be whether the goods have been delivered by the shipper for the purpose of immediate transportation, without further orders, or not.³ If the goods are not delivered for immediate transportation in the usual course of business, but the shipment is delayed at the instance of the owner, or the goods retained at the shipper's request, or the carrier is instructed to await further orders before shipping, the carrier's relation and liability is that of a warehouseman only until after the shipper has given directions for immediate shipment, or the time for immediate shipment has arrived.⁴ If something remains to be done by the shipper after the goods have been delivered for shipment, the relation and liability of the carrier is that of a warehouseman merely.⁵ But when the

3. Coyle v. Western R. Corp. 47 Barb. (N. Y.) 152; Wade v. Wheeler, 2 Lans. (N. Y.) 201; Judson v. Western R. Corp. 4 Allen (Mass.), 520, 81 Am. Dec. 718; Fitchburg, etc., R. Co. v. Hanna, 6 Gray (Mass.), 539, 66 Am. Dec. 427; Pittsburgh, etc., R. Co. v. Barrett, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 256; Clarke v. Needles, 25 Pa. St. 338; White v. Goodrich Transp. Co., 46 Wis. 493, 21 Am. Ry. Rep. 398; Little Rock, etc., R. Co. v. Hunter, 42 Ark. 200; Goodbar v. Wabash R. Co., 53 Mo. App. 434.

4. O'Neil v. New York Cent., etc., R. Co., *supra*; Platt v. Hibbard, 7 Cow. (N. Y.) 499; Nichols v. Smith, 115 Mass. 332; Dickinson v. Winchester, 4 Cush. (Mass.) 114, 50 Am. Dec. 760; Michigan Southern, etc., R. Co. v. Shurtz, 7 Mich. 515; St. Louis, etc., R. Co. v. Montgomery, 39 Ill. 335; Little Rock, etc., R. Co. v. Hunter, 42 Ark. 200, 18 Am. & Eng. R. Cas. 527; Illinois Cent. R. Co. v. Troustine, 64 Miss. 834; Basnight v. Atlantic, etc., R. Co., 111 N. C. 592; Schmidt v. Chicago, etc., R. Co., 90 Wis. 504; Pittsburgh, etc., R. Co. v. Barrett, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 256; Milloy v.

Grand Trunk R. Co., 23 Ont. Rep. 454, 55 Am. & Eng. R. Cas. 579; Foard v. Atlantic, etc., R. Co., 8 Jones L. (N. C.) 235, 78 Am. Dec. 277.

5. St. Louis, etc., R. Co. v. Knight, 122 U. S. 79; Barron v. Eldridge, 100 Mass. 455, 1 Am. Rep. 126; Watts v. Boston, etc., R. Corp., 106 Mass. 467; Alabama, etc., R. Co. v. Mt. Vernon Co., 84 Ala. 173; Mulligan v. Northern Pacific R. Co., 4 Dak. 315, 29 N. W. 659, 27 Am. & Eng. R. Cas. 33; Illinois Cent. R. Co. v. Ashmead, 58 Ill. 487; Illinois Cent. R. Co. v. McClellan, 54 Ill. 58; Illinois Cent. R. Co. v. Homberger, 77 Ill. 457; Basnight v. Atlantic, etc., R. Co., 111 N. C. 592. The last five cases cited were where goods had been deposited upon the platform or in the warehouse or car of the carrier for future shipment.

A charter provision as to "goods on deposit awaiting delivery" does not include goods awaiting transportation, but only those which have reached their destination. Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318.

Where goods are delivered to a car-

goods are detained or delayed awaiting shipment, through the carrier's act or to suit its purpose or convenience, and not on account of or by the request or act of the owner or shipper, the relation and liability is that of a common carrier and not of a warehouseman.⁶

§ 2. Carrier's liability as warehouseman during transportation.—While goods are in course of transportation carriers can only be relieved of their liability as common carriers by a delivery of the goods to the next carrier in the line of transportation, or by a notice to it that the goods are ready for delivery, and the lapse of a reasonable time for the latter to take them away, and in the event of its neglect so to do, the proper storage of the same, or by the doing of some act indicating a renunciation of the relation of carrier. In the event of a delay in the delivery to the succeeding carrier, for which the initial carrier is not responsible, it is its duty to notify the shipper immediately and await further instructions⁷

rier to be shipped, but not to be shipped till other goods are delivered the next morning, to be shipped with them, its liability in the meantime is that of a warehouseman only. Missouri Pac. R. Co. v. Riggs, (Kan. App.) 62 Pac. 712.

6. Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Gregory v. Wabash R. Co., 46 Mo. App. 574; Meyer v. Vicksburg, etc., R. Co., 41 La. Ann. 639; Gulf, etc., R. Co. v. Trawick, 80 Tex. 270; Moffatt v. Great Western R. Co., 15 L. T. N. S. 630.

The Massachusetts statute providing that a railroad company shall be liable for property burned by fire communicated by its engines, does not apply where the goods burned were in the custody of the company as a warehouseman. Bassett v. Connecticut River R. Co., 145 Mass. 129, 1 Am. St. Rep. 443, 32 Am. & Eng. R. Cas. 528. But it does apply where the goods were in a storehouse owned

by the company, but used exclusively by the consignee, neither the relation of carrier nor warehouseman existing at the time of the fire. Blaisdell v. Connecticut River R. Co., 145 Mass. 32.

7. Mills v. Michigan Cent. R. Co., 45 N. Y. 622, 6 Am. Rep. 152; McDonald v. Western Transp. Co., 34 N. Y. 497; Goold v. Chapin, 20 N.Y. 259, 75 Am. Dec. 398; Illinois. Cent. R. Co. v. Mitchell, 68 Ill. 471, 18 Am. Rep. 564; Merchants' Despatch, etc., Co. v. Moore, 88 Ill. 136, 21 Am. Ry. Rep. 293; Mason v. Grand Trunk R. Co., 37 U. C. Q. B. 163. See also Connecting carriers, chap. 17; Liability for delay, chap. 8.

Where a railroad company receives loaded cars from another road for transportation, it is liable as a common carrier in case they are destroyed en route by fire. Missouri Pac. R. Co. v. Chicago, etc., R. Co., 25 Fed. 317, 23 Am. & Eng. R. Cas. 718.

§ 3. Carrier's liability as warehouseman as to goods awaiting delivery.—Massachusetts rule.—The doctrine of the courts is conflicting as to when the relation and liability of a common carrier ceases and that of a warehouseman only attaches, where goods have been transported to their destination and are in the vehicles or warehouses of the carrier awaiting delivery to the consignee. In Massachusetts and some other States what is known as the Massachusetts rule is adopted, which holds that the carrier by railroad can only be required to carry the goods safely to the station and place them on the platform or in a warehouse; that when it has transported them safely to the place of delivery, and, the consignee not being present to receive them, has unloaded them and put them in a safe and proper place for the consignee to take them away, if the goods are of the kind that are usually unloaded and put in the freight house or warehouse by the carrier, or has them in its cars ready to be unloaded, if of the kind that the consignee usually takes from the cars, the liability of the carrier as an insurer is ended, and it becomes liable, by force of law, as a depositary or custodian of the property, or warehouseman, bound to reasonable diligence in the custody of them and liable only for a want of ordinary care. The carrier is not bound to give notice to the consignee of the arrival of the goods, but it is the duty of the latter to call for and take away the goods without notice from the carrier. The carrier is entitled to assume the liability of warehouseman, upon the completion of the transportation and the safe storage of the goods, during such reasonable time as they remain in its custody awaiting the call of the consignee.⁸ The existence

8. Mass.—*Nealand v. Boston, etc., R. Co.*, 161 Mass. 67; *Blaisdell v. Connecticut River R. Co.*, 145 Mass. 132; *Bassett v. Connecticut River R. Co.*, 145 Mass. 129, 1 Am. St. Rep. 443, 32 Am. & Eng. R. Cas. 528; *Rice v. Hart*, 118 Mass. 201, 19 Am. Rep. 433; *Stowe v. New York, etc., R. Co.*, 113 Mass. 521; *Lane v. Boston, etc., R. Co.*, 112 Mass. 455; *Barron v. Elridge*, 100 Mass. 455, 1 Am. Rep. 126; *Rice v. Boston, etc., R. Corp.*, 98 Mass. 212; *Norway Plains Co. v. Boston, etc., R. Co.*, 1 Gray (Mass.) 272, 61 Am. Dec. 423; *Thomas v.*

Boston, etc., R. Corp. 10 Metc. (Mass.) 477, 43 Am. Dec. 444.

Ga.—*Georgia, etc., R. Co. v. Pound*, 111 Ga. 6, 36 S. E. 312; *Almand v. Georgia R., etc., Co.*, 95 Ga. 775; *Georgia R. etc., Co. v. Thompson*, 86 Ga. 327, 45 Am. & Eng. R. Cas. 422; *Western, etc., R. Co. v. Camp*, 53 Ga. 596; *Southwestern R. Co. v. Felder*, 46 Ga. 433, 11 Am. Ry. Rep. 419; *Rome R. Co. v. Sullivan*, 14 Ga. 277; *Central R., etc., Co. v. Anderson*, 58 Ga. 393, 16 Am. Ry. Rep. 85; *Georgia Code*, § 2070, where the goods arrive out of time, notice must be given to

of a custom or established usage may be shown to vary the general rule in some States.⁹

the consignee and a reasonable time allowed to him to call for and remove them.

Ill.—Chicago, etc., R. Co. v. Kendall, 72 Ill App. 105; Gregg v. Illinois Cent. R. Co., 147 Ill. 550, 37 Am. St. Rep. 238; Porter v. Chicago, etc. R. Co., 20 Ill. 407, 71 Am. Dec. 286; Illinois Cent. R. Co. v. Friend, 64 Ill. 303; Chicago, etc., R. Co. v. Scott, 42 Ill. 132; Vincent v. Chicago, etc., R. Co. 49 Ill. 33; Illinois Cent. R. Co. v. Alexander, 20 Ill. 23; Davis v. Michigan Southern, etc., R. Co., 20 Ill. 412; Richards v. Michigan Southern, etc., R. Co., 20 Ill. 404; Merchants' Dispatch Transp. Co. v. Hallcock, 64 Ill. 284; Rothschild v. Michigan Cent. R. Co., 69 Ill. 164; Chicago, etc., R. Co. v. Sawyer, 69 Ill. 285, 18 Am. Rep. 613; Cahn v. Michigan Cent. R. Co., 71 Ill. 96; Merchants' Dispatch, etc., R. Co. v. Moore, 88 Ill. 138, 30 Am. Rep. 541; Chicago, etc., R. Co. v. Jenkins, 103 Ill. 599; Chicago, etc., R. Co. v. Bensley, 69 Ill. 630, but the liability of a common carrier ceases only after the unloading of the goods.

Ind.—Pittsburgh, etc., R. Co. v. Nash, 43 Ind. 423; Cincinnati, etc., R. Co. v. McCool, 26 Ind. 140; Bannsmer v. Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367.

Iowa.—Mohr v. Chicago, etc., R. Co., 40 Iowa, 579; Francis v. Dubuque, etc., R. Co., 25 Iowa, 60, 95 Am. Dec. 769.

The duty of a railroad company, as a carrier of wheat in bulk, does not cease until the cars have been so placed that they can be unloaded with a reasonable degree of convenience. It is not enough to put the cars where, possibly, they could be

unloaded. *Independence Mills Co. v. Burlington, etc., R. Co.*, 72 Iowa 535, 2 Am. St. Rep. 258, 32 Am. & Eng. R. Cas. 456.

When a carrier ceases to be a carrier and becomes a warehouseman, it cannot be protected as a carrier by the constitutional provisions as to regulations of commerce. *State v. Creeden*, 78 Iowa, 556, 43 N. Y. 673, 40 Am. & Eng. R. Cas. 31, 7 L. R. A. 295.

Mo.—*Pindell v. St. Louis, etc., R. Co.*, 41 Mo. App. 84; *Hartman v. Louisville, etc., R. Co.*, 39 Mo. App. 88; *Buddy v. Wabash, etc., R. Co.*, 20 Mo. App. 206; *Kansas City Transfer Co. v. Neiswanger*, 18 Mo. App. 103; *Bergner v. Chicago, etc., R. Co.*, 13 Mo. App. 499; *Eaton v. St. Louis, etc., R. Co.*, 12 Mo. App. 386; *Gashweiler v. Wabash, etc., R. Co.*, 83 Mo. 112, 25 Am. & Eng. R. Cas. 403, 53 Am. Rep. 558; *E. O. Stannard Milling Co. v. White Line Cent. Transit Co.*, 122 Mo. 258, 61 Am. & Eng. R. Cas. 185; *Rankin v. Pacific R. Co.*, 55 Mo. 167; *Cramer v. American Merchants' U. Exp. Co.*, 56 Mo. 524; *Holtzclaw v. Duff*, 27 Mo. 395.

N. C.—*Turrentine v. Wilmington, etc., R. Co.*, 100 N. C. 375, 6 Am. St. Rep. 602; *Neal v. Wilmington, etc., R. Co.*, 8 Jones L. (N. C.) 482; *Hilliard v. Wilmington, etc., R. Co.*, 6 Jones L. (N. C.) 343.

Pa.—*Allam v. Pennsylvania R. Co.*, 3 Pa. Super. Ct. 335, 183 Pa. 104, 41 W. N. C. 205, 38 Atl. 709, 39 L. R. A. 535; *National Line Steamship Co. v. Smart*, 107 Pa. St. 492; *Shenk v. Philadelphia Steam Propeller Co.*, 60 Pa. St. 109, 100 Am. Dec. 541; *McCarty v. New York, etc., R. Co.*, 30 Pa. St. 247; *Union Express Co. v.*

§ 4.—The New Hampshire rule.—English rule.—Origin of different rules.—In New Hampshire, New York and most of the other States what is known as the New Hampshire rule is followed, which holds that the carrier's liability as insurer in the case of railroads continues after the arrival of the goods at their destination and their removal into the warehouse, until the owner or consignee has had a reasonable time in which to call or send for them, inspect them, and take them away or reject them. The carrier's duty has not been completely performed until he has delivered the goods, or offered to deliver them to the consignee, or has done what is equivalent to delivery by giving to the consignee, if he can be found, due notice after their arrival, and by furnishing him a reasonable time thereafter to take charge of and remove the same. If the consignee does not then call for them, liability as a common carrier ceases.¹⁰ The rule laid down by the

Oleman, 92 Pa. St. 323, but express companies are bound to make actual delivery. And the carrier is bound to give notice when he specially contracts to do so. *Tanner v. Oil Creek R. Co.*, 53 Pa. St. 411. See also *Eagle v. White*, 6 Whart. (Pa.) 505, 37 Am. Dec. 434.

Tenn.—*East Tennessee, etc., R. Co. v. Kelly*, 91 Tenn. 699, 55 Am. & Eng. R. Cas. 621; *Butler v. East Tennessee, etc., R. Co.*, 8 Lea (Tenn.) 32, 9 Am. & Eng. R. Cas. 249; *Southern Express Co. v. Kaufman*, 12 Heisk. (Tenn.) 165; *Dean v. Vaccaro*, 2 Head (Tenn.) 488, 75 Am. Dec. 744; *Lancaster Mills v. Merchants' Cotton-Press Co.*, 89 Tenn. I, 24 Am. St. Rep. 586, 45 Am. & Eng. R. Cas. 423.

A railroad company keeping the property of its patrons in its own warehouse for a reasonable time until it shall be called for, is, in the absence of statute, to be regarded as a bailee for hire, and not a naked depositary. *Hardman v. Montana U. R. Co.*, 48 U. S. App. 570, 39 L. R. A. 300, 83 Fed. Rep. 88, 27 C. C. A. 407; *Norway Plains Co. v. Boston*,

etc., R. Co., 1 Gray (Mass.) 273, 61 Am. Dec. 423.

9. Georgia, etc., R. Co. v. Pound, 111 Ga. 6, 36 S. E. 312.

10. N. H.—*Welch v. Concord R. Co.*, 68 N. H. 206, 44 Atl. 304; *Moses v. Boston, etc., R. Co.*, 32 N. H. 523, 64 Am. Dec. 388; *Jewell v. Grand Trunk R. Co.*, 55 N. H. 84; *Smith v. Nashua, etc., R. Co.*, 27 N. H. 86, 59 Am. Dec. 364.

N. Y.—*King v. New Brunswick, etc., Steamboat Co.*, 36 Misc. Rep. (N. Y.) 555, 73 N. Y. Supp. 999; *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170, 17 N. E. 721, 6 Am. St. Rep. 350; *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574; *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *Nicholas v. New York Cent., etc., R. Co.*, 89 N. Y. 370, 9 Am. & Eng. R. Cas. 103; *Draper v. Delaware, etc., Canal Co.*, 118 N. Y. 118, 42 Am. & Eng. R. Cas. 410; *Pelton v. Rensselaer, etc., R. Co.*, 54 N. Y. 214, 13 Am. Rep. 568; *Sprague v. New York Cent. R. Co.*, 52 N. Y. 637; *Mills v. Michigan Cent. R. Co.*, 45 N. Y. 622, 6 Am. Rep. 152; *Zinn v. New*

English authorities is substantially the same as the New Hampshire rule. The consignee of goods shipped is entitled to a reasonable time within which to take away the goods, and that rea-

Jersey Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402; Hedges v. Hudson River R. Co., 49 N. Y. 223; McAndrew v. Whitlock, 52 N. Y. 40, 11 Am. Rep. 657; Rawson v. Holland, 59 N. Y. 611, 17 Am. Rep. 394; McKinney v. Jewett, 90 N. Y. 267, 9 Am. & Eng. R. Cas. 209; Solomon v. Philadelphia, etc., Steamboat Co., 2 Daly (N. Y.) 104; Price v. Powell, 3 N. Y. 322; Fenner v. Buffalo, etc., R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Byrne v. Fargo, 36 Misc. Rep. (N. Y.) 543, 73 N. Y. Supp. 943.

The question of reasonable time becomes immaterial where loss or injury results from a want of ordinary care on the part of the carrier. Lamb v. Camden, etc., R. Co., 2 Daly (N. Y.) 454.

Ala.—Southern Express Co. v. Holland, 109 Ala. 362, 19 So. 66; Collins v. Alabama, etc., R. Co., 104 Ala. 390; Columbus, etc., R. Co. v. Ludden, 89 Ala. 612, 42 Am. & Eng. R. Cas. 404; Anniston, etc., R. Co. v. Ledbetter, 92 Ala. 326; South, etc., Alabama R. Co. v. Wood, 66 Ala. 167, 9 Am. & Eng. R. Cas. 419, 41 Am. Rep. 749; Louisville, etc., R. Co. v. McGuire, 79 Ala. 395; Kennedy v. Mobile, etc., R. Co., 74 Ala. 430, 21 Am. & Eng. R. Cas. 145; Mobile, etc., R. Co. v. Prewitt, 46 Ala. 63, 7 Am. Rep. 586; Alabama, etc., R. Co. v. Kidd, 35 Ala. 209; Western R. Co. v. Little, 86 Ala. 159, 37 Am. & Eng. R. Cas. 659; Alabama, etc., R. Co. v. Grabfelder, 83 Ala. 200.

Ark.—St. Louis, etc., R. Co., v. Dodd, 59 Ark. 317; Missouri Pac. R. Co. v. Nevill, 60 Ark. 375, 28 L. R. A. 80.

Cat.—Cavallaro v. Texas, etc., R. Co., 110 Cal. 348; Wilson v. California Cent. R. Co., 94 Cal. 166, 17 L. R. A. 685. Notice must be given to the consignee under sec. 2120 of the Civil Code. See also Hirshfield v. Central Pac. R. Co., 56 Cal. 484, 7 Am. & Eng. R. Cas. 398; Jackson v. Sacramento Valley R. Co., 23 Cal. 270.

Conn.—Graves v. Hartford, etc., Steamboat Co., 38 Conn. 143, 9 Am. Rep. 369.

Del.—McHenry v. Philadelphia, etc., R. Co., 4 Harr. (Del.) 448.

Kan.—Kansas City, etc., R. Co. v. Patten, 3 Kan. App. 338; Missouri Pac. R. Co. v. Wichita, etc., Grocery Co., 55 Kan. 525; Leavenworth, etc., R. Co. v. Maris, 16 Kan. 333.

Ky.—Wald v. Louisville, etc., R. Co., 92 Ky. 645; Jeffersonville, etc., R. Co. v. Cleveland, 2 Bush (Ky.) 473.

La.—Maignan v. New Orleans, etc., R. Co., 24 La. Ann. 333.

Md.—Baltimore, etc., R. Co. v. Green, 25 Md. 72.

Mich.—Black v. Ashley, 80 Mich. 90, 42 Am. & Eng. R. Cas. 428; Feige v. Michigan Cent. R. Co., 62 Mich. 1; Buckley v. Great Western R. Co., 18 Mich. 121; McMillen v. Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Hasse v. American Express Co., 94 Mich. 133, 34 Am. St. Rep. 328, 55 Am. & Eng. R. Cas. 635.

Minn.—Kirk v. Chicago, etc., R. Co., 59 Minn. 161, 61 Am. & Eng. R. Cas. 203; Arthur v. St. Paul, etc., R. Co., 38 Minn. 95; Derosia v. Winona, etc., R. Co., 18 Minn. 133; Pinney v. First Div. St. Paul, etc., R. Co., 18

sonable time begins from notice or knowledge. When such time has elapsed the carrier becomes liable as warehouseman merely.¹¹ The conflict of opinion as to the proper rule to be applied in such cases arose from the common law rule requiring actual delivery by the carrier to the consignee. The impracticability of actual delivery by railroads, from their peculiar character and the magnitude of their business, and carriers by water, made a modification of that rule necessary so that a deposit of the goods and notice to the consignee were made a substitute for actual delivery. The cases holding to the Massachusetts view go upon the theory that the

Minn. 251, 20 Am. Ry. Rep. 71; Armstrong v. Chicago, etc., R. Co., 45 Minn. 85, 45 Am. & Eng. R. Cas. 422.

Neb.—Burlington, etc., R. Co. v. Arms, 15 Neb. 69.

N. J.—Morris, etc., R. Co. v. Ayres, 29 N. J. L. 393, 80 Am. Dec. 215.

Ohio.—Lake Erie, etc., R. Co. v. Hatch, 6 Ohio Cir. Ct. Rep. 230, 52 Ohio St. 408, 61 Am. & Eng. R. Cas. 293, note; Hirsch v. Steamboat Quaker City, 2 Disney (Ohio), 144.

S. C.—Hipp v. Southern R. Co., 50 S. C. 129, 27 S. E. 623; Spears v. Spartanburg, etc., R. Co., 11 S. C. 158.

Tex.—Missouri Pac. R. Co. v. Hayes, 72 Tex. 175; Houston, etc., R. Co. v. Adams, 49 Tex. 748, 30 Am. Rep. 116. See Texas, Rev. Stat.

Vt.—Winslow v. Vermont, etc., R. Co., 42 Vt. 700, 1 Am. Rep. 365; Blumenthal v. Brainard, 38 Vt. 402, 91 Am. Dec. 350; Ouimit v. Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

Wis.—Backhaus v. Chicago, etc., R. Co., 92 Wis. 393; Lemke v. Chicago, etc., R. Co., 39 Wis. 449, 13 Am. Ry. Rep. 406; Parker v. Milwaukee, etc., R. Co., 30 Wis. 689, 7 Am. Ry. Rep. 255; Wood v. Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 465; Wood v. Crocker, 18 Wis. 345, 86 Am. Dec. 773; Milwaukee, etc., R. Co. v. Fairchild, 6 Wis. 403.

U. S.—The City of Lincoln, 25 Fed. 835; The Mary Washington, 1 Abb. (U. S.) 1, Chase's Dec. (U. S.) 125, as to common carriers by water. Hardman v. Montana Union R. Co., 48 U. S. App. 570, 83 Fed. 88, 27 C. C. A. 407, 39 L. R. A. 300.

W. Va.—Berry v. West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 11 Am. & Eng. R. Cas. N. S. 103.

11. Eng.—Chapman v. Great Western R. Co., 5 Q. B. Div. 278, 49 L. J. Q. 420, 42 L. T. N. S. 252; Bradshaw v. Irish Northwestern R. Co., 7 Ir. R. C. L. 252, 21 W. R. 581; Shepherd v. Bristol, etc., R. Co., L. R. 3 Exch. 189, 37 L. J. Exch. 113; Mitchell v. Lancashire, etc., R. Co., L. R. 10 Q. B. 256; Neston Colliery Co. v. London, etc., R. Co., 4 Ry. & C. T. Cas. 257; Rowe v. Pickford, 8 Taunt. 83, 4 E. C. L. 27; Matter of Webb, 8 Taunt. 443, 4 E. C. L. 159; Garside v. Trent, etc., Nav. Co., 4 T. R. 581.

Can.—Richardson v. Canadian Pac. R. Co., 19 Ont. Rep. 369, 45 Am. & Eng. R. Cas. 413. But see Hall v. Grand Trunk R. Co., 34 N. C. Q. B. 517; Bowie v. Buffalo, etc., R. Co., 7 U. C. C. P. 191; Inman v. Buffalo, etc., R. Co., 7 U. C. C. P. 325; O'Neill v. Great Western R. Co., 7 U. C. C. P. 203; Millon v. Grand Trunk R. Co., 21 Ont. App. Rep. 404.

deposit of the goods in the carrier's warehouse is a quasi delivery, or in lieu of actual delivery, and at once ends the liability as a common carrier, while those which hold the opposite view consider that the carrier is merely relieved from actual delivery but still remains liable as carrier until the consignee receives his goods, or until he has failed to call for them within a reasonable time after notice.¹² In all such cases, it has been well stated, the question to be determined is whether anything remains to be done by the carrier in completion of its contract to safely carry and deliver the goods at the place of destination. If there is, its liability as carrier continues. If there is not, and the goods remain in the possession of the carrier, its liability in respect thereof, when not varied by contract or usage, is as warehouseman only.¹³ A railroad company does not cease to be a carrier and become a warehouseman by placing goods upon a wharf, with notice to a steamship company, which has not taken actual custody of them, to remove them as soon as possible.¹⁴

§ 5. Conflict of laws.—The statutory law of one State will be enforced by the courts of other States and the Federal courts, that construction of the statute being taken which is given to it by the highest tribunal of the State which enacted it.¹⁵ Where

12. See cases cited under § 3 and this section, *supra*.

13. *Gregg v. Illinois Cent. R. Co.*, 147 Ill. 550, 37 Am. St. Rep. 238, 61 Am. & Eng. R. Cas. 212; *Chicago, etc., R. Co. v. Warren*, 16 Ill. 502, 63 Am. Dec. 317; *East St. Louis, etc., R. Co. v. Wabash, etc.*, R. Co., 123 Ill. 594; *Missouri Pac. R. Co. v. Chicago, etc., R. Co.*, 25 Fed. 317. See also *Chicago, etc., R. Co. v. Sawyer*, 69 Ill. 285, 18 Am. Rep. 613.

14. *Texas, etc., R. Co. v. Clayton*, 173 U. S. 348, 43 L. Ed. 725, Adv. S. U. S. 475, 19 Sup. Ct. Rep. 421, 13 Am. & Eng. R. Cas. U. S. 236. See also *Texas, etc., R. Co. v. Reiss*, 99 Fed. 1006, 39 C. C. A. 680.

15. *Fairfield v. County of Gallatin*, 100 U. S. 47; *County of Leavenworth v. Barnes*, 94 U. S. 70; *Peik v. Chi-*

cago, etc., R. Co., 94 U. S. 164; *Town of South Ottawa v. Perkins*, 94 U. S. 260; *Township of Elmwood v. Marcy*, 92 U. S. 289; *Adams v. Nashville*, 95 U. S. 19; *Shelby v. Guy*, 11 Wheat. (U. S.) 367; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; *Jessup v. Carnegie*, 80 N. Y. 441; *Crum v. Bliss*, 47 Conn. 592; *Russell v. Madden*, 95 Ill. 485.

Where contracts have been made or vested rights acquired upon the faith of a construction given to the constitution or statutes of a state by its highest courts, the Federal courts and courts of other states will enforce such contracts and protect such rights although a different construction should subsequently be given by the local courts. *Gelpcke v. City of Dubuque*, 1 Wall. (U. S.) 175; *Havemeyer v.*

goods are shipped from one State to another and after reaching their destination are lost or injured, the carrier will be held liable according to the law of the place of destination in an action brought in that State.¹⁶ But if an action be brought for their loss or injury in the State of the place of shipment, the courts of the latter State will not be bound by the decisions of the courts of the former State upon the general principles of commercial law.¹⁷ It will follow the law of the place of destination where that law depends upon statute.¹⁸

§ 6. What is reasonable time for the removal of goods generally.—In those States which maintain the rule that the liability of a common carrier with respect to the goods carried by it continues for a reasonable time after their arrival at destination in which the consignee must call for and remove his goods, considerable difficulty is experienced in determining what is such reasonable time. A consignee must promptly and diligently remove goods carried within a reasonable time after arrival, without regard to distance from the depot, or means of removal, or convenience, or necessities of the consignee. Such reasonable time has been defined to be such as would enable one residing in the vicinity of the place of delivery, and informed of the probable time of arrival, in the ordinary course and during the usual hours of business, to inspect and remove the goods.¹⁹ The question as to what is

Iowa County, 3 Wall. (U.S.) 294; Olcott v. The Supervisors of Fond du Lac, 16 Wall. (U. S.) 678; Harris v. Jex, 55 N. Y. 421.

16. Springs v. South Bound R. Co., 46 S. C. 104, 24 S. E. 166; Heath v. South Bound R. Co., *Id.*; Rice v. Hart, 118 Mass. 201.

17. Faulkner v. Hart, 82 N. Y. 413, 37 Am. Rep. 574; Franklin v. Two-good, 25 Iowa 520. The same rule is laid down by the United States courts. Myrick v. Michigan Cent. R. Co., 107 U. S. 102.

In an action brought in Georgia, however, for personal injuries received in South Carolina, it was held that, there being no South Carolina statute regulating the rights of the

parties in such cases, the Georgia courts, in a liberal spirit of comity, would apply the common law in South Carolina as construed by its court of last resort. Atlantic, etc., R. Co. v. Tanner, 68 Ga. 384. See also Waters v. Cox, 2 Bradwell (Ill. App.) 129; Ames v. McCamber, 124 Mass. 85; Cubbedge v. Napier, 62 Ala. 518; Haywood v. Daves, 81 N. C. 8; Cragin v. Lamkin, 7 Allen (Mass.) 395; Williams v. Carr, 80 N. C. 294.

18. See cases cited in preceding notes to this section.

19. Berry v. West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 11 Am. & Eng. R. Cas. N. S. 103; Bell v. St. Louis, etc., R. Co., 6 Mo. App. 363; Jeffersonville R. Co. v. Cleve-

a reasonable time for a consignee of goods to remove them after notice of their arrival, where there is no dispute as to the facts, is a question of law for the court.²⁰ A consignee may not, after notice of the arrival of the goods, defer taking them away while he attends to other affairs, but he must at once and without intermission remove them.²¹ If there be a conflict of evidence as to the material facts, or the facts are doubtful, the question as to what was a reasonable time under the circumstances of the particular case should be submitted to the jury.²² So, also, if any doubt or question is made as to whether the goods were lost while the carrier was liable as common carrier or as warehouseman.²³ The reasonable time allowed to the consignee in which to remove the goods commences only after notice to or actual knowledge by him of their arrival, in those States where notice is required;²⁴ while in other States, the consignee is charged with knowledge of their arrival and is not entitled to notice or to a reasonable time to learn of their arrival.²⁵ The liability of a carrier may be changed to that of a warehouseman or ordinary bailee, before the elapse of a reasonable time for removal, by the acts of the parties, as where the goods are deposited on the platform in the usual place ready for delivery, the consignee notified thereof, and he pays the freight;²⁶ or where the consignee has received the goods and

land, 2 Bush (Ky.) 473; Leavenworth, etc., R. Co. v. Maris, 16 Kans. 333; Wood v. Crocker, 18 Wis. 345, 86 Am. Dec. 773; Derosia v. Winona, etc., R. Co., 18 Minn. 133; Broadwell v. Butler, 6 McLean (U. S.) 296.

20. Hedges v. Hudson River R. Co., 49 N. Y. 223, 3 Am. Ry. Rep. 346; Bennett v. Lycoming, etc., Ins. Co., 67 N. Y. 278; Davis v. Gwynne, 57 N. Y. 677; Lemke v. Chicago, etc., R. Co., 39 Wis. 449, 13 Am. Ry. Rep. 406; Frank v. Grand Tower, etc., R. Co., 57 Mo. App. 181.

21. Tarbell v. Royal Exchange Shipping Co., 110 N. Y. 180, 17 N. E. 721, 6 Am. St. Rep. 350; Hedges v. Hudson River R. Co., *supra*; Roth v. Buffalo, etc., R. Co., 34 N. Y. 548, 90 Am. Dec. 734.

22. Wood v. Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 465, 2 Am. Ry. Rep. 342; Coxon v. North Eastern R. Co., 4 Ry. & C. T. Cas. 284. See also cases cited under preceding notes to this section.

23. Sessions v. Western R. Corp. 16 Gray (Mass.) 132; Columbus, etc., R. Co. v. Ludden, 89 Ala. 612, 42 Am. & Eng. R. Cas. 404; Lamb v. Camden, etc., R. Co., 2 Daly (N. Y.) 454.

24. See Necessity of Notice, § 9, *post*; Michigan Cent. R. Co. v. Hale, 6 Mich. 243.

25. Berry v. West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 11 Am. & Eng. R. Cas. N. S. 103. See also Notice to Consignee, § 8, *post*.

26. New Albany, etc., R. Co. v. Campbell, 12 Ind. 55.

paid the charges and removed a part of the goods;²⁷ or the goods have been stored in a warehouse of the carrier, by express direction of the consignee, subject to call;²⁸ or where the carrier, by agreement with the consignee and for mutual convenience, stores goods on arrival in its freight house for the night.²⁹ Where the carrier is ready to deliver and the consignee refuses to take away his goods, the carrier can only be held thereafter as bailee of the owner, or, in the event that it charges for storage, as warehouseman.³⁰ The fact that the consignee resides at a distance from the place of delivery, or is absent therefrom and has no agent there, is not to be taken into consideration in determining what is a reasonable time in which he should remove the goods, nor is it to be measured by any peculiar circumstances in his condition and situation rendering him unable promptly to take the goods away.³¹ If the responsibility of a carrier have once terminated, by safely delivering the goods to the consignee, it cannot be revived by the latter returning them to the carrier's warehouse, without notice to the warehouseman.³² Ordinarily, it is the carrier's duty to unload the goods and deposit them in its warehouse, or on its plat-

27. Oderkirk v. Fargo, 58 Hun (N. Y.) 347, 34 St. Rep. (N. Y.) 166, 11 N. Y. Supp. 871.

28. Hartman v. Louisville, etc., R. Co., 39 Mo. App. 88; Chapman v. Great Western R. Co., 5 Q. B. Div. 278, 49 L. J. Q. B. 420; McCosson v. Grand Trunk R. Co., 23 U. C. C. P. 107; Matter of Webb, 8 Taunt, 443, 4 E. C. L. 159; Rowe v. Pickford, 8 Taunt. 83, 4 E. C. L. 27; Garside v. Trent, etc., Nav. Co., 4 T. R. 581; Mayer v. Grand Trunk R. Co., 31 U. C. C. P. 248.

29. Fenner v. Buffalo, etc., R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Blumenthal v. Brainard, 38 Vt. 402, 91 Am. Dec. 350; Southern Express Co. v. Holland, 109 Ala. 362.

30. Hathorn v. Ely, 28 N. Y. 78; Stowe v. New York, etc., R. Co., 113 Mass. 521; Rothschild v. Michigan Cent. R. Co., 69 Ill. 164; Mohr v. Chicago, etc., R. Co., 40 Iowa 579; American Sugar Refining Co. v. Mc-

Ghee, 96 Ga. 27; Missouri Pac. R. Co. v. Chicago, etc., R. Co., 25 Fed. 317, 23 Am. & Eng. R. Cas. 718; Kremer v. Southern Express Co., 6 Coldw. (Tenn.) 356; Young v. Smith, 3 Dana (Ky.) 91, 28 Am. Dec. 57.

31. Northrup v. Syracuse, etc., R. Co., 3 Abb. App. (N. Y.) 386, 5 Abb. Pr. N. S. (N. Y.) 425; Hilliard v. Wilmington, etc. R. Co., 6 Jones L. (N. C.) 343; Lemke v. Chicago, etc., R. Co., 39 Wis. 449, 13 Am. Ry. Rep. 406; Richardson v. Canadian Pac. R. Co., 19 Ont. Rep. 369, 45 Am. & Eng. R. Cas. 413; Moses v. Boston, etc., R. Co., 32 N. H. 523, 64 Am. Dec. 391; Wilson v. California Cent. R. Co., 94 Cal. 166, 55 Am. & Eng. R. Cas. 625; Chalk v. Charlotte, etc., R. Co., 85 N. C. 423, 9 Am. & Eng. R. Cas. 106; Columbus, etc., R. Co. v. Ludden, 89 Ala. 612, 42 Am. & Eng. R. Cas. 404.

32. Salinger v. Simmons, 8 Abb. Pr. N. S. (N.Y.) 409, 2 Lans. (N.Y.), 325, 57 Barb. (N. Y.) 513.

form or wharf in the usual and proper place to afford opportunity to the consignee to remove them, and the reasonable time for removal does not begin to run until this has been done.³³ Where, however, it is the consignee's duty, by reason of usage or special contract, to unload the goods, the carrier's duty is discharged when the goods are placed in a safe and convenient location for unloading, as by placing the cars on a side track, or at an elevator or warehouse, where the consignee may unload them, and its liability as a common carrier ceases after the consignee has had reasonable opportunity to call for and remove them.³⁴ Where the consignee has paid the freight and taken steps toward removing the goods and is afforded a reasonable opportunity for so doing, and unnecessarily delays the removal, the carrier cannot be held responsible.³⁵ Nor is the carrier longer responsible after delivery to an elevator company, although a receipt for the goods in accordance with the usual custom has not been taken.³⁶ What was a reasonable time and what was not a reasonable time in which the consignee should call for and remove his goods has been adjudged in many cases under various circumstances, some of which are referred to in the notes.³⁷

33. King v. New Brunswick, etc., S. Co., 36 Misc. Rep. (N. Y.) 555, 73 N. Y. Supp. 999; Hedges v. Hudson River R. Co., 49 N. Y. 223, 3 Am. Ry. Rep. 346; Chicago, etc., R. Co. v. Bensley, 69 Ill. 630; McHenry v. Philadelphia, etc., R. Co., 4 Harr. (Del.) 448; Missouri Pac. R. Co. v. Haynes, 72 Tex. 175; Mohr v. Chicago, etc., R. Co., 40 Iowa 579.

34. Draper v. Delaware, etc., Canal Co., 118 N. Y. 118, 42 Am. & Eng. R. Cas. 410; Gregg v. Illinois Cent. R. Co., 147 Ill. 550, 37 Am. St. Rep. 238, 61 Am. & Eng. R. Cas. 208; Pindell v. St. Louis, etc., R. Co., 41 Mo. App. 84; Independence Mills Co. v. Burlington, etc., R. Co., 72 Iowa 535, 2 Am. St. Rep. 258, 32 Am. & Eng. R. Cas. 456; Pittsburgh, etc., R. Co. v. Nash, 43 Ind. 423.

35. Goodwin v. Baltimore, etc., R. Co., 50 N. Y. 154, 10 Am. Rep. 457,

revg. 58 Barb. (N. Y.) 195; Woodward v. Illinois Cent. R. Co., 33 Ill. App. 433.

36. Arthur v. St. Paul, etc., R. Co., 38 Minn. 95, 32 Am. & Eng. R. Cas. 449.

37. Reasonable time.—Wynantskill Knitting Co. v. Murray, 90 Hun (N. Y.) 554, 36 N. Y. Supp. 26, from Saturday afternoon until the following Wednesday; Tarbell v. Royal Exchange Shipping Co., 110 N. Y. 170, 6 Am. St. Rep. 350; Backhaus v. Chicago, etc., R. Co., 92 Wis. 393, three days; Chalk v. Charlotte, etc., R. Co., 85 N. C. 423, 9 Am. & Eng. R. Cas. 106, two days; Lemke v. Chicago, etc., R. Co., 39 Wis. 449, 13 Am. Ry. Rep. 406, from Saturday evening until the Tuesday following, at noon; Columbus, etc., R. Co. v. Ludden, 89 Ala. 612, 42 Am. & Eng. R. Cas. 404, three days; Derosia v. Winona, etc., R. Co.,

§ 7. Time extended by failure or refusal to deliver.—Where goods, after arrival at their destination, have been applied for or demanded, but are refused or detained by the carrier, except where the goods are properly held for freight charges due, the carrier's liability as an insurer of the goods may be extended beyond what would ordinarily be a reasonable time and be continued until a reasonable time after the goods have been offered for delivery to the consignee.³⁸ The carrier's liability as a common carrier continues without regard to the time the goods may have actually been ready for delivery, where the consignee is prevented, without fault on his own part, from removing and caring for his goods by reason of the failure of the carrier to have the goods ready for delivery, or so placed that they can be unloaded with reasonable convenience,³⁹ or because of being

18 Minn. 133, 8 Am. Ry. Rep. 363; Anniston, etc., R. Co. v. Ledbetter, 92 Ala. 326, six days; Leavenworth, etc., R. Co. v. Maris, 16 Kan. 333, eight days; Arthur v. St. Paul, etc., R. Co., 38 Minn. 95, 32 Am. & Eng. R. Cas. 449, one day; Solomon v. Philadelphia, etc., Express Steamboat Co., 2 Daly (N. Y.) 104, from Saturday morning to the following Monday morning; Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 350, over night, where the consignee had called for a box at defendant's depot, found it ready, and left it there, intending to call for it the next morning.

Not a reasonable time.—McKinney v. Jewett, 90 N. Y. 267, 9 Am. & Eng. R. Cas. 209, where consignees were not notified of the arrival of goods until Saturday evening, too late for removal, and before they could be removed on Monday morning following, they were injured; Woodward v. Illinois Cent. R. Co., 33 Ill. App. 433; Wood v. Crocker, 18 Wis. 345, 86 Am. Dec. 773, where goods were destroyed by fire under similar circumstances; Louisville, etc., R. Co. v. McGuire, 79 Ala. 395; Parker v. Milwaukee, etc., R. Co., 30

Wis. 689, 7 Am. Ry. Rep. 255, where goods arrived during the day and were destroyed by fire on the following night; Louisville, etc., R. Co. v. Oden, 80 Ala. 38, where goods arrived on Friday, but consignee was told Saturday morning that they had not arrived, and they were burned on Sunday; Lake Erie, etc., R. Co. v. Hatch, 52 Ohio St. 408, where consignee was notified at six o'clock in the evening and the goods were burned during the following night; Moses v. Boston, etc., R. Co., 32 N. H. 523, 64 Am. Dec. 381, where goods arrived between 1 and 3 P. M. and were burned in the warehouse the following night; Dunham v. Boston, etc., R. Co., 46 Hun (N. Y.) 245, where the consignee began removing the goods as soon as they arrived, but before he could remove all a part remaining in the car burned.

38. Faulkner v. Hart, 82 N. Y. 413, 37 Am. Rep. 574; Louisville, etc., R. Co. v. McGuire, 79 Ala. 395; Richmond, etc., R. Co. v. White, 88 Ga. 805, 15 S. E. 802, 12 Ry. & Corp. L. J. 273.

39. Independence Mills Co. v. Burlington, etc., R. Co., 72 Iowa 535,

wrongly informed by the carrier or its agent, through mistake, on calling for the goods, that they have not arrived, although they have arrived and are stored in the depot or warehouse,⁴⁰ or by any similar conduct or wrongful act on the part of the carrier.⁴¹ In some jurisdictions the carrier is held not to continue liable as an insurer by reason of such failure in the goods being delivered through misinformation or mistake on the part of the carrier, but is held liable as a warehouseman on the ground that its negligence in failing to deliver the goods, or causing them to be detained, is the proximate cause of loss.⁴² But where by the terms of the contract of shipment the liability is that of a warehouseman, negligence must be shown to render the carrier liable.⁴³ And where the consignee has had sufficient time for the removal of the goods after the discovery and correction of a mistake as to their arrival, and notice thereof, the carrier is not liable for loss on the ground of conversion.⁴⁴

§ 8. Notice to consignee held not essential.—Those authorities which maintain the Massachusetts doctrine that the carrier's liability as insurer in the case of railroads, ends, and it assumes the liability of a warehouseman upon the completion of the transportation and a safe storage of the goods, also hold that the carrier is under no obligation, upon the arrival of the goods at their destination, to give the consignee notice of their arrival, and

2 Am. St. Rep. 258, 32 Am. & Eng. R. Cas. 456.

40. McKinney v. Jewett, 90 N. Y. 267, 9 Am. & Eng. R. Cas. 209; Meyer v. Chicago, etc., R. Co., 24 Wis. 566, 1 Am. Rep. 207; Burlington, etc., R. Co. v. Arms, 15 Neb. 69, 16 Am. & Eng. R. Cas. 272; Jeffersonville R. Co. v. Cotton, 29 Ind. 498, 95 Am. Dec. 656; Louisville, etc., R. Co. v. Campbell, 7 Heisk. (Tenn.) 258.

41. Campion v. Canadian Pac. R. Co., 43 Fed. 775; Derosia v. Winona, etc., R. Co., 18 Minn. 133, 8 Am. Ry. Rep. 363.

42. Central Trust Co. v. East Tennessee, etc., R. Co., 70 Fed. 764; Stevens v. Boston, etc., R. Co., 1 Gray (Mass.) 277; Kansas City, etc.,

R. Co. v. Morrison, 34 Kan. 502, 55 Am. Rep. 252, 23 Am. & Eng. R. Cas. 481; Union Pac. R. Co. v. Moyer, 40 Kan. 184, 10 Am. St. Rep. 183, 35 Am. & Eng. R. Cas. 615; East Tennessee, etc., R. Co. v. Kelly, 91 Tenn. 699, 55 Am. & Eng. R. Cas. 621; Bowie v. Buffalo, etc., R. Co., 7 U. C. C. P. 191.

43. Draper v. Delaware, etc., Canal Co., 118 N. Y. 118, 42 Am. & Eng. R. Cas. 410; Fenner v. Buffalo, etc., R. Co., 44 N. Y. 505, 4 Am. Rep. 709.

44. Williams v. Delaware, etc., Canal Co., 53 Hun (N. Y.) 635, 25 St. Rep. (N. Y.) 518, 6 N. Y. Supp. 36, 3 Silv. Sup. Ct. (N. Y.) 19.

its liability is not affected by a failure to give such notice. The consignee is charged with notice of the arrival of the goods, the reasons for the rule being stated that the consignee is reasonably assumed to have been advised by the shipper of the time the goods are likely to arrive, and that it is more just and reasonable to place upon him the duty of keeping track of his own goods than to charge the carrier with the practically impossible burden of notifying each consignee of the time of arrival of each package passing through its hands.⁴⁵ This view has been followed in certain other jurisdictions.⁴⁶

§ 9. Necessity of notice maintained.—On the other hand, those authorities which maintain the New Hampshire doctrine that in the case of railroads the carrier's liability as an insurer continues after the arrival of the goods at their destination, until the consignee has had a reasonable time in which to call for and remove his goods, hold that such liability continues until the consignee has been notified by the carrier of the arrival of the goods, and that in order to change the responsibility to that of a warehouseman, notice to the consignee is necessary. This rule is based upon the reasoning that it is unreasonable to require the consignee to be in constant attendance at the place of destination in order to ascertain the arrival of the goods, and that it is reasonable that the carrier's liability should not be reduced to that of a warehouseman only, until after notice has been given to the consignee of the arrival of the goods and the lapse of a reasonable time thereafter in which to take them away.⁴⁷ The statutes in several of the States require such notice to be given.⁴⁸

45. See authorities cited under § 3, *ante*.

46. Morris, etc., R. Co. v. Ayers, 29 N. J. L. 393, 80 Am. Dec. 215; Spears v. Spartanburg, etc., R. Co., 11 S. C. 158; Collins v. Alabama, etc., R. Co., 104 Ala. 390, 61 Am. & Eng. R. Cas. 229, and other Alabama cases cited under § 4, *ante*. The rule in this State has been changed in some cases by statute. See also Jeffersonville, etc., R. Co. v. Cleveland, 2 Bush (Ky.), 468.

47. See authorities generally cited under § 4, note 1, *ante*.

48. Wilson v. California Cent. R. Co., 94 Cal. 166, 17 L. R. A. 685; Hirshfield v. Central Pac. R. Co., 56 Cal. 484, 7 Am. & Eng. R. Cas. 398; Butler v. East Tennessee, etc., R. Co., 8 Lea (Tenn.), 33, 9 Am. & Eng. R. Cas. 249; Collins v. Alabama, etc., R. Co., 104 Ala. 390; Missouri Pac. R. Co. v. Haynes, 72 Tex. 175, 37 Am. & Eng. R. Cas. 645; Houston, etc., R. Co. v. Adams, 49 Tex. 748,

The carrier is also bound to give notice in all cases where it specially contracts to do so, although such notice is not required in the absence of contract.⁴⁹ The carrier may be excused from giving notice to the consignee, although required to do so, where the consignee or his agent already had actual knowledge of the arrival of the goods;⁵⁰ or where notice cannot be given because the consignee has no place of business or residence at the point of destination or he or his address are unknown to the carrier and cannot be ascertained,⁵¹ or where an established course of business or usage known to both consignee and carrier has dispensed with such notice.⁵² The giving of notice, where it is necessary, will not affect the liability of the carrier for injuries which have already been sustained by the goods.⁵³ The rule is well established in reference to carriers by water, owing to their peculiar methods of transportation, that ordinarily they must notify the consignee of the arrival of goods before their liability as carriers terminates; but such notice may be waived by former course of dealing with the consignee, or by usage prevailing among carriers in the same trade at that port.⁵⁴

30 Am. Rep. 116. See also statutes of Alabama, California, Tennessee and Texas.

49. Tanner v. Oil Creek R. Co., 53 Pa. St. 411, and the company's freight agent may bind the company by an agreement to give such notice.

50. Fenner v. Buffalo, etc., R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Pinney v. First Div. St. Paul, etc., R. Co., 19 Minn. 251; Bradshaw v. Irish Northwestern R. Co., 21 W. R. 581; Richardson v. Canadian Pac. R. Co., 19 Ont. Rep. 369, 45 Am. & Eng. R. Cas. 413.

51. Pelton v. Rensselaer, etc., R. Co., 54 N. Y. 214, 13 Am. Rep. 568; Northrop v. Syracuse, etc., R. Co., 3 Abb. App. Dec. (N. Y.) 386, 5 Abb. Pr. N. S. (N. Y.) 425; Butler v. East Tennessee, etc., R. Co., 8 Lea (Tenn.), 33, 9 Am. & Eng. R. Cas. 249; Kohn v. Packard, 3 La. 224, 23 Am. Dec. 453.

52. Gibson v. Culver, 17 Wend.

(N. Y.) 305, 31 Am. Dec. 297; J. Russell Mfg. Co. v. New Haven Steamboat Co., 50 N. Y. 121, 52 N. Y. 657; Ely v. New Haven Steamboat Co., 53 Barb. (N. Y.) 207; Pindell v. St. Louis, etc., R. Co., 34 Mo. App. 675; The Mary Washington, Chase's Dec. (U. S.) 125. Compare Mierson v. Hope, 2 Sweeny (N. Y.), 561; Dean v. Vaccaro, 2 Head (Tenn.), 488, 75 Am. Dec. 744.

53. The Mary Washington, Chase's Dec. (U. S.) 125; Richmond, etc., R. Co. v. White, 88 Ga. 805, 15 S. E. 802, 12 Ry. & Corp. L. J. 273.

54. Illionis Cent. R. Co. v. Carter, 165 Ill. 570, 46 N. E. 374, revg. 62 Ill. App. 618; McAndrew v. Whitlock, 52 N. Y. 40, 11 Am. Rep. 657; The Boskenna Bay, 40 Fed. 93; Tarbell v. Royal Exchange Shipping Co., 110 N. Y. 170; Lake Erie, etc., R. Co. v. Hatch, 52 Ohio St. 408; Basnight v. Atlantic, etc., R. Co., 111 N.

§ 10. **Sufficiency of notice.**—A notice is sufficient which actually informs the consignee of the arrival of his goods at the place of destination.⁵⁵ A newspaper notice, addressed to the public generally, is not a valid notice, unless shown to have been brought to the consignee's attention.⁵⁶ If notice be sent by mail, instead of being given personally, the carrier must bear the consequences of any delay in its receipt, and the positive evidence of the consignee that he did not receive a mailed notice until a certain date is entitled to greater weight than the inference that he received it at an earlier date, which may be drawn from the fact of its being mailed at an earlier date.⁵⁷ Where a statute requires a notice to be mailed proof of mailing is sufficient without production of the notice itself.⁵⁸ Notice to a husband is notice to the wife where the facts warrant the presumption that the husband was acting as the wife's agent.⁵⁹ Notice may be implied from the general usage and course of business between the parties, in which case it is not necessary to prove notice.⁶⁰

§ 11. **Notice to a consignor.**—It is quite generally held that when goods sent by a common carrier have arrived at their destination, and have been tendered to and refused by the consignee, the contract for their carriage has been performed, and after the consignee has had a reasonable time to call for and receive them, the carrier becomes merely a warehouseman, and responsible for the care of a warehouseman in protecting the consignor's interest, and is not bound, as a general rule, to notify

C. 592; *Brand v. New Jersey Steam-boat Co.*, 10 Misc. Rep. (N. Y.) 128; *Frank v. Grand Tower, etc., R. Co.*, 57 Mo. App. 181; *Allam v. Pennsylvania R. Co.*, 183 Pa. 104, 41 W. N. C. 205, 38 Atl. 709, 39 L. R. A. 535; *Hill Mfg. Co. v. Boston, etc., R. Corp.* 104 Mass. 122, 6 Am. Rep. 202; *Shenk v. Philadelphia Steam Propeller Co.*, 60 Pa. St. 109, 100 Am. Dec. 541; *Hermann v. Goodrich*, 21 Wis. 536, 94 Am. Dec. 562; *Kohn v. Packard*, 3 La. 224, 23 Am. Dec. 453; *Richardson v. Canadian Pac. R. Co.*, 19 Ont. Rep. 369, 45 Am. & Eng. R. Cas. 413; *Bourne v. Gatliff*,

42 E. C. L. 337, 33 E. C. L. 364, 3 M. & G. 643, 11 Cl. & F. 45.

55. *Cavallaro v. Texas, etc., R. Co.*, 110 Cal. 348, 42 Pac. 918.

56. *Rome R. Co. v. Sullivan*, 14 Ga. 277.

57. *Solomon v. Philadelphia, etc., Steamboat Co.*, 2 Daly (N. Y.), 104.

58. *Collins v. Alabama, etc., R. Co.*, 104 Ala. 390.

59. *Furman v. Chicago, etc., R. Co.*, 68 Iowa, 219, 23 Am. & Eng. R. Cas. 730.

60. *Wood v. Milwaukee, etc., R. Co.*, 27 Wis. 541, 9 Am. Rep. 465, 2 Am. Ry. Rep. 342.

the consignor of the non-acceptance of the goods by the consignee.⁶¹ Where goods are received by a carrier, to be delivered to the consignee, on payment of the amount due therefor, if the latter be not prepared to pay, on notice of their arrival, but promise to do so in a few days, but before payment the carrier's office is broken into and the goods stolen, or the goods are destroyed by fire, the carrier's liability, after notification to the consignee, is that of a warehouseman only, and the authorities would not seem to require notice to the consignor in such a case, though notice may be sometimes necessary.⁶² The carrier must conduct itself as a reasonable and prudent man would do with reference to it, and whether it is reasonable that it should give such notice may be a question for the jury, but it is not liable for omitting to give it unless it is the failure to give such notice which caused the loss.⁶³ The carrier is not liable to the consignor for failure to give him notice of the refusal of the consignee to receive goods, where the consignor has failed to disclose his name and address.⁶⁴ It has been held, on the other hand, that where goods transported by an express company are by it tendered to the consignee, and he fails to receive and pay for them, the express company is under obligation to notify the consignor. When this is done, the company is relieved of its responsibility as a common carrier, and holds the goods subject to the order of the consignor; but not be-

61. Kremer v. Southern Express Co., 6 Coldw. (Tenn.) 356; Steamboat Keystone v. Moies, 28 Mo. 243, 75 Am. Dec. 123; Lesinsky v. Great Western Dispatch, 13 Mo. App. 575; Hull v. Missouri Pac. R. Co., 60 Mo. App. 593; Hudson v. Baxendale, 2 H. & N. 575.

62. Weed v. Barney, 45 N. Y. 344, 6 Am. Rep. 96; Grossman v. Fargo, 6 Hun (N. Y.), 310; Gibson v. American Merchants', etc., Express Co., 1 Hun (N. Y.), 389, 3 T. & C. (N. Y.) 503; Landsberg v. Dinsmore, 4 Daly (N. Y.), 490.

63. Weed v. Barney, 45 N. Y. 344, 6 Am. Rep. 96; Morrison v. Davis, 20 Pa. St. 171, 57 Am. Dec. 645; Denny v. New York Cent., etc., R.

Co., 13 Gray (Mass.), 481, 74 Am. Dec. 645; Hudson v. Baxendale, 2 H. & N. 575. See also Zinn v. New Jersey Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402.

64. Williams v. Holland, 22 How. Pr. (N. Y.) 137.

Where the consignee is not a resident of the place of delivery, and the carrier after due inquiry is unable to find him and delivers the goods to other merchants for him, such delivery being *bona fide* and according to the usage of trade, the carrier is not liable to the consignor. Mayell v. Potter, 2 Johns. Cas. (N. Y.) 371. See also Fisk v. Newton, 1 Den. (N. Y.) 45, 43 Am. Dec. 649.

fore.⁶⁵ And in other cases, that the carrier's liability as such terminates when the carrier tenders delivery to the consignee and the latter declines to receive the goods, and it becomes chargeable as a warehouseman only, but as such it is chargeable with the duty of notifying the consignor of the refusal, and the further duty of holding the goods subject to the orders of the consignor.⁶⁶

§ 12. Liability of connecting carriers.—In the case of connecting carriers where goods pass over several connecting lines, the rule as to the carrier's liability as insurer terminating upon its depositing the goods in its warehouse do not apply, but in such a case, the liability of each carrier continues generally as an insurer until it parts with the possession and control of the goods, either by delivering them to the succeeding carrier, or by depositing them in a warehouse, after the failure or refusal of the succeeding carrier to receive them.⁶⁷ But the neglect of the succeeding carrier to receive them for an unreasonable time, after due notice and request, does not amount to a refusal which would justify the carrier in terminating its relation as carrier by a new disposition of the goods.⁶⁸ And where a carrier has received goods for transportation to a point beyond its lines, and there are no means of public transportation from its terminus to the place of destination, its duty is not ended by mere delivery to a warehouseman there, but it must also send notice to the consignee thereof.⁶⁹

§ 13. The burden of proof.—In an action against a carrier for the loss by fire of a car received by it from another company while it is standing on its side track at its destination to be unloaded by the consignee, the burden of proof is on the carrier to prove that its responsibility is that of a warehouseman only, where

65. American Merchants', etc., Express Co. v. Wolfe; 79 Ill. 430. **66.** Wis. 81, 5 Am. Ry. Rep. 302, 9 Am. Rep. 439; Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318. See also Connecting carriers, chap. 17.

67. American Sugar Refining Co. v. McGhee, 96 Ga. 27; Green, etc., Nav. Co. v. Marshall, 48 Ind. 596. **68.** Goold v. Chapin, 20 N. Y. 259, 75 Am. Dec. 398.

69. Brown, etc., Co. v. Pennsylvania Co., 63 Minn. 546, 65 N. W. 961, 2 Am. & Eng. R. Cas. N. S. 640; Hooper v. Chicago, etc., R. Co., 27 Wis. 536, 94 Am. Dec. 562.

that defence is set up; the liability of a common carrier having once attached is presumed to continue until the contrary is proven. But the burden of proof to show that its liability as a carrier has again attached is thrown upon the opposing party, when it proves that it has delivered the car upon its side track to the consignee for unloading, where, by its contract, it is bound when the car is unloaded, to transport it to another place.⁷⁰

§ 14. Effect of special contract or usage on rule.—The carrier may stipulate that its liability as insurer shall cease with the arrival of the goods at their destination and their being placed on the platform, or in the storeroom of the company, according as the usage of business may require, and in either case its liability as a common carrier would cease after the consignee had a reasonable time to call for and remove the goods, and it would be liable as warehouseman only.⁷¹ It may stipulate, by mere notice communicated to the consignee, that it will not be responsible for goods not removed within a reasonable time, and if they are not removed in such time, it is liable as a gratuitous bailee, unless a charge is made for storage during that time.⁷² It may stipulate that the goods must be removed on the day of arrival or stored at the owner's risk, and in case of destruction in the station, that no damage shall accrue, and no notice of the arrival need be given the consignee under such a stipulation.⁷³ But where a charge is made for storage, such a stipulation does not qualify the duty of the carrier as warehouseman and free it from the ordinary responsibility to take reasonable care, and it is, therefore, liable for damage happening through its negligence.⁷⁴ A railroad company, acting as a common carrier, may stipulate, by a contract express or implied, that its liability as a carrier

70. Peoria, etc., R. Co. v. United States Rolling Stock Co., 136 Ill. 643, 29 Am. St. Rep. 348, 49 Am. & Eng. R. Cas. 81, 27 N. E. 59, 10 Ry. & Corp. L. J. 247, revg. 36 Ill. App. 552.

71. Draper v. Delaware, etc., Canal Co., 118 N. Y. 118, 42 Am. & Eng. R. Cas. 410; Fenner v. Buffalo, etc., R. Co., 44 N. Y. 505, 4 Am. Rep. 709.

72. Harris v. Great Western R.

Co., 1 Q. B. Div. 515, 45 L. J. Q. B. Div. 729; Van Toll v. South Eastern R. Co., 12 C. B. N. S. 75, 104 E. C. L. 75, 31 L. J. C. P. 241.

73. Gashweiler v. Wabash, etc., R. Co., 83 Mo. 112, 25 Am. & Eng. R. Cas. 403, 53 Am. Rep. 558.

74. Mitchell v. Lancashire, etc., R. Co., 44 L. J. Q. B. 107, L. R. 10 Q. B. 256. See also Kimball v. Western R. Corp., 6 Gray (Mass.) 542.

shall terminate with a delivery at a particular point, and that it will assume no liability at all, in such case, as warehouseman; and if the consignee is fully advised at the time of the shipment that the company has no agent at the particular station or place to which the consignment is made, and the failure to employ such agent is not shown to be unreasonable in view of the condition of the company's business, there is, in the absence of rebutting circumstances, an implied consent that the carrier's responsibility shall be dissolved, when he has done all that the nature of the case permits him to do, according to the reasonable and proper usages of his business.⁷⁵ Under a bill of lading for the delivery of goods, at the place of destination, to a transient person, if, on arrival, he cannot be found, on inquiry, the carrier is relieved from responsibility by delivering the goods to a responsible third party there for the consignee, it having acted bona fide and according to the usage of trade;⁷⁶ and if the consignee be unable to remove the goods, within the time specified by the carrier, the latter is bound to store them, or place them in a safe place for the owner, or it is liable for any damage they may sustain.⁷⁷ Usually the liability of the common carrier continues until the delivery of the goods, but a uniform and established usage of business, known to the parties, may be given in evidence, to determine when the carrier's responsibility as a common carrier terminates, as well as when it commenced.⁷⁸ A

75. South, etc., Alabama R. Co. v. Wood, 66 Ala. 167, 9 Am. & Eng. R. Cas. 419, 41 Am. Rep. 749, and the liability of the company as a common carrier terminates with the safe delivery of the car containing the goods on a side track at such place.

Ordinarily, however, a carrier must have a place of its own, or access to the places of other companies, at which to discharge its freight and to take care of it for the consignees for a reasonable time. Chicago, etc., R. Co. v. Hoyt, 37 Ill. App. 64.

76. Mayell v. Potter, 2 Johns. Cas. (N. Y.) 371; Fisk v. Newton, 1 Den. (N. Y.) 45. Where, however, the carrier binds itself to deliver the

goods to its own agent, it is liable if its agent deposits them in the warehouse of a third person, who by mistake delivers them to the wrong person. Alabama, etc., R. Co. v. Kidd, 35 Ala. 209.

77. Cook v. Erie R. Co., 58 Barb. (N. Y.) 312.

78. Stimson v. Jackson, 58 N. H. 138; Farmers', etc., Bank v. Champlain Transp. Co., 16 Vt. 52, 42 Am. Dec. 491. But no custom or practice of the carrier's servants in assisting consignees to move or unload their goods can affect the principal, after the duty of the carrier as to the delivery of the freight has ended. Jewell v. Grand Trunk R. Co., 55 N. H. 84, 11 Am. Ry. Rep. 496.

stipulation, rule, or special contract requiring goods to be removed by the consignee within a fixed period, after which the liability of the carrier shall be that of a warehouseman only, must be reasonable, or it will not be enforced; and whether it is reasonable or not is to be determined in each case from the particular circumstances of that case.⁷⁹ Where the carrier accepts goods with an understanding on its part that they may be left at its depot until called for, its liability is that of a warehouseman only, after the lapse of a reasonable time for the consignee to demand and receive delivery of them,⁸⁰ and where the property is allowed to remain, after its arrival, at the depot, for the convenience solely of the consignee, the liability of the carrier is that of a warehouseman.⁸¹ But such agreements must be made with the carrier's authorized agent, or with one acting within the apparent scope of the agent's authority.⁸² The provisions of the charter of a railroad company or other incorporated carrier may affect its liability as warehouseman, but a provision that, upon notice to the consignee of the arrival of the goods, the carrier's liability shall, after the lapse of a reasonable time for the consignee to remove the goods, become that of a warehouseman only, is simply a statement of the general rule which prevails in most States.⁸³

§ 15. Duty of carrier as warehouseman to store safely.— It is the duty of a carrier, after having safely transported goods to their destination, to unload them with due care and store and keep them safely in its warehouse or depot for and on account of

79. Louisville, etc., R. Co. v. Oden, 80 Ala. 38; Miller v. Marsfield, 112 Mass. 260; Dimick v. Milwaukee, etc., R. Co., 18 Wis. 471; Collins v. Alabama, etc., R. Co., 104 Ala. 390, 61 Am. & Eng. R. Cas. 229; Angle v. Mississippi, etc., R. Co., 9 Iowa, 487.

80. Chapman v. Great Western R. Co., 42 L. T. N. S. 252. But if it deliver them to a warehouseman at the expiration of such time, it is not responsible for the negligence of the latter. Bickford v. Metropolitan Steamship Co., 109 Mass. 151.

81. Fenner v. Buffalo, etc., R. Co.,

44 N. Y. 505; Oderkirk v. Fargo, 58 Hun (N. Y.), 347.

82. Oderkirk v. Fargo, 58 Hun (N. Y.) 347; Mulligan v. Northern Pac. R. Co., 4 Dak. 315, 29 N. W. 659, 27 Am. & Eng. R. Cas. 33.

83. Mills v. Michigan Cent. R. Co., 45 N. Y. 622, 6 Am. Rep. 152; Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318; Michigan Cent. R. Co. v. Lantz, 32 Mich. 502, 8 Am. Ry. Rep. 74; Michigan Cent. R. Co. v. Hale, 6 Mich. 243; Michigan Cent. R. Co. v. Ward, 2 Mich. 538.

the consignee until called for,⁸⁴ or until they are, after the lapse of a reasonable time, subjected to its lien for charges.⁸⁵ A railroad company is liable as a warehouseman for the security and fitness of the place in which goods shipped over its road are stored, and is required to take necessary precaution for the safety of such goods, and is also responsible for the ordinary care and attention of its servants and agents in caring for them, so that they may be delivered whenever called for.⁸⁶ Where a railroad company is required by special contract to deliver goods at a particular warehouse,⁸⁷ or by statute is forbidden from storing goods transported in any warehouse other than that to which it was specifically consigned, its liability as a common carrier continues until a storage in the proper warehouse.⁸⁸

§ 16. Carrier's liability as warehouseman for negligence.— When a carrier has become a warehouseman as to goods by reason of a failure to remove them within a reasonable time, it is liable only for such losses or injuries as are shown to have resulted from the want of ordinary and reasonable care on its part, and such care is measured by the care a reasonable man would take of his own property under the same circumstances, or such care as men of ordinary or reasonable prudence usually bestow on property placed in their custody and similarly situated.⁸⁹ In

84. Scheu v. Benedict, 116 N. Y. 510, 15 Am. St. Rep. 426; Cook v. Erie R. Co., 58 Barb. (N. Y.) 312; Gregg v. Illinois Cent. R. Co., 147 Ill. 550, 37 Am. St. Rep. 238; Cahn v. Michigan Cent. R. Co., 71 Ill. 96; Chicago, etc., R. Co. v. Bensley, 69 Ill. 630; Rice v. Boston, etc., R. Corp., 98 Mass. 212; Milwaukee, etc., R. Co. v. Fairchild, 6 Wis. 403; Culbreth v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 392.

85. See Carrier's Lien for Charges, chap. 16.

86. Grieve v. New York Cent., etc., R. Co., 25 App. Div. (N. Y.) 518, 49 N. Y. Supp. 949; Sunderland v. Westcott, 2 Sweeny (N. Y.), 260, 40 How. Pr. (N. Y.) 468; Merchants' Dispatch, etc., Co. v. Mer-

riam, 111 Ind. 5, 31 Am. & Eng. R. Cas. 78. See also Madan v. Covert, 81 N. Y. 296; Grossman v. Fargo, 6 Hun (N. Y.), 310. A common carrier is not justified in storing goods at an intermediate point, because he considers the further carriage thereof unsafe, without notice to the consignor; in such case, he is liable for the neglect to carry to the place of destination. Van Winkle v. Adams Express Co., 3 Rob. (N. Y.) 59.

87. Moore v. Michigan Cent. R. Co., 3 Mich. 23.

88. Chicago, etc., R. Co. v. Sawyer, 69 Ill. 285, 18 Am. Rep. 613; Vincent v. Chicago, etc., R. Co., 49 Ill. 33; People v. Chicago, etc., R. Co., 55 Ill. 95, 8 Am. Rep. 631.

89. As to what is ordinary or rea-

such cases ordinary or reasonable care is a relative term, being governed by the circumstances surrounding the carrier. In a country village the same degree of security, either as to fire or burglary, cannot be required of a warehouseman or a common carrier, as such, as in larger cities, where greater facilities for warehousing exist.⁹⁰ The carrier being liable for negligence in failing to provide a warehouse properly and safely constructed, evidence of the character of the freight depot, the materials of which it is constructed, its liability to take fire, and facts of a similar nature are admissible.⁹¹ It is competent to show the

sonable care, see: *U. S.—Farmers' L. & T. Co. v. Oregon R., etc., Co.*, 73 Fed. 1003; *The Guiding Star*, 53 Fed. 936; *White v. Colorado Cent. R. Co.*, 3 McCrary (U. S.), 559, 5 Dil. (U. S.) 428.

Ark.—St. Louis, etc., R. Co. v. Dodd, 59 Ark. 317; *St. Louis, etc., R. Co. v. Bone*, 52 Ark. 26.

Del.—Culbreth v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 392.

Ill.—Chicago, etc., R. Co. v. Scott, 42 Ill. 132.

Iowa.—Leland v. Chicago, etc., R. Co. (Iowa), 23 N. W. 390, 21 Am. & Eng. R. Cas. 108.

Ky.—Wald v. Louisville, etc., R. Co., 92 Ky. 645.

Mass.—Aldrich v. Boston, etc., R. Co., 100 Mass. 31, 1 Am. Rep. 76, 97 Am. Dec. 74; *Parker v. Lombard*, 100 Mass. 405.

Md.—Baltimore, etc., R. Co. v. Schumacher, 29 Md. 168, 96 Am. Dec. 510.

Minn.—Armstrong v. Chicago, etc., R. Co., 45 Minn. 85, 45 Am. & Eng. R. Cas. 422.

Mo.—Levering v. Union Transp., etc., Co., 42 Mo. 88, 3 Am. Rep. 245, 97 Am. Dec. 320; *E. O. Standard Milling Co. v. White Line Cent. Transit Co.*, 122 Mo. 258, 61 Am. & Eng. R. Cas. 186; *Yarnell v. Kansas City, etc., R. Co.*, 113 Mo. 570; *Bren-*

nen v. St. Louis, 92 Mo. 488, 16 Am. & Eng. Corp. Cas. 486; *Alcorn v. Chicago, etc., R. Co.*, 108 Mo. 81.

N. J.—Morris, etc., R. Co. v. Ayres, 29 N. J. L. 393, 80 Am. Dec. 215.

N. C.—Turrentine v. Wilmington, etc., R. Co., 100 N. C. 375, 6 Am. St. Rep. 602; *Glenn v. Charlotte, etc., R. Co.*, 63 N. C. 510.

Pa.—McCarty v. New York, etc., R. Co., 30 Pa. St. 247.

S. C.—Brown v. Atlantic, etc., R. Co., 19 S. C. 39, 13 Am. & Eng. R. Cas. 479.

Eng.—Searle v. Laverick, L. R. 9 Q. B. 122; *Giblin v. McMullen*, L. R. 2 P. C. 317.

90. *Laporte v. Wells, Fargo, etc., Express*, 23 App. Div. (N. Y.) 267, 48 N. Y. Supp. 292; *Brand v. New Jersey Steamboat Co.*, 10 Misc. Rep. (N. Y.) 128. The stipulation in a bill of lading that property not removed by the party entitled to receive it within twenty-four hours after its arrival at destination shall be at the sole risk of the owner, does not relieve the company from liability for the loss of the goods owing to its failure to exercise the care required of a warehouseman. *Aaronson v. Pennsylvania R. Co.*, 23 Misc. Rep. (N. Y.) 666, 52 N. Y. Supp. 95.

91. *Whitney v. Chicago, etc., R. Co.*, 27 Wis. 327, 5 Am. Ry. Rep. 291.

degree of care usually exercised by warehousemen in the vicinity in similar cases,⁹² but not that the goods were cared for with the same degree of care as was always bestowed upon that kind of goods at that station.⁹³ Evidence is admissible that there was not room in the freight house at the time and as to its sufficiency for the business usually done at that station, to disprove negligence in leaving goods in the open air.⁹⁴ In an action against a carrier to recover for goods lost by fire while stored in a warehouse, through the alleged negligence of defendant in storing them in an unsafe place, evidence is admissible showing the condition of the surrounding buildings, or that smoking in the locality had been prohibited by a city ordinance, as bearing on the issue as to such negligence.⁹⁵ As a warehouseman, the carrier is not liable for a loss caused by a fire wilfully started, by an employe,⁹⁶ or for a loss caused by an accidental fire,⁹⁷ or for goods stolen,⁹⁸ or for losses caused by the explosion of packages, the contents of which are unknown to it,⁹⁹ or for loss by leakage of a defective cask,¹ nor for similar losses, except upon proof that such losses resulted from a want of ordinary care on the part of the carrier and that such want of ordinary care was the proximate cause of such losses; as, for example, where the danger from fire could have been foreseen, should have been foreseen, and guarded against,³ or there was a negligent omission to

92. Cass v. Boston, etc., R. Co., 14 Allen (Mass.), 448.

93. Lane v. Boston, etc., R. Co., 112 Mass. 455.

94. Stowe v. New York, etc., R. Co., 113 Mass. 521.

95. H. C. Judd & Root v. New York, etc., S. Co., 130 Fed. 991.

96. Stewart v. Gracy, 93 Tenn. 314.

97. Aldrich v. Boston, etc., R. Co., 100 Mass. 31, 1 Am. Rep. 76, 97 Am. Dec. 74; Chapman v. Great Western R. Co., 28 W. R. 566; Collins v. Alabama, etc., R. Co., 104 Ala. 390, 61 Am. & Eng. R. Cas. 229; Basnight v. Atlantic, etc., R. Co., 111 N. C. 592.

98. Williams v. Holland, 22 How. Pr. (N. Y.) 137; Lamb v. Western

R. Corp., 7 Allen (Mass.) 98; Neal v. Wilmington, etc., R. Co., 8 Jones L. (N. C.) 482; Mote v. Chicago, etc., R. Co., 27 Iowa, 22, 1 Am. Rep. 212; Finucane v. Small, 1 Esp. N. P. 315.

99. Weed v. Barney, 45 N. Y. 344, 6 Am. Rep. 96; White v. Colorado Cent. R. Co., 5 Dill. (U. S.) 428, 3 McCrary (U. S.), 559.

1. Hudson v. Baxendale, 2 H. & N. 575.

2. Cailiff v. Danvers, 1 Peake N. P. 114; Mackenzie v. Cox, 9 C. & P. 632, 38 E. C. L. 263.

3. Thomas v. Lancaster Mills, 71 Fed. 481, 34 U. S. App. 404; Thomas v. Wabash, etc., R. Co., 63 Fed. 200, 61 Am. & Eng. R. Cas. 206, note; St. Louis, etc., R. Co. v. Dodd, 59

take reasonable and prudent precaution to guard goods in its custody from thieves.⁴ The carrier, where no charge is made for the storage of goods, like other gratuitous bailees, is liable only for losses occasioned by gross negligence on its part.⁵ But although there is no separate charge for storage during the reasonable time after the arrival of the goods in which the consignee may call for and take them away, yet the freight to be paid, fixed by the carrier as a compensation for the whole service, is paid as well for the temporary storage as for the carriage, and such temporary storage is, therefore, not gratuitous.⁶ The carrier has a right, in the absence of an agreement to perform the entire service for a stipulated sum, to make a separate charge for storage,⁷ although in some jurisdictions it is held that the consignee is entitled to have his goods remain in the depot a reasonable time in which to arrange for removing them, and no storage can be charged until

Ark. 317, 61 Am. & Eng. R. Cas. 247.

The fact that a carrier which placed goods received for shipment in its warehouse took adequate precautions against fire on its own premises does not exonerate it from liability as a matter of law for the destruction of the goods from a fire originating on adjoining premises which it did not own nor control, although such fire was so violent that it was impossible to prevent it from spreading to its own building, where it had full knowledge of the manifest danger to its own premises arising from the specially hazardous condition of those adjoining, and took no means to guard against it. Under such circumstances, it may have been culpable negligence, and a breach of duty as a bailee for hire, to place the goods in such warehouse. *Judd v New York, etc., S. Co.*, 117 Fed. 206, 54 C. C. A. 238, rehearing granted 118 Fed. 826, 55 C. C. A. 438.

4. *Faucett v. Nichols*, 64 N. Y. 377.

5. *Treleven v. Northern Pac. R. Co.*, 89 Wis. 598; *McCombs v. North*

Carolina, etc., R. Co., 67 N. C. 193; *Smith v. Nashua, etc., R. Co.*, 27 N. H. 86, 59 Am. Dec. 364; *Michigan Southern, etc., R. Co. v. Shurtz*, 7 Mich. 515; *Hapgood Plow Co. v. Wabash R. Co.*, 61 Mo. App. 372, 1 Mo. App. Rep. 637; *Brown v. Grand Trunk R. Co.*, 54 N. H. 535, 11 Am. Ry. Rep. 195; *Angle v. Mississippi, etc., R. Co.*, 18 Iowa, 555.

6. *Norway Plains Co. v. Boston, etc., R. Co.*, 1 Gray (Mass.), 272, 61 Am. Dec. 423; *Mobile, etc., R. Co. v. Prewitt*, 46 Ala. 63, 7 Am. Rep. 586; *Western, etc., R. Co. v. Camp*, 53 Ga. 596; *Brown v. Grand Trunk R. Co.*, 54 N. H. 535; *Mitchell v. Lancashire, etc., R. Co.*, L. R. 10 Q. B. 256; *Cairus v. Robins*, 8 M. & W. 258; *White v. Humphrey*, 11 Q. B. 43, 63 E. C. L. 43.

7. *Hurd v. Hartford, etc., Steamboat Co.*, 40 Conn. 48; *Illinois Cent. R. Co. v. Alexander*, 20 Ill. 23; *Rome R. Co. v. Sullivan*, 14 Ga. 277; *Miller v. Mansfield*, 112 Mass. 260; *Dimmick v. Milwaukee, etc., R. Co.*, 18 Wis. 471.

after the lapse of such time.⁸ Where the carrier charges for storage, its liability is that of a bailee for hire and it is bound to the exercise of ordinary care for the safety of the goods in its charge.⁹ The burden of proof is on the consignee or owner of the goods to prove negligence or the want of ordinary care in the custody of the goods on the part of the carrier, where the loss of goods has occurred while the carrier held the goods as warehouseman, as, for example, where the goods have been shown to have been stolen or destroyed by fire.¹⁰ But the failure of the carrier to deliver, upon demand, goods held by it as warehouseman, casts upon it the burden of accounting for them and showing that the goods have been lost without any negligence on its part.¹¹

§ 7. Statute making railroad company liable for losses by fire.

—A statute making a railroad company liable for property burned by fire communicated by its engines does not apply where the goods burned were in the custody of the company as a warehouseman;¹² but it does apply where the goods were in a storehouse owned by the company, but used exclusively by the consignee, neither the relation of carrier nor warehouseman existing at the time of the fire.¹³

8. Bansemer v. Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367; Morris, etc., R. Co. v. Ayres, 29 N. J. L. 393, 80 Am. Dec. 215; Brown v. Grand Trunk R. Co., 54 N. H. 535, 11 Am. Ry. Rep. 195.

9. Burroughs v. Grand' Trunk R. Co., 67 Mich. 351.

10. Claffin v. Meyer, 75 N. Y. 260; Jackson v. Sacramento Valley R. Co., 23 Cal. 269; National Line Steamship Co. v. Smart, 107 Pa. St. 492; E. O. Stannard Milling Co. v. White Line Cent. Trans. Co., 122 Mo. 258; Denton v. Chicago, etc., R. Co., 52 Iowa, 161, 35 Am. Rep. 263; Texas, etc., R. Co. v. Wever, 3 Tex. App. Civ. Cas. § 60; Louisville, etc.,

R. Co. v. Manchester Mills, 88 Tenn. 653. *Compare* Almand v. Georgia R., etc., Co., 95 Ga. 775; Missouri Pac. Ry. Co. v. Texas, etc., Ry. Co., 33 Fed. 361.

11. Schwerin v. McKie, 51 N. Y. 180; Bank of Oswego v. Doyle, 91 N. Y. 42; Williamson v. New York, etc., R. Co., 56 N. Y. Super. Ct. 508, 4 N. Y. Supp. 834; Brown v. Atlantic, etc., R. Co., 19 S. C. 39, 13 Am. & Eng. R. Cas. 479.

12. Bassett v. Connecticut River R. Co., 145 Mass. 129, 1 Am. St. Rep. 443, 32 Am. & Eng. R. Cas. 528.

13. Blaisdell v. Connecticut River R. Co., 145 Mass. 132, 32 Am. & Eng. R. Cas. 530, note.

CHAPTER X.

LIMITATION OF LIABILITY.

- SECTION
1. Limitation of carrier's liability generally.
 2. Operation and effect of limitation in general.
 3. Limitation by public notice.
 4. Limitation by special contract.
 5. Special contract must be express and will not be presumed.
 6. Contract need not be signed by shipper unless required by statute.
 7. Where there are two contracts limiting liability.
 8. Conflict of oral and written agreements.
 9. Contract must have been fairly entered into.
 10. Necessity of consideration.
 11. Contract signed by shipper without examination.
 12. Contract must have been made at time of shipment.
 13. Contract must be legible and intelligible.
 14. By what law validity of contract is determined.
 15. Who may make special contract.
 16. Carrier may not limit its liability for negligence.
 17. The New York rule.
 18. Rule in Illinois and Wisconsin.
 19. The English and Canadian rule.
 20. Reasons upon which the different rules are based.
 21. Liabilities subject to limitation.
 22. Mode or form of limitation.—Bill of lading or shipping receipt.
 23. Limitation of time in which to bring suit.
 24. Requirement of notice of loss or presentation of claim within fixed time.
 25. To what damages stipulation does not apply.
 26. Limitation of liability as ground of defense.—Pleading.
 27. Limitation of liability as ground of defense.—Presumptions, and burden of proof.
 28. Stipulation requiring claim to be made before removal of goods.
 29. Limitation of liability to forwarder or warehouseman.
 30. Limitation of amount of liability.
 31. Stipulations that measure of damages shall be invoice value or market price at place of shipment.
 32. Construction of special contracts.
 33. When stipulations of contract inoperative.
 34. Fraudulent concealment or misrepresentation of value by shipper.
 35. Carrier's duty to inquire as to value of property.
 36. Shipper's duty to state value and character of goods.

§ 1. Limitation of carrier's liability general.—A common carrier may, by a just and reasonable contract, limit the extent of its common law liability in case of loss or injury. This may be done by special or express contracts or to a limited extent by contracts implied from public notice. This is almost universally held to be the rule by the United States Courts, the courts of England and Canada, and the courts of the States, except a few States where by constitutional provision or statute such limitation is prohibited. But the rule is equally as well settled and almost as universally maintained that the carrier cannot contract to relieve itself from liability for loss or injury which is the result of its own negligence or that of its servants.¹

1. U. S.—New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357; New Jersey Steam Transp. Co. v. Merchants' Bank, 6 How. (U. S.) 344; Bank of Kentucky v. Adams Express Co., 93 U. S. 174; Muser v. Holland, 17 Blatchf. (U. S.) 412; Grand Trunk R. Co. v. Stevens, 95 U. S. 655; Ogdensburg, etc., R. Co. v. Pratt, 22 Wall. (U. S.) 123.

Ala.—Mobile, etc., R. Co. v. Hopkins, 41 Ala. 486, 94 Am. Dec. 607; Southern Express Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; South, etc., Alabama R. Co. v. Henlein, 52 Ala. 606, 56 Ala. 368; Grey v. Mobile, etc., Trade Co., 55 Ala. 387, 28 Am. Rep. 729.

Ark.—Taylor v. Little Rock, etc., R. Co., 32 Ark. 398, 29 Am. Rep. 1, 39 Ark. 148, 18 Am. & Eng. R. Cas. 590; Little Rock, etc., R. Co. v. Talbot, 39 Ark. 523, 18 Am. & Eng. R. Cas. 598, 47 Ark. 97.

Colo.—Western Union Tel. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136; Merchants' Dispatch, etc., Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757.

Conn.—Camp v. Hartford, etc., Steamboat Co., 43 Conn. 333; Welch v. Boston, etc., R. Co., 41 Conn. 333, 6 Am. Ry. Rep. 95; Hale v. New

Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398.

Ga.—Southern Express Co. v. Barnes, 36 Ga. 532; Purcell v. Southern Express Co., 34 Ga. 315.

Ill.—Black v. Wabash, etc., R. Co., 111 Ill. 351, 53 Am. Rep. 628, 25 Am. & Eng. R. Cas. 388; Wabash, etc., R. Co. v. Peyton, 106 Ill. 354, 46 Am. Rep. 705, 18 Am. & Eng. R. Cas. 1.

Ind.—Lake Erie, etc., R. Co. v. Holland (Ind.), 69 N. E. 138, 63 L. R. A. 948; Bartlett v. Pittsburgh, etc., R. Co., 94 Ind. 281, 18 Am. & Eng. R. Cas. 549.

Iowa.—McCoy v. Keokuk, etc., R. Co., 44 Iowa, 424.

Kan.—Kansas Pac. R. Co. v. Reynolds, 17 Kans. 251.

Ky.—Rhodes v. Louisville, etc., R. Co., 9 Bush (Ky.), 688.

La.—Simon v. Steamship Fung Shuey, 21 La. An. 363.

Me.—Morse v. Canadian Pac. R. Co., 97 Me. 77, 53 Atl. 874; Willis v. Grand Trunk R. Co., 62 Me. 488.

Mass.—Buckland v. Adams Express Co., 97 Mass. 124, 93 Am. Dec. 68.

Minn.—O'Malley v. Great Northern R. Co., 86 Minn. 580, 90 N. W. 974; Jacobus v. St. Paul, etc., R.

§ 2. Operation and effect of limitation in general.—Freeing itself by contract from its usual common-law duties does not change the true character of a carrier's employment, and it is a public carrier still.² Where a common carrier, accepting property for transportation, commits a breach of its common-law duties, the shipper may maintain an action in tort therefor, though the carrier receives the property under a special contract limiting its liability; the carrier in accepting the shipment accepting it with the obligations imposed by law, and the special contract merely constituting a defense in so far as the exemptions from liability which it creates are valid.³ Under a contract of shipment providing that no carrier is bound to carry the property by a particular train or vessel, or otherwise than with as reasonable dispatch as its general business will permit, or shall be liable for loss thereof by fire, the carrier is not liable, where the fire destroying the vessel and cargo did not arise from its fault, though the goods would not have been destroyed if it had carried them on the night of their arrival; the capacity of the vessel not being

Co., 20 Minn. 125, 18 Am. Rep. 360, 1 Cent. L. J. 375.

Miss.—Mobile, etc., R. Co. v. Weiner, 49 Miss. 725.

Mo.—Oxley v. St. Louis, etc., R. Co., 65 Mo. 629.

Neb.—Atchison, etc., R. Co. v. Washburn, 5 Neb. 117.

N. H.—Hall v. Cheney, 36 N. H. 26.

N. J.—Taylor v. Pennsylvania R. Co., 8 N. J. L. J. 149; Paul v. Pennsylvania R. Co. (N. J. Sup.), 57 Atl. 139; Ashmore v. Pennsylvania Steam Towing, etc., Co., 28 N. J. L. 180.

N. C.—Parker v. Atlantic, etc., R. Co., 133 N. C. 335, 63 L. R. A. 827, 45 S. E. 658; Lee v. Raleigh, etc., R. Co., 72 N. C. 236.

Ohio.—Pennsylvania Co. v. Yoder, 25 Ohio C. C. R. 32; Erie R. Co. v. Lockwood, 28 Ohio St. 358; Gaines v. Union Transp., etc., Co., 28 Ohio St. 418, 14 Am. Ry. Rep. 158; Cincinnati, etc., R. Co. v. Berdan, 22 Ohio Cir. Ct. R. 326.

Pa.—Farnham v. Camden, etc., R. Co., 55 Pa. St. 53.

S. C.—Levy v. Southern Express Co., 4 S. C. 234.

Tenn.—Dillard v. Louisville, etc., R. Co., 2 Lea (Tenn.), 288.

Tex.—Galveston, etc., R. Co. v. Allison, 59 Tex. 193, 12 Am. & Eng. R. Cas. 28.

Vt.—Kimball v. Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567.

Va.—Wilson v. Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654.

W. Va.—Brown v. Adams Express Co., 15 W. Va. 812.

Wis.—Detroit, etc., R. Co. v. Farmers', etc., Bank, 20 Wis. 122.

Eng.—Peek v. North Staffordshire R. Co., 10 H. L. Cas. 473, 32 L. J. Q. B. 241.

2. Lake Erie, etc., R. Co. v. Holland (Ind.), 69 N. E. 138, 63 L. R. A. 948.

3. Nelson v. Great Northern R. Co., 28 Mont. 297, 72 Pac. 642.

sufficient for all the cargo.⁴ So where a bill of lading provided that goods should be delivered to successive carriers, and that no carrier should be liable for loss or damage after said goods were ready for delivery to the next carrier, and a railroad company transported the goods to a seaport with proper diligence, and deposited them in the railroad company's warehouse ready for shipment when the boats of the connecting carrier should arrive, the connecting carrier having no warehouse or dock, and while the goods were awaiting transportation, they were destroyed by fire, not caused by defendant's negligence, the railroad company was not liable.⁵ The rule of law and stipulations varying or limiting the liability of the common carrier must be strictly construed against the carrier has reference to the question of the extent of the liability of the carrier during the period in which he is acting in such capacity, and does not have reference to the question of when the liability of a common carrier ceases by the delivery of the property to the consignee.⁶ Appropriate language being used in a bill of lading, liquidating, on a value basis, recoverable damages for the loss of or injury to the subject of carriage happening through events described by such language as to reasonably include results of negligence on the part of the carrier, and also appropriate language exempting the carrier from liability in consideration of a special freight rate or other valuable consideration, for loss of or damage to such subject, by events not necessarily attributable to the carrier's negligence, the reasonable construction is that the limitation of liability on a value basis refers to loss by negligence, and that the entire exemption from liability refers to damages caused by such mere accidents as the carrier would be liable for, and that neither refers to occurrences for which there would be no liability whatever, nor to damages, caused by willful misfeasance.⁷

4. *The Nutmeg State*, 103 Fed. 797.

5. *Courteen v. Kanawha Dispatch*, 110 Wis. 610, 86 N. W. 176.

6. *Paddock v. Toledo, etc., R. Co.*, 21 Ohio C. C. R. 626, 11 O. C. D. 789.

7. *Ullman v. Chicago, etc., R. Co.*, 112 Wis. 168, 88 N. W. 41. The words "in case of accident" being used in a bill of lading, referring

to events involving damage to the subject of carriage for which the carrier would be liable, and later in the contract the words "negligence aforesaid" being used in regard to the producing cause of injuries to the subject of carriage, without any precedent language other than the words "in case of accident" to which such words can reasonably refer,

§ 3. Limitation by public notice.—The authorities generally hold that a common carrier can only restrict or limit its common law liability and discharge itself from duties which the law has annexed to its employment by express contract, and not by a general notice, although brought home to the owner of the goods.⁸ But the carrier may by a general notice publicly posted, but not shown to have been brought to the shipper's attention before shipment, require all shippers to state the true nature or value of the property shipped, with a view to the amount of compensation for the services and risk, or else the carrier will be absolved from the consequences of a loss, not occasioned by negligence or misconduct, beyond the apparent value of such property.⁹ It is the generally accepted doctrine that the carrier may limit its liability by public notice of a reasonable rule or regulation as to the manner of entry or consignment of goods, the statement of their value and character, and as to its own charges.¹⁰ Such a rule or regu-

leaving such latter expression without significance except by reference to the former expression, such latter expression should be taken as pointing to the former under the rule for judicial construction that every word or expression in a contract should be given some significance if that can reasonably be done. *Id.*

8. Hollister v. Nowlen, 19 Wend. (N. Y.) 234; **Cole v. Goodwin**, 19 Wend. (N. Y.) 251; **Clerk v. Paxton**, 21 Wend. (N. Y.) 153; **Dorr v. New Jersey Steam Nav. Co.**, 11 N. Y. 485, 4 Sand. (N. Y.) 136; **Fibel v. Livingston**, 64 Barb. (N. Y.) 179; **Freeman v. Newton**, 3 E. D. Sm. (N. Y.) 246; **Judson v. Western R. Corp.** 6 Allen (Mass.), 486, 490, 83 Am. Dec. 646; **Illinois Cent. R. Co. v. Frankensburg**, 54 Ill. 88; **Davidson v. Graham**, 2 Ohio St. 131; **Brown v. Adams Express Co.**, 15 W. Va. 812; **McMillan v. Michigan, etc., R. Co.**, 6 Mich. 79, 111; **Gott v. Dinsmore**, 111 Mass. 45; **Fillebrown v. Grand Trunk R. Co.**, 55 Me. 462, 92 Am. Rep. 606.

9. McMillan v. Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; **Western Transp. Co. v. Newhall**, 24 Ill. 466, 76 Am. Dec. 760; **Farmers', etc., Bank v. Champlain Transp. Co.**, 16 Vt. 52, 18 Vt. 131, 23 Vt. 186, 56 Am. Dec. 68; **Adams Express Co. v. Stettner**, 61 Ill. 184, 14 Am. Rep. 57; **Oppenheimer v. United States Express Co.**, 69 Ill. 62, 18 Am. Rep. 596; **Southern Express Co. v. Newby**, 36 Ga. 635, 91 Am. Dec. 783.

10. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (U. S.) 344; **Hopkins v. Westcott**, 6 Blatchf. (U. S.) 64; **Lawrence v. New York, etc., R. Co.**, 36 Conn. 63; **Kallman v. United States Express Co.**, 3 Kan. 205; **Brehme v. Dinsmore**, 25 Md. 328; **Judson v. Western R. Corp.** 6 Allen (Mass.), 486, 83 Am. Dec. 646; **McMillan v. Michigan Southern, etc., R. Co.**, 16 Mich. 79, 93 Am. Dec. 208; **Snider v. Adams Express Co.**, 63 Mo. 376; **Ketchum v. American M. U. Express Co.**, 52 Mo. 390; **Moses v. Boston, etc., R. Co.**, 24 N. H. 71, 55

lation in respect to duties designed simply to insure good faith and fair dealing is held to be one of which the shipper must inform himself if reasonable opportunity therefor be given him, and he will be bound by it whether it is specifically brought to his attention or not. A general notice publicly posted is sufficient to discharge the carrier.¹¹ In New York, however, the rule is that mere public notice will not operate as a limitation of the carrier's liability unless brought home to the owner of the goods.¹² But except for the establishment of such rules or regulations to insure regularity and promptness and properly inform the carrier of the responsibility he assumes, the force of a mere notice cannot extend, and the general doctrine maintained by the courts of the United States, as well as in England and Canada, is that a carrier cannot limit its liability by any public notice unless such notice is shown to have been brought to the knowledge or attention of the shipper within a reasonable time before shipment and to have been expressly assented to by him, or his agent.¹³ There are cases in some of the States, however, which

Am. Dec. 222; *Fibel v. Livingston*, 64 Barb. (N. Y.) 179; *Farmers'*, etc., *Bank v. Champlain Transp. Co.*, 23 Vt. 186, 56 Am. Dec. 68; *Boorman v. American Express Co.*, 21 Wis. 152.

11. *Erie R. Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451, 16 Am. Ry. Rep. 457; *Oppenheimer v. United States Express Co.*, 69 Ill. 62, 18 Am. Rep. 596.

The language of the publication must be plain, explicit and unambiguous, if the carrier relies on a mere notice or advertisement as a limitation of its liability. *Beckman v. Shouse*, 5 Rawle (Pa.), 179, 28 Am. Dec. 653; *Barney v. Prentiss*, 4 Har. & J. (Md.) 317, 7 Am. Dec. 670.

12. *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; *Cole v. Goodwin*, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470.

13. See cases cited note 12, *supra*.
N. Y.—*Springer v. Westcott*, 166

N. Y. 117, 59 N. E. 693; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212, 8 Am. Rep. 543; *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Camden, etc., R. Co. v. Belknap*, 21 Wend. (N. Y.) 354; *Zimmer v. New York Cent., etc., R. Co.*, 137 N. Y. 462; *Grossman v. Dodd*, 63 Hun (N. Y.), 324, affd. 187 N. Y. 599; *Madan v. Sherard*, 73 N. Y. 329, 29 Am. Rep. 153; *Reed v. Fargo*, 7 N. Y. Supp. 185.

Where an express company gave plaintiff a receipt for a trunk check which contained a provision limiting the company's liability, plaintiff was not bound thereby, when she had no knowledge of the contents of the paper, and there was no showing that it was proffered as a contract, or that plaintiff accepted it as anything more than a means to identify her property. *Walker v. Platt*, 34 Misc. Rep. (N. Y.) 799, 69 N. Y. Supp. 943.

U. S.—*New Jersey Steam Nav. Co.*

hold that while a general or published notice is insufficient for a contract limiting liability to be implied therefrom, yet when the notice is not unreasonable, and is clear and explicit, and is brought home to the shipper, or the course of business is well

v. Merchants' Bank, 6 How. (U. S.) 344; Ormsby v. Union Pac. R. Co., 4 Fed. 706, 2 McCrary (U. S.), 48; Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318; Ayres v. Western R. Corp., 14 Blatchf. (U. S.) 9; The Brig May Queen, 1 Newb. Adm. 465; The Pacific, Deady (U. S.), 17.

Ala.—Southern Express Co. v. Armstead, 50 Ala. 350; Southern Express Co. v. Crook, 44 Ala. 468; 4 Am. Rep. 140; Southern Express Co. v. Caperton, 44 Ala. 101, 4 Am. Rep. 118; Mobile, etc., R. Co. v. Jarboe, 41 Ala. 644; Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49.

Conn.—Peck v. Weeks, 34 Conn. 145; Derwot v. Loomer, 21 Conn. 245; Hale v. New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398. See Coupland v. Housatonic R. Co., 61 Conn. 531, 55 Am. & Eng. R. Cas. 380.

Ga.—Georgia R. Co. v. Gann, 68 Ga. 350. A common carrier of goods cannot limit his legal liability as an insurer, except by an express contract entered into by both parties. Central of Georgia R. Co. v. Lippman, 110 Ga. 665, 36 S. E. 202.

Ill.—Oppenheimer v. United States Express Co., 69 Ill. 62, 18 Am. Rep. 596; Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Western Transp. Co. v. Newhall, 24 Ill., 466, 76 Am. Dec. 760; Chicago, etc., R. Co. v. Harmon, 12 Ill. App. 54. There must be clear proof that the shipper expressly assented to limitations on the carrier's liability contained in its contract, or the shipper, notwithstanding notice of

such intended limitation, may insist that the carrier shall transport his goods incident to the common-law employment. Adams Exp. Co. v. Bratton, 106 Ill. App. 563.

Ind.—Indianapolis, etc., R. Co. v. Cox, 29 Ind. 360, 95 Am. Dec. 640; Evansville, etc., R. Co. v. Young, 28 Ind. 516.

La.—New Orleans Mut. Ins. Co. v. New Orleans, etc., R. Co., 29 La. Ann. 302; Roberts v. Riley, 15 La. Ann. 103, 77 Am. Dec. 183; Logan v. Pontchartrain R. Co., 11 Rob. (La.) 24, 43 Am. Dec. 199; Baldwin v. Collins, 9 Rob. (La.) 468.

Md.—Baltimore, etc., R. Co. v. Brady, 32 Md. 333.

Mass.—Buckland v. Adams Express Co., 97 Mass. 131, 93 Am. Dec. 68; Judson v. Western R. Corp., 6 Allen (Mass.) 490.

Mich. — McMillan v. Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; American Transp. Co. v. Moore, 5 Mich. 368.

Miss.—Mobile, etc., R. Co. v. Werner, 49 Miss. 725.

Neb.—Atchison, etc., R. Co. v. Miller, 16 Neb. 661, 18 Am. & Eng. R. Cas. 545.

N. C.—Gardner v. Southern R. Co., 127 N. C. 293, 37 N. E. 328.

N. H.—Moses v. Boston, etc., R. Co., 24 N. H. 71, 55 Am. Dec. 222; Bennett v. Dutton, 10 N. H. 481.

N. J.—Gibbons v. Wade, 8 N. J. L. 255.

Ohio—Mack v. Great Western Dispatch, 2 O. C. D. 22, the acceptance of dray tickets did not constitute an assent to their terms; Gaines v. Union Transp. etc., Co., 28 Ohio St.

understood and has been often acted upon without question, the limitation which it imposes may be binding upon the shipper.¹⁴

418; *Jones v. Voorhees*, 10 Ohio 145; *Davidson v. Graham*, 2 Ohio St. 131; *Union Mut. Ins. Co. v. Indianapolis, etc.*, R. Co., 1 Disney (Ohio) 480.

S. C.—*Levy v. Southern Express Co.*, 4 S. C. 234.

Tenn.—*Walker v. Skipwith, Meigs (Tenn.)* 502, 33 Am. Dec. 161.

Vt.—*Winchell v. National Express Co.*, 64 Vt. 15; *Mann v. Birchart*, 40 Vt. 326; *Blumenthal v. Brainard*, 38 Vt. 402, 91 Am. Dec. 350; *Kimball v. Rutland, etc.*, R. Co., 26 Vt. 247, 62 Am. Dec. 567; *Farmers', etc.*, *Bank v. Champlain Transp. Co.*, 18 Vt. 131, 23 Vt. 186, 56 Am. Dec. 68.

W. Va.—*Brown v. Adams Express Co.*, 15 W. Va. 812.

Eng.—*Peek v. North Staffordshire R. Co.*, 10 H. L. Cas. 473, 32 L. J. Q. B. 241; *Doolan v. Midland R. Co.*, L. R. 2 App. 792, 25 W. R. 882; *Cohen v. South Eastern R. Co.*, 2 Exch. Div. 253, 46 L. J. Exch. Div. 417.

Can.—*Grand Trunk R. Co. v. Vogel*, 11 Can. Sup. Ct. 612, 27 Am. & Eng. R. Cas. 18; *Fitzgerald v. Grand Trunk R. Co.*, 4 Ont. App. 601, 5 Can. Sup. Ct. 209.

14. *Bingham v. Rogers*, 6 W. & S. (Pa.) 495, 40 Am. Dec. 581; *Beckman v. Shouse*, 5 Rawle (Pa.) 179, 28 Am. Dec. 653. These decisions have been questioned in later cases. In *Laing v. Colder*, 8 Pa. St. 479, 49 Am. Dec. 533, the court says: "The expediency of recognizing in the carrier a right to do so by a general notice has been strongly and justly questioned, and in some of our sister states altogether denied. Were the question an open one in Pennsylvania, I should, for one, unhesitat-

ingly follow them in repudiating a principle which places the bailor absolutely at the mercy of the carrier, whom in a vast majority of instances, he cannot but choose to employ." See also *Farnham v. Camden, etc.*, R. Co., 55 Pa. St. 53; *Pennsylvania Cent. R. Co. v. Schwarzenberger*, 45 Pa. St. 208, 84 Am. Dec. 490; *Verner v. Schweitzer*, 32 Pa. St. 208; *Camden, etc., R. Co. v. Baldauf*, 16 Pa. St. 67, 55 Am. Dec. 481.

In Maine the rule is that notice brought home to the owner of the goods, at or before the time of delivery for shipment, if either expressly or impliedly assented to by the owner, will restrict the carrier's liability. *Little v. Boston, etc.*, R. Co., 66 Me. 239; *Sager v. Portsmouth, etc.*, R. Co., 31 Me. 228, 50 Am. Dec. 659; *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462, 92 Am. Dec. 606.

In North Carolina it is held that common carriers may, by notice brought to the knowledge of the owner, reasonably qualify their liability in certain cases, as, if the notice be that they will not be liable for glass in a box, or articles of unusual value, unless informed of the facts. *Smith v. North Carolina R. Co.*, 64 N. C. 235.

In Kentucky it has been held "that public notice given by the carrier and brought home to the knowledge of the shipper, enters into the contract of affreightment so far as the carrier has a right to impose terms, either by express or implied contract, unless the notice is inconsistent with the terms of the express contract." *Orndorff v. Adams Express Co.*, 3 Bush (Ky.), 194, 96 Am. Dec. 207. See also *Adams Express*

§ 4. Limitation by special contract.—In the earlier cases in New York it was held that a common carrier could not, even by express contract, restrict its common law liability.¹⁵ But these cases were modified by later authorities and the courts determined that a carrier may limit his responsibility by an express agreement with the owner, in the form of a special acceptance of the goods to be transported.¹⁶ The courts in England and America, both State and Federal, now generally maintain the rule that a carrier may, by special contract not unreasonable between himself and the shipper or passenger, limit its common law liability.¹⁷ It is usual for the consignor, on delivery of goods for transportation to a carrier, to receive a bill of lading, expressing the terms and conditions upon which the merchandise is to be carried. He is presumed to assent to its conditions because he receives it under circumstances which, by the ordinary usages of business, would naturally lead him to infer that the document he receives, which is his muniment of title, *quasi negotiable* and upon the faith of which he may borrow money, is a contract and not a mere receipt.¹⁸ The rule is, therefore, gen-

Co. v. Nock, 2 Duv. (Ky.) 562, 87 Am. Dec. 510.

15. Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470; Gould v. Hill, 2 Hill (N. Y.), 623; Hollister v. Nowlen, 19 Wénd. (N. Y.) 234, 32 Am. Dec. 455.

16. Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485; Parsons v. Mon-teath, 13 Barb. (N. Y.) 353; Moore v. Evans, 14 Barb. (N. Y.) 524, overruling Gould v. Hill, 2 Hill N. Y. 623; Fibel v. Livingston, 64 Barb. (N. Y.) 179; Mercantile Mut. Ins., Co. v. Chase, 1 E. D. Sm. (N. Y.) 115.

17. Erie R. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451, 16 Am. Ry. Rep. 457; Illinois Cent. R. Co. v. Schwartz, 13 Ill. App. 490; Thayer v. St. Louis, etc., R. Co., 22 Ind. 26, 85 Am. Dec. 409; Camp v. Hartford, etc., Steamboat Co., 43 Conn. 333; Feige v. Michigan Cent. R. Co., 62 Mich. 1;

Michigan Cent. R. Co. v. Hale, 6 Mich. 243; Potts v. Wabash, etc., R. Co., 17 Mo. App. 394; Bingham v. Rogers, 6 W. & S. (Pa.) 495, 40 Am. Dec. 581; Richmond, etc., R. Co. v. Payne, 86 Va. 481, 42 Am. & Eng. R. Cas. 366; Baltimore, etc., R. Co. v. Rathbone, 1 W. Va. 87, 88 Am. Dec. 664; Zouch v. Chesapeake, etc., R. Co., 36 W. Va. 524, 19 Am. & Eng. R. Cas. 711; Fitzgerald v. Grand Trunk R. Co., 4 Ont. App. 601, 28 U. C. C. P. 586; Southcote's Case, 4 Coke 84; Morse v. Slue, 1 Vent. 238; Nicholson v. Willan, 5 East 507; Smith v. Horn, 8 Taunt. 144, 4 E. C. L. 50; Anon v. Jackson, 2 Peake N. P. 185.

18. Long v. New York Cent. R. Co., 50 N. Y. 76; Huntington v. Dinsmore, 4 Hun (N. Y.) 66, 6 T. & C. (N. Y.) 195; Grace v. Adams, 100 Mass. 505; Snider v. Adams Express Co., 63 Mo. 376; Brehme v. Adams

erally recognized in the United States that the acceptance by the shipper or his agent of a receipt or bill of lading signed by the carrier expressing the terms and conditions upon which the goods are received, and are to be carried, and containing a limitation of the carrier's liability, constitutes in the absence of fraud or imposition, where the limitation is not illegal or unreasonable, a contract controlling the rights of the parties.¹⁹ The rule is maintained even though it be shown that the consignor did not read the bill of lading, since it was his duty to do so.²⁰ It is not essential to the validity of such a limitation that it be shown that the shipper was aware of it, or that it had been explained to him, or that his attention had been called to it, or that it was brought

Express Co., 25 Md. 328; McMahon v. Macy, 51 N. Y. 155; Farnham v. Camden, etc., R. Co., 55 Pa. St. 53; American Express Co. v. Second National Bank, 69 Pa. St. 394; Logan v. Mobile Trade Co., 46 Ala. 514.

19. U. S.—Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 329.

N. Y.—Kirkland v. Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575.

Ark.—St. Louis, etc., R. Co. v. Weakly, 50 Ark. 397, 35 Am. & Eng. R. Cas. 635, 7 Am. St. Rep. 104.

Ind.—Adams Express Co. v. Carnahan (Ind. App.), 63 N. E. 245, 64 N. E. 647.

Kan.—Atchison, etc., R. Co. v. Dill, 48 Kan. 210, 55 Am. & Eng. R. Cas. 378.

Ky.—Adams Express Co. v. Nock, 2 Duv. (Ky.) 563, 87 Am. Dec. 510.

Mass.—Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131.

Miss.—Southern Express Co. v. Moon, 39 Miss. 832.

Mo.—Levering v. Union Transp., etc., Co., 42 Mo. 88, 97 Am. Dec. 320.

N. H.—Merrill v. American Express Co., 62 N. H. 514.

R. I.—Ballou v. Earle, 17 R. I. 441, 33 Am. St. Rep. 881, 48 Am. & Eng. R. Cas. 31.

Tenn.—East Tennessee, etc., R. Co., v. Brumley, 5 Lea (Tenn.) 401; Dillard v. Louisville, etc., R. Co., 2 Lea (Tenn.) 288.

Vt.—Davis v. Central Vermont R. Co., 66 Vt. 290, 44 Am. St. Rep. 852, 61 Am. & Eng. R. Cas. 197. Compare Blumenthal v. Brainard, 38 Vt. 402, 91 Am. Dec. 350.

Wis.—Proof that shipper took a receipt containing provisions restricting the carrier's liability is *prima facie* evidence of his assent to them. Morrison v. Phillips, etc., Constr. Co., 44 Wis. 405, 28 Am. Rep. 599, 19 Am. Rep. 312; Boorman v. American Express Co., 21 Wis. 154; Strohn v. Detroit, etc., R. Co., 21 Wis. 554, 94 Am. Dec. 554.

20.—Grace v. Adams, 100 Mass. 505; Snider v. Adams Express Co., 63 Mo. 376; Mulligan v. Illinois Cent. R. Co., 36 Iowa 181; American M. U. Express Co. v. Schier, 55 Ill. 140, the question whether the shipper assented to the restrictions and conditions in an inland bill of lading is one of fact for the jury. See also Illinois Cent. R. Co. v. Jonte, 13 Brad. (Ill. App.) 424.

to the knowledge of the shipper himself where his agent assented to the stipulation, provided the carrier has used no deception or improper means to prevent the shipper or his agent from noticing or objecting to the provision limiting liability.²¹ In the ab-

21. *N. Y.*—*Zimmer v. New York Cent., etc., R. Co.*, 137 N. Y. 460; *Hill v. Syracuse, etc., R. Co.*, 73 N. Y. 351, 29 Am. Rep. 163; *Germania F. Ins. Co. v. Memphis, etc., R. Co.*, 72 N. Y. 90, 28 Am. Rep. 113; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475. See also *Fowler v. Liverpool, etc., Steam Co.*, 87 N. Y. 190, 9 Am. & Eng. R. Cas. 235; *Coffin v. New York Cent. R. Co.*, 64 Barb. (N. Y.) 379, 56 N. Y. 632.

Ala.—*Western R. Co. v. Harwell, 97 Ala. 341; Louisville, etc., R. Co. v. Meyer, 78 Ala. 597.*

Iowa.—*Mulligan v. Illinois Cent. R. Co.*, 36 Iowa 181.

Ky.—*Louisville, etc., R. Co., v. Brownlee, 14 Bush. (Ky.) 590.*

Mass.—*Quimby v. Boston, etc., R. Co.*, 150 Mass., 365; *Hill v. Boston, etc., R. Co.*, 144 Mass. 284, 28 Am. & Eng. R. Cas. 88; *Monitor Mut. F. Ins. Co. v. Buffum*, 115 Mass. 343.

Mo.—*Kellerman v. Kansas City, etc., R. Co. (Kan.)*, 34 S. W. 41; *Patterson v. Kansas City, etc., R. Co., 56 Mo. App. 657.*

S. C.—*Johnstone v. Richmond, etc., R. Co.*, 39 S. C. 55, 55 Am. & Eng. R. Cas. 346.

Wis.—*Morrison v. Phillips, etc., Constr. Co.*, 44 Wis. 405, 19 Am. Ry. Rep. 312, 28 Am. Rep. 599.

Eng.—*Burke v. South Eastern R. Co.*, 5 C. P. Div. 1; *Harris v. Great Western R. Co.*, 1 Q. B. Div. 515; *O'Rorke v. Great Western R. Co.*, 23 U. C. Q. B. 427.

Tex.—*Ryan v. Missouri, etc., R. Co.*, 65 Tex. 13, 23 Am. & Eng. R. Cas. 707, 57 Am. Rep. 589; *International,*

etc., R. Co. v. Watt, 2 Tex. App. Civ. Cas. § 781.

The insertion of a stipulation limiting the liability of a carrier in a bill of lading, and the receipt of the goods under it, are not sufficient evidence of an assent to such exemption by the shipper or consignee to render such stipulation binding upon the latter. *The Guildhall*, 58 Fed. 796.

Where, under a custom, a railroad company, on shipment of goods, instead of issuing a bill of lading, signed a receipt for the goods prepared by the shipper, which at the instance of the railroad company contained the clause, "subject to the terms and conditions of the R. R. Co.'s bill of lading," and such bill of lading contained the condition that "no carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto by causes beyond its control, or by floods or fire" not due to its own negligence, the provisions of such bill of lading become incorporated into the contract of shipment, though the shipper was not aware that such provision was contained therein, he having the means to acquaint himself of such fact, and in such case neither the shipper nor the consignee can recover for the loss by fire of the goods shipped, while in possession of the carrier or of a connecting carrier bound by the same contract of shipment; such loss occurring without the negligence of such carriers. *Cincinnati, etc., R. Co. v. Berdan*, 22 Ohio Cir. Ct. R. 326.

sence of fraud, concealment, or improper practice, the legal presumption is that stipulations limiting the common law liability of common carriers, contained in a receipt or bill of lading given to a shipper or passenger, are known to the party receiving it, and that he has read and assented to them.²² But a special contract limiting the liability of the carrier is only binding upon the shipper when fairly and freely executed or assented to by him, and he will not be bound by it when obtained unfairly or through fraud or misrepresentation, nor will his assent be implied where undue advantage has been taken of him.²³ The general rule is not followed by the courts of Illinois and Ohio, but it is there held that the express assent of the shipper to the limitation must be shown, and that it cannot be implied or presumed from the mere acceptance of the receipt or bill of lading containing the limitation, although the fact of acceptance may be considered as some evidence of assent.²⁴ In Georgia the statute provides

22. Steers v. Liverpool, etc., Steamship Co., 57 N. Y. 1, 15 Am. Rep. 453; McMillan v. Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Ballou v. Earle, 17 R. I. 441, 33 Am. St. Rep. 881, 48 Am. & Eng. R. Cas. 31; International, etc., R. Co. v. Watt, 2 Tex. App. Civ. Cas. § 781. Compare Brown v. Adams Express Co., 15 W. Va. 812.

It may be a question for the jury whether or not the shipper actually assented to the limitation in question. Baltimore, etc., R. Co. v. Brady, 32 Md. 333; Palmer v. Grand Junction R. Co., 4 M. & W. 749, 3 Jur. 559, 7 D. P. C. 232.

23. Atchison, etc., R. Co. v. Dill, 48 Kan. 210, 29 Pac. 148; Union Pac. R. Co. v. Marston, 30 Neb. 241, 45 Am. & Eng. R. Cas. 328; Simons v. Great Western R. Co., 2 C. B. N. S. 620, 89 E. C. L. 620.

24. Ill.—Chicago, etc., R. Co. v. Simon, 160 Ill. 648, affg. 57 Ill. App. 502; Chicago, etc., R. Co. v. Harmon, 12 Ill. App. 54; Indianapolis, etc., R. Co. v. Jurey, 8 Ill. App. 160; Men-

chants' Despatch Transp. Co. v. Furthmann, 149 Ill., 66, 61 Am. & Eng. R. Cas. 145; Erie R. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451, 16 Am. Ry. Rep. 457; Merchants' Despatch Transp. Co. v. Joesting, 89 Ill. 153; Merchants' Despatch Transp. Co. v. Leysor, 89 Ill. 43; Field v. Chicago, etc., R. Co., 71 Ill. 458; Anchor Line v. Dater, 68 Ill. 369; United States Express Co. v. Haines, 67 Ill. 137; Adams Express Co. v. Stettaners, 61 Ill. 184; 11 Am. Rep. 57; Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Adams Express Co. v. Haynes, 42 Ill. 89. See Anchor Line v. Knowles, 66 Ill. 150; Black v. Wabash, etc., R. Co., 111 Ill. 351, 53 Am. Rep. 628.

Acceptance of receipt some evidence of assent: Erie, etc., Transp. Co. v. Dater. 91 Ill. 195, 33 Am. Rep. 51; Boscowitz v. Adams Express Co., 93 Ill. 523, 34 Am. Rep. 191. See also Merchants' Despatch Transp. Co. v. Theilbar, 86 Ill. 71.

Ohio.—Pittsburgh, etc., R. Co. v. Barrett, 36 Ohio St. 448, 3 Am. &

that no contract limiting the liability of a common carrier shall be valid unless it has the express assent of the shipper.²⁵

§ 5. Special contract must be express and will not be presumed.—In the absence of evidence to the contrary, it is to be assumed that property accepted by a carrier for transportation is taken under the responsibility cast upon it by the common law, except as modified by statute, and, if lost under circumstances which render the carrier liable by the general rule of law, it must respond, unless it can show that there was a special acceptance, equivalent to a contract, which exempts it from the ordinary liability of common carriers.²⁶ The fact that the carrier was accustomed to give to shippers receipts containing provisions limiting its liability will not support a presumption that there was a special contract limiting its liability in the absence of any showing that such a receipt was never given or came to the knowledge of the shipper,²⁷ nor will the carrier be absolved from liability by evidence that the shipper or his agent previously knew of conditions in the shipping bills or receipts usually given, which would discharge the carrier from liability for the loss sustained.²⁸ Mere notices brought home to the owner of the goods, by which the carrier seeks to avoid or limit its common law liability, but which are not expressly assented to, cannot be availed of to defeat a claim for loss.²⁹

Eng. R. Cas. 256; Gaines v. Union Transp., etc., Co., 28 Ohio St. 418, 14 Am. Ry. Rep. 158; Davidson v. Graham, 2 Ohio St. 131.

25. Georgia R. Co. v. Spears, 66 Ga. 485, 42 Am. Rep. 81; Wallace v. Sanders, 42 Ga. 486; Southern Express Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Purcell v. Southern Express Co., 34 Ga. 315; Southern Express Co. v. Barnes, 36 Ga. 532.

26. Park v. Preston, 108 N. Y. 434, 15 N. E. 705; Madan v. Sherard, 73 N. Y. 330; Blossom v. Dodd, 43 N. Y. 264; Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485.

27. London, etc., F. Ins. Co. v.

Rome, etc., R. Co., 144 N. Y. 200, affg. 68 Hun (N. Y.) 598, 23 N. Y. Supp. 231.

28. Reed v. Fargo, 7 N. Y. Supp. 185; Pearsall v. Western Union Tel. Co., 124 N. Y. 256, 26 N. E. 534; Kirkland v. Dinsmore, 62 N. Y. 171, 175; Pittsburgh, etc., R. Co. v. Barrett, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 256.

29. Gott v. Dinsmore, 111 Mass. 52. The assent of the shipper to certain express provisions in the receipt or bill of lading may be proven by implication, but not the provisions themselves. Dillard v. Louisville, etc., R. Co., 2 Lea (Tenn.) 288.

§ 6. Contract need not be signed by shipper unless required by statute.—Although, as we have seen, the contract limiting the carrier's liability must be express and cannot be implied, the assent of the shipper to the contract may be implied and the contract need not be signed by the shipper, unless a statute requires such signature by him.³⁰ But under a statute providing that the obligations of a common carrier cannot be limited by general notice, and that, except as to the rate of hire, time, place and manner of delivery, the acceptance of a ticket, bill of lading, or written contract, shall not constitute an acceptance of provisions modifying the carrier's obligations, unless the person accepting it manifests his assent by his signature, a provision in such contract or receipt exempting the company from liability is of no effect, where such contract or receipt was signed only by the carrier's agent.³¹ But such a contract may still be binding on the carrier, under such a statute, whether signed by the shipper or not.³²

§ 7. Where there are two contracts limiting liability.—Where there are two contracts of shipment, both representing the same shipment, limiting the carrier's liability, the carrier is bound by the one which is the least beneficial to itself.³³ Where the carrier has posted one set of notices stating the conditions on which he will transport freight, and has advertised different conditions in printed hand bills spread abroad, he will be bound by the conditions which hold him more nearly to his common law liability.³⁴ Where a shipping receipt, signed by the carrier's agent only, limited the amount for which damages would be paid, while a special agreement under seal signed by the shipper released the carrier from all liability, it was held that the receipt and release were separate and distinct contracts, prepared and executed at the instance of the carrier, and the carrier could not, in its own interest, elect

30. See last preceding section.

31. Hartwell v. Northern Pac. Express Co., 5 Dak. 463, 37 Am. & Eng. R. Cas. 635; Hazel v. Chicago, etc., R. Co., 82 Iowa 477; 49 Am. & Eng. R. Cas. 78.

32. Baxendale v. Great Eastern R. Co., 10 B. & S. 212, L. R. 4 Q. B. 244,

3 Ry. & C. T. Cas. XXV., as to such provision in the English Railway and Canal Traffic Act.

33. Munn v. Baker, 2 Stark. 255, 3 E. C. L. 399.

34. St. Louis, etc., R. Co. v. Smuck, 49 Ind. 302.

which should be the shipping contract; that the shipping receipt, not under seal or witnessed, and not regarded by the carrier as the shipping contract, could not be deemed the contract under which the goods were carried; the other agreement was the shipping contract, and the limitations therein being void as against public policy because attempting to release the carrier from all liability for negligence, the shipper was not precluded from recovering the full value of his goods; that, if both papers constitute but one contract, both are tainted with the illegality, and are therefore void, and the liability of the carrier must be determined under the principles of the public law.³⁵

§ 8. Conflict of oral or written agreements.—A common carrier may, by special contract, limit its liability, and, in the absence of fraud or mistake, the contract, signed by the shipper, is the sole evidence of the agreement, although it differs from the previous oral agreement, and the shipper did not read it.³⁶ The presumption is that the written contract contains the entire agreement, and the general rule applies that oral testimony cannot be admitted to contradict or vary its provisions.³⁷ A final written contract between the shipper and the carrier supersedes all prior agreements relating to the same matter.³⁸ A subsequent oral agreement cannot be shown to relieve the carrier from its lia-

35. Woodburn v. Cincinnati, etc., R. Co., 40 Fed. 731, 42 Am. & Eng. R. Cas. 514.

36. St. Louis, etc., R. Co. v. Cleary, 77 Mo. 634, 46 Am. Rep. 13, 16 Am. & Eng. R. Cas. 122; Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, 13 Am. St. Rep. 776, 2 L. R. A. 75, 9 S. W. 749, testimony cannot be elicited from a shipper on cross examination as to the nature of his agreement, where the contract of shipment is in writing.

37. McFadden v. Missouri Pac. R. Co., 92 Mo. 343, 1 Am. St. Rep. 721, 30 Am. & Eng. R. Cas. 17, but a recital in a written contract of carriage that the rate is a special and reduced one may be contradicted by

parol evidence; Minneapolis, etc., R. Co. v. Home Insurance Co., 55 Minn. 236; Western, etc., R. Co. v. McElwee, 6 Heisk. (Tenn.) 208; Dixon v. Columbus, etc., R. Co., 4 Biss. (U. S.) 137, where a freight bill was signed by certain parties as agents, but there was nothing to indicate that it was the contract of the railroad company, parol evidence to show that it was the contract of the company was inadmissible.

38. Smith v. Findley, 34 Kan. 316, 23 Am. & Eng. R. Cas. 712; Leonard v. Chicago, etc., R. Co., 54 Mo. App. 293; Hostetter v. Baltimore, etc., R. Co., (Pa.) 11 Atl. 609, 32 Am. & Eng. R. Cas. 549.

bility under a written contract.³⁹ Where a written contract was entered into after the breach of an oral contract in relation to the same matter, the written contract did not merge the oral contract and would not bar a recovery for the breach of it.⁴⁰ So, a written contract which does not contain the entire agreement made between the parties, but only a part of such agreement, and which is merely supplemental to a prior verbal agreement, does not merge such verbal contract, and the latter may be proven and the carrier will be liable thereunder, though such liability might not have existed under the written contract alone.⁴¹ A verbal contract which in no way varies or contradicts a written contract must be incorporated with it and the two together held to constitute the whole contract.⁴² Where the terms of the written contract are contradictory or ambiguous, the real contract under which the carrier received the property may be shown by parol evidence to explain the written contract.⁴³ Where a verbal contract between the parties was complete and the written contract set up by the carrier consisted of a receipt, handed to the shipper, of the contents of which he was ignorant, the verbal contract may be shown and will control.⁴⁴ In jurisdictions where the possession by the shipper of a receipt containing limitations upon the liability of the carrier is only *prima facie* evidence that he assented to its conditions, it has been held that where a shipper claims that the shipment was made under a special oral agreement and that the receipt was not delivered until some days after the shipment, it may be shown by other evidence that the shipment was in fact made under the oral agreement

39. Corbett v. Chicago, etc., R. Co., 86 Wis. 82.

40. Harrison v. Missouri Pac. R. Co., 74 Mo. 364, 7 Am. & Eng. R. Cas. 382, 41 Am. Rep. 318; Cross v. Graves, 4 Tex. App. Civ. Cas., § 100; Hamilton v. Western North Carolina R. Co., 96 N. C. 398.

41. Shiff v. New York Cent., etc., R. C., 16 Hun (N. Y.), 278; Hoskins v. Missouri Pac. R. Co., 19 Mo. App. 315; Union R., etc., Co. v. Riegel, 73 Pa. St. 72.

42. Fitzgerald v. Grand Trunk R. Co. 27 U. C. C. P. 528.

43. Saltsman v. New York Cent., etc., R. Co., 65 Hun (N. Y.), 448, 20 N. Y. Supp. 361.

44. King v. Woodbridge, 34 Vt. 565. So, where the written contract was signed after the goods left the station and was supposed by the shipper to be a mere receipt, evidence of a verbal contract different from the written contract is admissible to show the real contract between the parties. St. Louis, etc., R. Co. v. Clark, 48 Kan. 321, 55 Am. & Eng. R. Cas. 367.

and the presumption arising from possession of the receipt thus rebutted.⁴⁵ On an issue as to whether a shipment was made under a written contract or a subsequent parol contract between the carrier and the shipper, the latter has the right to show that the written contract was abandoned, and that the shipment was made under a subsequent parol contract.⁴⁶

§ 9. Contract must have been fairly entered into.—Contracts limiting the common law liability of carriers must have been fairly made and freely entered into in order to be binding on the shipper.⁴⁷ Where such special contracts have been procured by duress,⁴⁸ or by the arbitrary insertion of words in the contract by the carrier,⁴⁹ or under circumstances where the shipper did not have a complete understanding of the contract or freely accepted the same,⁵⁰ or where the carrier has made unreasonable demands and succeeded in obtaining an undue advantage of the shipper,⁵¹ the courts will not sustain the contract. Such contracts are not favored by the courts. The carrier is bound to carry under its common law liability if the shipper insists upon it, and it is the latter's option to accept a contract of limited liability instead of the insurance that the common law requires of the carrier.⁵²

§ 10. Necessity of consideration.—A special contract between a shipper and a common carrier, or a stipulation in a bill of lading, qualifying or limiting the common law liability of the carrier must be supported by a valuable consideration, apart from the mere acceptance of the property for carriage and agreement

45. Strohn v. Detroit, etc., R. Co., 21 Wis. 554, 94 Am. Dec. 564; Wabash R. Co. v. Harris, 55 Ill. App. 159; Louisville, etc., R. Co. v. Craycraft, 12 Ind. App. 203; Missouri, etc., R. Co. v. Carter, 9 Tex. Civ. App. 677.

46. Toledo, etc., R. Co. v. Levy, 127 Ind. 168, 26 N. E. 773.

47. Atchison, etc., R. Co. v. Dill, 48 Kan. 210, 55 Am. & Eng. R. Cas. 355, 29 Pac. 148.

48. Missouri, etc., R. Co. v. Carter, 9 Tex. Civ. App. 677.

49. Kansas City, etc., R. Co. v. Simpson, 30 Kan. 645, 16 Am. & Eng. R. Cas. 158, 46 Am. Rep. 104.

50. Adams Express Co. v. Nock, 2 Duv. (Ky.) 562, 87 Am. Dec. 510.

51. Simons v. Great Western R. Co., 2 C. B. N. S. 620, 89 E. C. L. 620; Hance v. Wabash Western R. Co., 56 Mo. App. 476; Paddock v. Missouri Pac. R. Co., 1 Mo. App. Rep. 87.

52. Wallace v. Matthews, 39 Ga. 617, 99 Am. Dec. 473.

to transport it, such, for example, as an actual reduction from the usual freight rate,⁵³ or additional facilities for transportation.⁵⁴ Both rates of transportation offered the shipper must be reasonable and he must be given the option to make his selection, in order to render the consideration of a reduced rate valid and sufficient.⁵⁵ Where there is but one contract and one rate open and offered to the shipper by a common carrier, and no option

53. *Ullman v. Chicago, etc., R. Co.*, 112 Wis. 168, 88 N. W. 41; *Lake Erie, etc., R. Co. v. Holland (Ind.)*, 69 N. E. 138, 63 L. R. A. 948; *Hance v. Wabash Western R. Co.*, 56 Mo. App. 476; *Mouton v. Louisville, etc., R. Co. (Ala.)*, 29 So. 602; *Southard v. Minneapolis, etc., R. Co.*, 60 Minn. 382; *Wehmann v. Minneapolis, etc., R. Co.*, 58 Minn. 22, 61 Am. & Eng. R. Cas. 273.

Surrender of a prior verbal contract is sufficient consideration for a substituted written one. *Leonard v. Chicago, etc., R. Co.*, 54 Mo. App. 293.

A provision in a shipping receipt that no carrier shall be liable for damage by wet not due to its own negligence or that of its servants is binding where entered into in consideration of a reduced rate of shipment. *Mears v. New York, etc., R. Co. (Conn.)*, 52 Atl. 610, 56 L. R. A. 884.

54. *Gardner v. Southern R. Co.*, 127 N. C. 293, 37 S. E. 328. The clause in a bill of lading limiting the carrier's liability will not be held valid on the ground that a reduced rate was intended, no rate being specified, and none being talked of by the parties. *Phoenix Powder Mfg. Co. v. Wabash R. Co. (Mo. App.)*, 74 S. W. 492.

55. *Duvenick v. Missouri Pac. R. Co.*, 57 Mo. App. 550; *Louisville, etc., R. Co. v. Sowell*, 90 Tenn. 17, 49 Am. & Eng. R. Cas. 166.

There must be an actual freedom of choice between different rates offered: *Little Rock, etc., R. Co. v. Cravens*, 57 Ark. 112, 55 Am. & Eng. R. Cas. 650; *Little Rock, etc., R. Co. v. Eubanks*, 48 Ark. 460, 3 Am. St. Rep. 245, 31 Am. & Eng. R. Cas. 176; *Deming v. Merchants' Cotton Press Co.*, 90 Tenn. 306.

Parol evidence is admissible to show that a pretended reduced rate was actually the regular rate always charged, and the recital in the bill of lading that a reduced rate is not allowed is not conclusive. *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, 1 Am. St. Rep. 721, 30 Am. & Eng. R. Cas. 17.

Findings in an action against an express company for loss of goods that the company, on receiving the goods, gave the consignor a receipt therefor which limited the company's liability to the sum fixed as the value of the property, and that the consignor was informed that the rate was 25 cents if the value did not exceed \$50, and that she authorized the agent of the company to fix the value at \$100, and was informed that the charges were 35 cents, and that she knew that the charges were graduated according to the value of the property, show an agreement limiting the company's liability, based on a consideration. *Adams Express Co. v. Carnahan (Ind. App.)*, 63 N. E. 245, 64 N. E. 647.

is given him, a special provision limiting the common-law liability of the carrier to "loss or damage occasioned by wrongful acts or gross negligence" is without consideration and void.⁵⁶ If no reduced rates were in fact allowed the shipper the limitation is invalid as being without consideration,⁵⁷ or if the higher rate adopted by the carrier for shippers not signing a contract limiting liability is illegal as in excess of the rate allowed by statute, although the statutory rate is actually in excess of that charged the shipper in signing the contract.⁵⁸ So also where there is no real option offered to the shipper because the agent of the carrier has no authority to offer transportation except at a particular rate fixed by his superiors,⁵⁹ or the carrier's rules would not have permitted the shipment unless the shipper accepted the bill of lading with its limitations.⁶⁰ A stipulation in a contract for shipment of perishable freight, "Subject to delay," inserted without any further reduction of rate than ordinarily charged on a bill of lading at owner's risk, is without consideration and void.⁶¹ Where a contract partially exempting a railroad from liability for injury to goods shipped was made in consideration of a reduced rate, but the company charged a rate in excess of that stipulated in the contract, it was not entitled to insist upon its exemption from liability.⁶² But the lack of an independent consideration for an exemption of a carrier from liability for damages caused by fire, expressed in the bill of lading, cannot successfully be urged to avoid such provision, although the carrier may have had but one rate, where the consideration expressed was sufficient to support the entire contract made.⁶³ Where it is entirely competent for parties to enter into a con-

56. Illinois Cent. R. Co. v. Lancashire Ins. Co. (Miss.), 30 So. 43.

57. Ward v. Missouri Pac. R. Co., 158 Mo. 226, 58 S. W. 28; Gulf, etc., R. Co. v. McCarty, 82 Tex. 608; Gulf, etc., R. Co. v. Wright, 1 Tex. Civ. App. 402.

58. Paddock v. Missouri Pac. R. Co., 1 Mo. App. Rep. 87, 60 Mo. App. 328.

59. Kansas Pac. R. Co. v. Reynolds, 17 Kans. 251; Louisville, etc., R. Co. v. Gilbert, 88 Tenn. 430, 42 Am. & Eng. R. Cas. 272.

60. St. Louis, etc., R. Co. v. Spann, 57 Ark. 127.

61. Parker v. Atlantic, etc., R. Co., 133 N. C. 335, 63 L. R. A. 827, 45 S. E. 658, 43 S. E. 1005.

62. Hendrix v. Wabash R. Co. (Mo. App.), 80 S. W. 970.

63. Cau v. Texas, etc., R. Co., 24 S. Ct. 663, 194 U. S. 427, 48 L. Ed. 1053, affg. 113 Fed. 91, 51 C. C. A. 76. See also Texas, etc., R. Co. v. Cau, 120 Fed. 15, 645.

tract, and an agreement is made that, in consideration of a stipulated sum, the carrier agrees to perform certain services upon condition of certain exemptions, sufficient consideration is to be found in the carrier's obligation thus assumed to support the exemption provided for in the contract.⁶⁴ But if not, in the absence of proof to the contrary, sufficient consideration in the way of reduced rates or special privileges will be presumed and need not be proved.⁶⁵ Provisions of a contract as to the loading and unloading by the shipper and timely notice of injury to be given to the carrier,⁶⁶ or limiting the liability of the carrier for goods shipped to a point beyond its own line,⁶⁷ need not be supported by additional consideration than the contract of shipment, as, of reduced rates, in cases where the contract limits the common law liability of the carrier. The latter is in effect a stipulation to carry the property only to the terminus of its own line, which is all that its duty as a carrier requires.

§ 11. Contract signed by shipper without examination.—Where goods are delivered to a carrier for transportation, and before the goods are shipped, a bill of lading or receipt is delivered to the shipper, the latter is bound to ascertain its contents, and if he accepts without objection, he is bound by its terms; he may not set up ignorance of its contents nor resort to prior parol negotiations to vary them.⁶⁸ So, if he execute a contract hurriedly,

64. Nelson v. Hudson River R. Co., 48 N. Y. 498; Rubens v. Ludgate Hill Steamship Co., 20 N. Y. Supp. 481; York Co. v. Illinois Cent. R. Co., 3 Wall. (U. S.) 107. See also Jennings v. Grand Trunk R. Co., 127 N. Y. 438, affg. 52 Hun (N. Y.), 227.

65. Brown v. Louisville, etc., R. Co., 36 Ill. App. 140.

Where receipts contain no limitations and subsequent bills of lading have stipulations limiting liability, the latter will be presumed to be without consideration. Southard v. Minneapolis, etc., R. Co., 60 Minn. 382.

Where the evidence is conflicting as to whether money paid by the carrier

to the shipper was a rebate obtained on the charges for shipment or was in consideration of the assumption by the shipper of all risk of loss by fire, the presumption would be in favor of the payment being a rebate. Thomas v. Wabash, etc., R. Co., 63 Fed. 200.

66. Crow v. Chicago, etc., R. Co., 57 Mo. App. 135.

67. Hance v. Wabash Western R. Co., 56 Mo. App. 476.

68. Germania Fire Ins. Co. v. Memphis, etc., R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Hill v. Syracuse, etc., R. Co., 73 N. Y. 352, 29 Am. Rep. 163; West v. First National Bank, 20 Hun (N. Y.), 411. See also

or without due examination, he cannot avoid the limitations imposed by it by showing that he was ignorant of its contents. If he signs a contract and acts under it in enjoyment of all its advantages, he cannot repudiate it upon the ground that its provisions were not brought to his attention. In the absence of fraud, misrepresentation, or mistake, he will be presumed to have read and assented to its provisions.⁶⁹

§ 12. Contract must have been made at time of shipment.— The acceptance of a bill of lading without assenting to its conditions does not conclude one who has shipped goods under a verbal agreement before the bill of lading was tendered. The shipper cannot be deprived of any of his common law rights by subsequently receiving a bill of lading or receipt containing limitations and conditions to which his attention had not been called when he made the shipment.⁷⁰ When goods are shipped under an oral agreement for transportation, such agreement is not merged in a bill of lading afterward delivered to the shipper, although it provides for a limitation of liability and that, by accepting it, the shipper agrees to the conditions, and the shipper is not concluded by an inadvertent omission to examine the conditions from showing the actual oral agreement of shipment.⁷¹ In order to limit the carrier's common law liability by a special contract or a clause in a bill of lading, the contract must have been made, or the bill of lading must have been taken, without dissent, at the time of the delivery of the property for transportation. When no receipt or bill of lading was given or contract made at the time of delivery, the carrier cannot limit its liability by a receipt or bill given afterwards and not assented to by the shipper or

Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; Grace v. Adams, 100 Mass. 505, 1 Am. Rep. 131; Mulligan v. Illinois R. Co., 36 Iowa, 181, 14 Am. Rep. 514; Kirkland v. Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475; Ullman v. Chicago, etc., R. Co., 112 Wis. 168, 88 N. W. 41.

69. Nashville, etc., R. Co. v. Haslett (Tenn.), 79 S. W. 1031; Bethea v. Northeastern R. Co., 26 S. C. 96;

Johnstone v. Richmond, etc., R. Co., 39 S. C. 55; Coles v. Louisville, etc., R. Co., 41 Ill. App. 607; O'Rorke v. Great Western R. Co., 23 U. C. Q. B. 427.

70. Lamb v. Camden, etc., R. Co., 4 Daly (N. Y.), 483; Merchants' Despatch Transp. Co. v. Furthmann, 149 Ill. 66, affg. 47 Ill. App. 561.

71. Bostwick v. Baltimore, etc., R. Co., 45 N. Y. 712.

consignee.⁷² When the bill or receipt is given after shipment or loss or injury of the goods the limitations contained therein are void, and cannot affect the rights of the shipper under the verbal contract made at the time of shipment, in the absence of proof that the bill was accepted in place of the prior contract.⁷³ Where, however, the carrier gives the consignor a shipping receipt stating that a bill of lading will be issued on application at a designated place and the goods transported subject to the conditions in the bill of lading, the consignor will be bound by the terms of the bill of lading,⁷⁴ and, where the intention of the parties is not clear, it may be a question for the jury whether a particular shipment was made under the oral contract or the subsequent written agreement.⁷⁵

§ 13. Contract must be legible and intelligible.—Where there is nothing in the nature of the transaction, or the custom of trade, which should necessarily charge the shipper with knowledge that he was receiving and accepting the written evidence of a contract, a receipt, obscurely printed in fine type, delivered in a dimly lighted car in which it was difficult to read the

72. Michigan Cent. R. Co. v. Boyd, 91 Ill. 268; American Express Co. v. Spellman, 90 Ill. 455; Kansas Pac. R. Co. v. Reynolds, 17 Kan. 251; Gulf, etc., R. Co. v. Wood (Tex. Civ. App.), 30 S. W. 715.

Where plaintiff directed a delivery company to transport his baggage from a certain place, and paid the charges, a receipt given by an employee of the company, when he subsequently called for the baggage, to a person who pointed it out to him, did not constitute the contract, so as to limit the company's liability for the loss of the baggage to the amount stipulated therein. Pompilj v. Manhattan Delivery Co., 84 N. Y. Supp. 230.

73. Swift v. Pacific Mail Steamship Co., 106 N. Y. 206, 30 Am. & Eng. R. Cas. 105; Park v. Preston, 108 N. Y. 434; Detroit, etc., R. Co.

v. Adams, 15 Mich. 458; McCullough v. Wabash Western R. Co., 34 Mo. App. 23; Missouri, etc., R. Co. v. Carter, 9 Tex. Civ. App. 677; Louisville, etc., R. Co. v. Craycraft, 12 Ind. App. 203; Gulf, etc., R. Co. v. Wood (Tex. Civ. App.), 30 S. W. 715; Louisville, etc., R. Co. v. Meyer, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44; Goetter v. Pickett, 61 Ala. 387; Strohn v. Detroit, etc., R. Co., 21 Wis. 554, 94 Am. Dec. 554; Gott v. Dinsmore, 111 Mass. 45, the rule applies although the shipper had formerly been the agent of the carrier, and knew that receipts given for goods always contained a limitation of the carrier's liability.

74. Wilde v. Merchants' Despatch Transp. Co., 47 Iowa, 272.

75. Wallingford v. Columbia, etc., R. Co., 26 S. C. 258.

limitations contained in the receipt, although a direction to read them was legible, has been held not to be binding as to the limitations therein contained on the shipper, because of the lack of the requisite evidence of the shipper's assent to the contract.⁷⁶ So, where a receipt contained a printed clause limiting the carrier's liability for goods transported by it, but over part of this clause in the receipt, a stamp was pasted so as to render it unintelligible, it was held insufficient to warrant a finding that the shipper assented to any limitation of the carrier's liability.⁷⁷

§ 14. By what law validity of contract is determined.—A contract of affreightment made in one country or State between citizens or residents thereof, and the performance of which begins there must be governed as to the validity, the nature, the obligation, and the interpretation thereof by the law of that country or State, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country or State, or unless there is something to show that the intention of the parties was that the law of the State or government where the contract is to be performed should prevail; and then, in conformity to the presumed intention of the parties, the law of the place of performance governs.⁷⁸ A contract made in

76. *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Madan v. Sherard*, 73 N. Y. 329, 29 Am. Rep. 153. These were cases of local express companies receiving baggage from travelers for transportation to their immediate destination. In the latter case the question as to whether the delivery of the receipt under the circumstances created a contract according to its terms was held to be one for the jury. See also *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 216; *Isaacson v. New York, etc., R. Co.*, 94 N. Y. 286; *Westcott v. Fargo*, 63 Barb. (N. Y.) 354; *Coffin v. New York Cent. R. Co.*, 64 Barb. (N. Y.) 391; *Kerr v. Liverpool, etc., R. Co.*, 12 Wkly. Dig. (N. Y.) 265.

77. *Perry v. Thompson*, 98 Mass. 249.

78. *Liverpool, etc., Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788, 39 Alb. L. J. 373, 5 R. R. & Corp. L. J. 435, 9 Sup. Ct. Rep. 469, 37 Am. & Eng. R. Cas. 699, where a contract was made in New York for shipment of goods on a British vessel, that the goods shipped were to be delivered by a carrier at Liverpool, and the freight and primage were payable there in sterling currency, and that the vessel was stranded on the coast of Great Britain, do not make the contract an English contract, or refer to the English law the question of the liability of the carrier for the negligence of the master and the crew in the course of the voyage. See also *China Mut. Ins. Co. v. Force*, 142 N. Y. 90-100, 36 N. E. 874; *Robertson v. National Steam-*

one State to be performed partly in that State and partly in another State, being void under the laws of the State where made, will not be enforced in the other State, though valid under the law of the other State wherein it is to be partly performed,⁷⁹ and where valid in the State where made, will be binding in the other State, although void under the statute there.⁸⁰ Contracts

ship Co., 1 App. Div. (N. Y.) 61, 37 N. Y. Supp. 68; *Armour v. Michigan Cent. R. Co.*, 65 N. Y. 111, 22 Am. Rep. 603; *Dyke v. Erie R. Co.*, 45 N. Y. 113, 6 Am. Rep. 43; *Fairchild v. Philadelphia, etc.*, R. Co., 148 Pa. St. 527; *Cantu v. Bennett*, 39 Tex. 303; *Ryan v. Missouri, etc.*, R. Co., 65 Tex. 13, 57 Am. Rep. 589, 23 Am. & Eng. R. Cas. 703; *Palmer v. Atchison, etc.*, R. Co., 101 Cal. 187, 61 Am. & Eng. R. Cas. 241; *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398; *Western, etc.*, R. Co. v. *Exposition Cotton Mills*, 91 Ga. 522, 35 Am. & Eng. R. Cas. 602; *Wald v. Pittsburg, etc.*, R. Co., 60 Ill. App. 460; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553; *The Carib Prince*, 63 Fed. 266.

Contract for through shipment.—A provision in a bill of lading of goods to be shipped from Texas to another State, that the carrier shall not be liable for loss by fire, is valid notwithstanding a Texas statute making a stipulation of that character void, as that statute does not apply to interstate or foreign commerce. *Otis Co. v. Missouri Pac. R. Co.*, 112 Mo. 623, 55 Am. & Eng. R. Cas. 636; *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455.

A State statute making it unlawful for a carrier to limit his common law liability to deliver property received for transportation will not control a contract made in another State contemplating a through carriage to a third State, although the carrier is

incorporated in the first State. *Thomas v. Wabash, etc., R. Co.*, 63 Fed. 200, 4 Inters. Com. Rep. 802.

The presumption that a contract for shipment, made with plaintiffs by defendant carrier in Massachusetts, was intended to be governed by its laws, by which the clause exempting the carrier from liability is void, is not overcome by the fact that defendant was a New York corporation, and plaintiffs residents of New York, and that the stock shipped was to be delivered in New York, especially where, indorsed on the contract, there was a provision, exempting the carrier from liability for injury to the persons accompanying the stock, which expressly provided that any question arising thereunder should be determined by the laws of New York. *Grand v. Livingston*, 4 App. Div. (N. Y.) 589, 38 N. Y. Supp. 490.

79. *Pittman v. Pacific Express Co.* (Tex. Civ. App.), 59 S. W. 949; *McDaniel v. Chicago, etc., R. Co.*, 24 Iowa, 412. See also *Hartman v. Louisville, etc., R. Co.*, 39 Mo. App. 88; *Robinson v. Merchants' Despatch Transp. Co.*, 45 Iowa, 470.

80. *Hazel v. Chicago, etc., R. Co.*, 82 Iowa, 477, 49 Am. & Eng. R. Cas. 78; *Talbott v. Merchants' Despatch Transp. Co.*, 41 Iowa, 247, 20 Am. Rep. 589; *International, etc., R. Co. v. Moody*, 71 Tex. 614, the burden of proof is on the carrier to show that the stipulation was valid under the laws of the State where made.

But this rule does not operate to

which are to be partly performed in the State where they are made and entered into are governed by the laws of such State, although they are to be partly performed in another State.⁸¹ When a contract is made in one country or State, to be wholly performed in another, its validity is to be determined by the law of the place of performance, unless the contract expressly provide otherwise.⁸² The Federal courts have refused to follow or be bound by the decisions of the State courts in determining the

render invalid a contract for interstate shipment which is contrary to the laws of the State where it was made, where such laws rendering it invalid are themselves invalid, as an interference with the exclusive power of congress over interstate commerce. *Carton v. Illinois Cent. R. Co.*, 59 Iowa, 148, 44 Am. Rep. 672, 6 Am. & Eng. R. Cas. 305; *Texas, etc., R. Co. v. Richmond* (Tex. Civ. App.), 63 S. W. 619.

81. *Cleveland, etc., R. Co. v. Druien*, 26 Ky. Law Rep. 103, 80 S. W. 778; *MERCHANTS' DESPATCH TRANSP. CO. v. FURTHMAN*, 149 Ill. 66, 66 Am. & Eng. R. Cas. 145; *Michigan Cent. R. Co. v. Boyd*, 91 Ill. 268; *Forepaugh v. Delaware, etc., R. Co.*, 128 Pa. St. 217, 15 Am. St. Rep. 672, 40 Am. & Eng. R. Cas. 78; *Brooke v. New York, etc., R. Co.*, 108 Pa. St. 530, 56 Am. Rep. 235, 21 Am. & Eng. R. Cas. 64; *Milwaukee, etc., R. Co. v. Smith*, 74 Ill. 197; *Coup v. Wabash, etc., R. Co.*, 56 Mich. 111, 56 Am. Rep. 374, 18 Am. & Eng. R. Cas. 542; *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398; *Atlanta, etc., R. Co. v. Tanner*, 68 Ga. 390; *Atchison, etc., R. Co. v. Moore*, 29 Kans. 632, 11 Am. & Eng. R. Cas. 243; *McMaster v. Illinois Cent. R. Co.*, 65 Miss. 271, 7 Am. St. Rep. 653; *Knowlton v. Erie R. Co.*, 19 Ohio St. 260, 2 Am. Rep. 395; *Bridges v. Ashville, etc., R. Co.*, 27 S. C. 462, 13 Am. St. Rep. 653;

Pennsylvania Co. v. Fairchild, 69 Ill. 260.

82. *Curtis v. Delaware, etc., R. Co.*, 74 N. Y. 116; *Dyke v. Erie R. Co.*, 45 N. Y. 113, 6 Am. Rep. 43; *Burkley v. Eckhart*, 3 N. Y. 132; *Pritchard v. Norton*, 106 U. S. 124; *Junction Railroad Co. v. Bank of Ashland*, 12 Wall. (U. S.) 226; *Osgood v. Bauder*, 75 Iowa, 550, 39 N. W. 887.

The rule that the place of performance of a contract gives the law of its performance was applied in an action brought in Pennsylvania by a passenger against a New Jersey railroad corporation, for the loss of his trunk, and it was held that it made no difference that the undertaking was in part to carry the baggage across the Delaware river, as the inhabitants of both States have equal rights of navigation and passage on that stream. *Brown v. Camden, etc., R. Co.*, 83 Pa. St. 316.

But a contract limiting the carrier's common law liability, void by the statute of the State where the contract was made, even though it was interstate in character, was held to be void, although the contract was to be performed in another State, in the absence of evidence as to the law of the State where the contract was to be performed, the law there being presumed to be the same as in the State where the contract was made. *Texas, etc., R. Co. v. Richmond*

validity of such contracts and other questions of unwritten commercial law, but hold that there is a general commercial law of the United States, of which any local decision is but the evidence, and that the Federal courts will not follow such local decision if they consider it wrong, but will follow the rules laid down by Federal tribunals, or exercise their own judgment where the question is a new one, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the State have concurrent jurisdiction, and upon a contract made and to be performed within the State.⁸³ An express stipulation by any common carrier for hire, in a contract of carriage, that it shall be exempt from liability for losses caused by the negligence of itself or its servants, is held in the Federal courts, to be unreasonable and contrary to public policy, and consequently void, and will not be enforced by such tribunals although it may be valid under the law of the State where it was made.⁸⁴ In some of the State courts and in the English courts it is held, on the contrary, that such stipulations, although void under the law of their State or country, are not immoral, and will be given effect, if it appears that they were made in another State or country where such contracts are valid.⁸⁵ Whether or not a special contract existed has been held to be a question affecting only the shipper's remedy and, therefore, to be governed by the law of the place where the action is brought.⁸⁶ Where the action against a carrier is not based on any special contract and such a contract is not set up or involved in the action but arises from the contract and duties resulting therefrom under the com-

(Tex. Civ. App.), 63 S. W. 619, revg. 61 S. W. 410. See also Southern Pac. Co. v. Anderson (Tex. Civ. App.), 63 S. W. 1023.

83. Liverpool, etc., Steam Co. v. Phoenix Ins. Co., 129 U. S. 397, 37 Am. & Eng. R. Cas. 688; Myrick v. Michigan Cent. R. Co., 107 U. S. 102, 9 Am. & Eng. R. Cas. 25; Bucher v. Cheshire R. Co., 125 U. S. 555, 34 Am. & Eng. R. Cas. 389; Eells v. St. Louis, etc., R. Co., 52 Fed. 903, 55 Am. & Eng. R. Cas. 341; Swift v. Tyson, 16 Pet. (U. S.) 1.

84. Liverpool, etc., Steam Co. v.

Phoenix Ins. Co., *supra*; Inman v. South Carolina, etc., R. Co., 129 U. S. 128, 32 L. Ed. 612, 5 R. R. & Corp. L. J. 271; Lewisohn v. National Steamship Co., 56 Fed. 602; The Guildhall, 58 Fed. 796; The Hugo, 57 Fed. 403; The Brantford City, 29 Fed. 373.

85. O'Regan v. Cunard Steamship Co., 160 Mass. 356; Fonseca v. Cunard Steamship Co., 153 Mass. 553, 25 Am. St. Rep. 660; *In re Missouri Steamship Co.*, L. R. 42 Ch. D^v. 321.

86. Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106.

mon law, the right of the shipper to recover for loss or damage is to be governed by the law of the place where the loss or damage occurred, and any limitation placed by the law of a particular State upon the extent of the recovery for a breach of such a contract, or for a tort committed in violation of it, is not applicable in a suit brought in another State.⁸⁷

§ 15. Who may make special contract.—A consignor of goods has power to contract for their carriage and bind the consignee.⁸⁸ A shipping contract limiting the liability of a carrier is binding upon the consignor who delivers his goods by his agent to the carrier for shipment, where the agent to make the shipment assents to the stipulations limiting liability or accepts a receipt or bill of lading containing such stipulations in the usual course of business.⁸⁹ But while, ordinarily, a person authorized to deliver and delivering the property of another to a common carrier for shipment may be by the latter treated as having authority to stipulate for and accept the terms of affreightment, and as against the carrier the owner is bound by them, he is not necessarily charged with any of the terms and conditions of the bills of lading other than those which the carrier is at liberty to treat as within the authority of the person receiving them to accept in behalf of the owners of the property.⁹⁰ Where a carrier accepts goods for carriage to a place beyond the terminus of its route,

87. Lyon v. Erie R. Co., 57 N. Y. 489; Dyke v. Erie R. Co., 45 N. Y. 113, 6 Am. Rep. 43; Pomeroy v. Ainsworth, 22 Barb. (N. Y.) 118; Pope v. Nickerson, 3 Story (U. S.), 485; Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1; Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Little v. Riley, 43 N. H. 109; Knowlton v. Erie R. Co., 19 Ohio St. 260, 2 Am. Rep. 395; Brown v. Camden, etc., R. Co., 83 Pa. St. 316; Springs v. South Bound R. Co., 46 S. C. 104; Bridges v. Ashville, etc., R. Co., 27 S. C. 462, 13 Am. St. Rep. 653.

88. Nelson v. Hudson River R. Co., 48 N. Y. 498; Mills v. Michigan Cent. R. Co., 45 N. Y. 622, 6 Am. Rep. 152.

89. Zimmer v. New York Cent., etc., R. Co., 137 N. Y. 460; Shelton v. Merchants' Despatch Transp. Co., 59 N. Y. 258; Squire v. New York Cent., R. Co., 98 Mass. 239, 93 Am. Dec. 162; Hill v. Boston, etc., R. Co., 144 Mass. 284, 28 Am. & Eng. R. Cas. 89; Smith v. Southern Express Co., 104 Ala. 387; Illinois Cent. R. Co. v. Morrison, 19 Ill. 136; Ryan v. Missouri, etc., R. Co., 65 Tex. 13, 57 Am. Rep. 589; Lewis v. Great Western R. Co., 5 H. & N. 867; Van Schaack v. Northern Transp. Co., 3 Biss. (U. S.) 394.

90. Jennings v. Grand Trunk R. Co., 127 N. Y. 438, 49 Am. & Eng. R. Cas. 98; Coffin v. New York Cent., etc., R. Co., 64 Barb. (N. Y.) 379,

being bound to deliver them at the end of its route to the next succeeding carrier, it is authorized to make such delivery upon the usual contract required by the latter, although under such contract the latter would be exempted from liability, and the consignor would be bound by its act in so doing.⁹¹ General authority to a consignor to deliver goods to a carrier for transportation includes power to contract for the terms of transportation and to agree on exemptions from liability, and the consignor's authority to enter into special contracts with the carrier, binding on the consignee, is to be presumed; the carrier need not inquire into it.⁹² In the absence of actual notice of the fact that the consignor has exceeded his authority from the consignee, the carrier cannot be made liable.⁹³ But the consignor, in an action against the carrier, is not bound by a special contract limiting liability made by the consignee with the carrier, unless it is shown that he had notice of the consignee's contract for carriage.⁹⁴

§ 16. Carrier may not limit its liability for negligence.—The doctrine is established by the great weight of authority in this country that a carrier cannot by stipulation or contract relieve or

56 N. Y. 632; *Bostwick v. Baltimore, etc., R. Co.*, 45 N. Y. 712; *Germania Fire Ins. Co. v. Memphis, etc., R. Co.*, 72 N. Y. 90; *Guillame v. General Transp. Co.*, 100 N. Y. 491; *Swift v. Pacific Mail, etc., Co.*, 106 N. Y. 206; *Park v. Preston*, 108 N. Y. 434; *London, etc., R. Co. v. Bartlett*, 7 H. & N. 400; *Seller v. Steamship Pacific*, 1 Or. 409; *Hayn v. Campbell*, 63 Cal. 143; *Ohio, etc., R. Co. v. Hamlin*, 42 Ill. App. 441; *Illinois Cent. R. Co. v. Morrison*, 19 Ill. 139.

91. *Rawson v. Holland*, 59 N. Y. 611, 17 Am. Rep. 394. Compare *Merchants' Wharf-Boat Assoc. v. Wood*, 64 Miss. 661, 3 So. 248.

92. *Shelton v. Merchants' Despatch Transp. Co.*, *supra*; *Mills v. Michigan Cent. R. Co.*, *supra*; *Brown v. Louisville, etc., R. Co.*, 36 Ill. App. 140; *McMillan v. Michigan Southern, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec.

208; *Squire v. New York Cent., etc., R. Co.*, *supra*; *Craycroft v. Atchison, etc., R. Co.*, 18 Mo. App. 487; *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300; *Ryan v. Missouri, etc., R. Co.*, *supra*; *York Co. v. Illinois Cent. R. Co.*, 3 Wall. (U. S.) 107; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Robinson v. Merchants' Despatch Transp. Co.*, 45 Iowa, 470; *Christenson v. American Express Co.*, 15 Minn. 270, 2 Am. Rep. 122; *Barnett v. London, etc., R. Co.*, 5 H. & N. 604.

93. *Meyer v. Harnden's Express Co.*, 24 How. Pr. (N. Y.) 290; *McNamee v. Harnden's Express Co.*, 1 Daly (N. Y.) 227; *Knell v. United States, etc. S. Co.*, 1 J. & S. (N. Y.) 423; *Briggs v. Boston, etc., R. Co.*, 6 Allen (Mass.), 246, 83 Am. Dec. 626.

94. *White v. Goodrich Transp. Co.*, 46 Wis. 493, 21 Am. Ry. Rep. 398.

exempt itself from liability for losses or injuries caused by its own negligence or want of care and skill, or that of its servants, or by its own or their wilful default, misfeasance or tort. Public policy and every consideration of right and justice, it is held, demands that the right of the owners to absolute security against the negligence of the carrier, and of all persons engaged in performing its duty, shall not be taken away by any reservation in its receipt, or by any arrangement, contract or stipulation entered into. Such contracts are, therefore, declared to be void as being unreasonable and contrary to public policy and afford no protection to the carrier.⁹⁵ A carrier cannot limit its liability

95. U. S.—Liverpool, etc., Co. v. Phoenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 5 R. R. & Corp. L. J. 435, 39 Alb. L. J. 373, 9 Sup. Ct. Rep. 469; Inman v. South Carolina R. Co., 129 U. S. 128, 32 L. Ed. 612, 5 R. R. & Corp. L. J. 271, 9 Sup. Ct. Rep. 249; Phoenix Ins. Co. v. Erie, etc., Transp. Co., 117 U. S. 312; Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261; The Guildhall, 58 Fed. 796, 2 McCrary (U. S.), 48; Scruggs v. Baltimore, etc., R. Co., 18 Fed. 318, 5 McCrary (U. S.), 590; Nelson v. National Steamship Co., 7 Ben. (U. S.) 340; The Iowa, 50 Fed. 561; Rintoul v. New York Cent., etc., R. Co., 17 Fed. 905, 16 Am. & Eng. R. Cas. 144; Thomas v. Lancaster Mills, 71 Fed. 481, 34 U. S. App. 404; Eells v. St. Louis, etc., R. Co., 52 Fed. 903; Kuter v. Michigan Cent. R. Co., 1 Biss. (U. S.) 35; Woodburn v. Cincinnati, etc., R. Co., 40 Fed. 731, 42 Am. & Eng. R. Cas. 514; Woodward v. Illinois Cent. R. Co., 1 Biss. (U. S.) 447. See also cases cited note 1, § 1, ante.

Ala.—Louisville, etc., R. Co. v. Sherrod, 84 Ala. 178, 4 So. 29; Alabama, etc., R. Co. v. Little, 71 Ala. 611, 12 Am. & Eng. R. Cas. 37; East Tennessee, etc., R. Co. v. Johnston, 75 Ala. 596, 51 Am. Rep. 489, 22 Am.

& Eng. R. Cas. 437; Central, etc., R. Co. v. Smitha, 85 Ala. 47; Alabama, etc., R. Co. v. Thomas, 89 Ala. 294, 18 Am. St. Rep. 119; Louisville, etc., R. Co. v. Grant, 99 Ala. 325; Montgomery, etc., R. Co. v. Edmonds, 41 Ala. 667; Mobile, etc., R. Co. v. Jarboe, 41 Ala. 644; Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; Alabama, etc., R. Co. v. Thomas, 83 Ala. 343, 3 So. 802.

Ark.—St. Louis, etc., R. Co. v. Lesser, 46 Ark. 236.

Cal.—Hooper v. Wells, 27 Cal. 11, 85 Am. Dec. 211.

Colo.—Union Pac. R. Co. v. Rainey, 19 Colo. 225; Milton v. Denver, etc., R. Co., 1 Colo. App. 307.

Conn.—See cases cited note 1, § 1, ante.

Dak.—Hartwell v. Northern Pac. R. Co., 5 Dak. 463; Hazel v. Chicago, etc., R. Co., 82 Iowa, 477, 49 Am. & Eng. R. Cas. 76.

Del.—Truax v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 233; Flinn v. Philadelphia, etc., R. Co., 1 Houst. (Del.) 169.

Fla.—Brock v. Gale, 14 Fla. 523, 14 Am. Rep. 356.

Ga.—Nicoll v. East Tennessee, etc., R. Co., 89 Ga. 260; Central R. Co. v. Bryant, 73 Ga. 722; Bryant v. South-western R. Co., 68 Ga. 805, 6 Am. &

for the negligence of its employes by stipulating that those fur-

Eng. R. Cas. 388; *Mitchell v. Georgia, R. Co.*, 68 Ga. 644; *Georgia R. Co. v. Spears*, 66 Ga. 485, 42 Am. Rep. 81; *Georgia R. Co. v. Beatie*, 66 Ga. 438, 42 Am. Rep. 75.

Ill.—*United States Express Co. v. Council*, 84 Ill. App. 491; *Merchants', etc., Transp. Co. v. Leysor*, 89 Ill. 43; *Merchants', etc., Transp. Co. v. Joesting*, 89 Ill. 152; *American Express Co. v. Spellman*, 90 Ill. 195; *Erie R. Co. v. Wilcox*, 84 Ill. 239; *Boscowitz v. Adams Express Co.*, 93 Ill. 523, 5 Cent. L. J. 58; *Adams Express Co. v. Stettiners*, 61 Ill. 184; *Erie, etc., Transp. Co. v. Dater*, 8 Cent. L. J. 293, 91 Ill. 195; *Merchants', etc., Transp. Co. v. Theilbar*, 86 Ill. 71; *Chicago, etc., R. Co. v. Montfort*, 60 Ill. 175; *Illinois Cent. R. Co. v. Sauper*, 38 Ill. 354.

Ind.—*Parrill v. Cleveland, etc., R. Co.*, 23 Ind. App. 638, 55 N. E. 1026; *Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129; *Indianapolis, etc., R. Co. v. Forsythe*, 4 Ind. App. 326; *Michigan Southern, etc., R. Co. v. Heaton*, 37 Ind. 448, 10 Am. Rep. 89; *Indianapolis, etc., R. Co. v. Allen*, 31 Ind. 394; *Adams Express Co. v. Harris*, 120 Ind. 73, 16 Am. St. Rep. 315, 40 Am. & Eng. R. Cas. 153; *Baltimore, etc., R. Co. v. Ragsdale*, 14 Ind. App. 406; *Lake Shore, etc., R. Co. v. Bennett*, 89 Ind. 457, 6 Am. & Eng. R. Cas. 391; *St. Louis, etc., R. Co. v. Smuck*, 49 Ind. 302; *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Adams Express Co. v. Fendrick*, 38 Ind. 150; *Adams Express Co. v. Reagan*, 29 Ind. 21, 92 Am. Dec. 332; *Wright v. Gaff*, 6 Ind. 416.

Iowa.—*Hart v. Chicago, etc., R. Co.*, 69 Iowa, 485; *McCune v. Burlington, etc., R. Co.*, 52 Iowa, 600; *Brush v. Sabula, etc., R. Co.*, 43 Iowa,

554; *Mulligan v. Illinois Cent. R. Co.*, 36 Iowa, 181; *Thompson v. Chicago, etc., R. Co.*, 27 Iowa, 561; *Griswold v. Illinois Cent. R. Co.*, 90 Iowa, 265. See *Iowa Code and Statutes*.

Kan.—*Missouri Valley R. Co. v. Caldwell*, 8 Kan. 244, 5 Am. Ry. Rep. 287; *Sprague v. Missouri Pac. R. Co.*, 34 Kan. 347, 23 Am. & Eng. R. Cas. 684; *Kansas City, etc., R. Co. v. Simpson*, 30 Kan. 645, 46 Am. Rep. 104; *Kansas Pac. R. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630; *Leavenworth, etc., R. Co. v. Maris*, 16 Kan. 333; *St. Louis, etc., R. Co. v. Piper*, 13 Kan. 505; *Goggin v. Kansas Pac. R. Co.*, 12 Kan. 416; *Kallman v. U. S. Express Co.*, 3 Kan. 205.

Ky.—*Louisville, etc., R. Co. v. Plummer (Ky.)*, 35 S. W. 1113; *Louisville, etc., R. Co. v. Owen*, 93 Ky. 201; *Baughman v. Louisville, etc., R. Co.*, 94 Ky. 150; *Louisville, etc., R. Co. v. Brownlee*, 14 Bush (Ky.), 590; *Louisville, etc., R. Co. v. Hedger*, 9 Bush (Ky.), 645, 15 Am. Rep. 740; *Adams Express Co. v. Guthrie*, 9 Bush (Ky.), 78; *Reno v. Hogan*, 12 B. Mon. (Ky.) 63, 54 Am. Dec. 513; *Adams Express Co. v. Nock*, 2 Duv. (Ky.) 562, 87 Am. Dec. 510.

La.—*Maxwell v. Southern Pac. R. Co.*, 48 La. Ann. 385; *Higgins v. New Orleans, etc., R. Co.*, 28 La. Ann. 133; *New Orleans Mut. Ins. Co. v. New Orleans, etc., R. Co.*, 20 La. Ann. 302; *Roberts v. Riley*, 15 La. Ann. 103, 77 Am. Dec. 183; *Baldwin v. Collins*, 9 Rob. (La.) 468.

Me.—*Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462, 92 Am. Dec. 606; *Stone v. Waitt*, 31 Me. 409, 52 Am. Dec. 621; *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, 50 Am. Dec. 659.

Md.—In this State it has been held

nished to assist the shipper in loading and unloading freight

that the right of common carriers to limit their common law liability by express contract, whenever there is reason and justice to sustain the limitation, is too well established to be questioned. But the contract ought to be in clear and distinct terms. *McCoy v. Erie*, etc., *Transp. Co.*, 42 Md. 498; *Bankard v. Baltimore*, etc., *R. Co.*, 34 Md. 197, 6 Am. Rep. 321; *Brehme v. Adams Express Co.*, 25 Md. 328; *Baltimore*, etc., *R. Co. v. Brady*, 32 Md. 333.

Mich.—The limitation may be made by special contract, but not by general notice. *Feige v. Michigan Cent. R. Co.*, 62 Mich. 1; *Smith v. American Express Co.* (Mich.), 66 N. W. 479; *Coup v. Wabash*, etc., *R. Co.*, 56 Mich. 111, 56 Am. Rep. 374, 18 Am. & Eng. R. Cas. 542; *Sisson v. Cleveland*, etc., *R. Co.*, 14 Mich. 489, 90 Am. Dec. 252; *Great Western R. Co. v. Hawkins*, 18 Mich. 427; *Hawkins v. Great Western R. Co.*, 17 Mich. 57, 97 Am. Dec. 179; *McMillan v. Michigan Southern*, etc., *R. Co.*, 16 Mich. 79, 93 Am. Dec. 208; *Michigan Cent. R. Co. v. Hale*, 6 Mich. 243. Compare *Michigan Cent. R. Co. v. Ward*, 2 Mich. 538. See also *Michigan statutes*.

A contract between a railroad and a shipper by which the railroad builds a side track for the shipper's convenience, and the shipper agrees to indemnify the railroad from all liability for loss by fire, though caused by the railroad's negligence, is not against public policy, as, in putting in such tracks, the railroad is not acting as a common carrier. *Mann v. Pere Marquette R. Co.* (Mich.), 97 N. W. 721, 10 Det. L. N. 764.

Minn.—*Hutchinson v. Chicago*, etc.,

R. Co., 37 Minn. 524, 35 N. W. 433; *Boehl v. Chicago*, etc., *R. Co.*, 44 Minn. 191; *Ortt v. Minneapolis*, etc., *R. Co.*, 36 Minn. 396; *Moulton v. St. Paul*, etc., *R. Co.*, 31 Minn. 85, 12 Am. & Eng. R. Cas. 13, 47 Am. Rep. 781; *Shriver v. Sioux City*, etc., *R. Co.*, 24 Minn. 506, 31 Am. Rep. 353; *Christenson v. American Express Co.*, 15 Minn. 270, 2 Am. Rep. 122.

Miss.—*Illinois Cent. R. Co. v. Boagard* (Miss.), 27 So. 879; *Johnson v. Alabama*, etc., *R. Co.*, 69 Miss. 191, 30 Am. St. Rep. 534; *Chicago*, etc., *R. Co. v. Moss*, 60 Miss. 1003, 45 Am. Rep. 428, 21 Am. & Eng. R. Cas. 98; *New Orleans*, etc., *R. Co. v. Falter*, 58 Miss. 911, 9 Am. & Eng. R. Cas. 96; *Illinois Cent. R. Co. v. Scruggs*, 69 Miss. 418; *Chicago*, etc., *R. Co. v. Abels*, 60 Miss. 1017, 21 Am. & Eng. R. Cas. 105; *Mobile*, etc., *R. Co. v. Franks*, 41 Miss. 494; *Southern Express Co. v. Moon*, 39 Miss. 822.

Mo.—*D. Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164, 2 Mo. App. Rep. 545; *Witting v. St. Louis*, etc., *R. Co.*, 101 Mo. 631, 20 Am. St. Rep. 636, 45 Am. & Eng. R. Cas. 369, 28 Mo. App. 103; *Vaughn v. Wabash R. Co.*, 62 Mo. App. 461; *Leonard v. Chicago*, etc., *R. Co.*, 54 Mo. App. 293; *Doan v. St. Louis*, etc., *R. Co.*, 38 Mo. App. 408; *Hick v. Missouri Pac. R. Co.*, 51 Mo. App. 532; *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, 1 Am. St. Rep. 721, 30 Am. & Eng. R. Cas. 17; *Potts v. Wabash*, etc., *R. Co.*, 17 Mo. App. 394; *Drew v. Red Line Transit Co.*, 3 Mo. App. 495; *Kirby v. Adams Express Co.*, 2 Mo. App. 369, 3 Cent. L. J. 435; *Dawson v. Chicago*, etc., *R. Co.*, 79 Mo. 296, 18 Am. & Eng. R. Cas. 521; *St. Louis*, etc., *R. Co. v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13,

shall be the employes of the latter.⁹⁶ A shipping receipt that

16 Am. & Eng. R. Cas. 122; Read v. St. Louis, etc., R. Co., 60 Mo. 199; Sturgeon v. St. Louis, etc., R. Co., 65 Mo. 569; Snider v. Adams Express Co., 63 Mo. 376; Rice v. Kansas Pac. R. Co., 63 Mo. 413; Ketchum v. American Merchants' U. Exp. Co., 52 Mo. 390; Wolf v. American Express Co., 43 Mo. 421, 97 Am. Dec. 406; Levering v. Union Transp., etc., Co., 42 Mo. 88, 97 Am. Dec. 320.

But a contract, fairly entered into, limiting a right of recovery to a sum expressly agreed upon by the parties as representing the true value of the property shipped, is not a contract exempting the carrier in any degree from the consequences of its own negligence, but simply fixes the rate of freight and liquidates the damages. Harvey v. Terre Haute, etc., R. Co., 74 Mo. 541, 6 Am. & Eng. R. Cas. 293; Ball v. Wabash, etc., R. Co., 83 Mo. 574, 25 Am. & Eng. R. Cas. 384.

Neb.—Pennsylvania Co. v. Kennard Glass & Paint Co. (Neb.), 81 N. W. 372; Atchison, etc., R. Co. v. Lawler, 40 Neb. 356, 61 Am. & Eng. R. Cas. 255; St. Joseph, etc., R. Co. v. Palmer, 38 Neb. 463, 61 Am. & Eng. R. Cas. 69; Chicago, etc., R. Co. v. Witty, 32 Neb. 275, 29 Am. St. Rep. 436.

N. H.—Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Moses v. Boston, etc., R. Co., 24 N. H. 71, 55 Am. Dec. 222. See also Merrill v. American Express Co., 62 N. H. 514.

N. J.—Taylor v. Pennsylvania R. Co., 8 N. J. L. J. 149; Paul v. Pennsylvania R. Co. (N. J. Sup.), 57 Atl. 139; Gibbons v. Wade, 8 N. J. L. 255.

N. C.—Parker v. Atlantic, etc., R. Co., 133 N. C. 335, 63 L. R. A. 827, 45 S. E. 658; Gardner v. Southern R. Co., 127 N. C. 293, 37 S. E. 328;

Branch v. Wilmington, etc., R. Co., 88 N. C. 573, 18 Am. & Eng. R. Cas. 621; Mason v. Richmond, etc., R. Co., 111 N. C. 482, 32 Am. St. Rep. 814, 53 Am. & Eng. R. Cas. 183; Smith v. North Carolina R. Co., 64 N. C. 235.

Ohio.—Pennsylvania R. Co. v. Yoder, 25 Ohio C. C. R. 32; Union Express Co. v. Graham, 26 Ohio St. 595; Knowlton v. Erie R. Co., 19 Ohio St. 260, 2 Am. Rep. 395; Cleveland, etc., R. Co. v. Curran, 19 Ohio St. 1, 2 Am. Rep. 362; Jones v. Voorhees, 10 Ohio, 145; Welsh v. Pittsburgh, etc., R. Co., 10 Ohio St. 65; 75 Am. Dec. 490; Graham v. Davis, 4 Ohio St. 362, 62 Am. Dec. 285; Davidson v. Graham, 2 Ohio St. 131.

Or.—Seller v. Steamship Pacific, 1 Or. 409.

Pa.—Willock v. Pennsylvania R. Co., 166 Pa. St. 184, 45 Am. St. Rep. 674, 35 W. N. C. (Pa.) 545; Armstrong v. United States Express Co., 159 Pa. St. 640; Buck v. Pennsylvania R. Co., 150 Pa. St. 170, 30 Am. St. Rep. 800; Weiller v. Pennsylvania R. Co., 134 Pa. St. 310 19 Am. St. Rep. 700 42 Am. & Eng. R. Cas. 390; Grogan v. Adams Express Co., 114 Pa. St. 523, 60 Am. Rep. 360, 30 Am. & Eng. R. Cas. 9; Pennsylvania R. Co. v. Raiordon, 119 Pa. St. 577, 4 Am. St. Rep. 670; Adams Express Co. v. Sharpless, 77 Pa. St. 516; Empire Transp. Co. v. Wamsutta Oil Refining, etc., Co., 63 Pa. St. 14, 3 Am. Rep. 515; American Express Co. v. Sands, 55 Pa. St. 140; Powell v. Pennsylvania R. Co., 32 Pa. St. 414, 75 Am. Dec. 564; Goldey v. Pennsylvania R. Co., 30 Pa. St. 242, 72 Am. Dec. 703; Camden, etc., R. Co. v. Baldauf, 16 Pa. St. 67, 55 Am. Dec. 481; Bingham v. Rogers,

goods are shipped "at owner's risk" exempts even connecting

6 W. & S. (Pa.) 495, 40 Am. Dec. 581; Beckman v. Shouse, 5 Rawle (Pa.), 179, 28 Am. Dec. 653; Atwood v. Reliance Transp. Co., 9 Watts (Pa.), 87, 34 Am. Dec. 503.

R. I.—Hubbard v. Harnden Express Co., 10 R. I. 244.

S. C.—Johnstone v. Richmond, etc., R. Co., 39 S. C. 55, 55 Am. & Eng. R. Cas. 346; Springs v. South Bound R. Co., 46 S. C. 104; Wallingford v. Columbia, etc., R. Co., 26 S. C. 258, 30 Am. & Eng. R. Cas. 44; Piedmont Mfg. Co. v. Columbia, etc., R. Co., 19 S. C. 353, 16 Am. & Eng. R. Cas. 194; Porter v. Southern Express Co., 4 S. C. 135, 16 Am. Rep. 762; Swindler v. Hilliard, 2 Rich. L. (S. C.) 286, 45 Am. Dec. 732; Patten v. Magrath, Dudley L. (S. C.) 159, 31 Am. Dec. 552.

Tenn.—Louisville, etc., R. Co. v. Sowell, 90 Tenn. 17, 49 Am. & Eng. R. Cas. 166; Deming v. Merchants' Cotton Press, etc., Co., 90 Tenn. 306; Merchants', etc., Transp. Co. v. Bloch, 86 Tenn. 392, 6 Am. St. Rep. 847; Louisville, etc., R. Co. v. Wynn, 88 Tenn. 320, 45 Am. & Eng. R. Cas. 312; Nashville, etc., R. Co. v. Jackson, 6 Heisk. (Tenn.) 271; Southern Express Co. v. Womack, 1 Heisk. (Tenn.) 256; Olwell v. Adams Express Co., 1 Cent. L. J. 186; East Tennessee, etc., R. Co. v. Nelson, 1 Coldw. (Tenn.) 272; East Tennessee, etc., R. Co. v. Bromley, 5 Lea (Tenn.) 401; Texas, etc., R. Co. v. Rogers (Tenn.), 3 S. W. 660.

Tex.—The statutes of this state declare invalid any exceptions or special contract seeking to vary the common law liability of common carriers. Houston, etc., R. Co. v. Burke, 55 Tex. 323, 40 Am. Rep. 808, 9 Am. & Eng. R. Cas. 59; Gulf, etc., R. Co. v.

Trawick, 68 Tex. 314, 2 Am. St. Rep. 494, 30 Am. & Eng. R. Cas. 49; Heaton v. Morgan's La., etc., S. Co., 1 Tex. App. Civ. Cas. § 774, 4 Tex. L. J. 375; New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357; Arnold v. Jones, 26 Tex. 337, 82 Am. Dec. 617; Chevalier v. Strahan, 2 Tex. 115, 47 Am. Dec. 639; Galveston, etc., R. Co. v. Ball, 80 Tex. 602; Houston, etc., R. Co. v. Williams, (Tex. Civ. App.) 31 S. W. 559; Houston, etc., R. Co. v. Davis, 11 Tex. Civ. App. 24.

A carrier independently of the statute, cannot stipulate exemption from liability for losses resulting from its negligence. Gulf, etc., R. Co. v. Maetze, 2 Tex. App. Civ. Cas. § 631, 18 Am. & Eng. R. Cas. 613; Missouri Pac. R. Co. v. China Mfg. Co., 79 Tex. 26; Atchison, etc., R. Co. v. Grant, 6 Tex. Civ. App. 674; Gulf, etc., R. Co. v. Eddins, 7 Tex. Civ. App. 116; Gulf, etc., R. Co. v. Wilhelm, 3 Tex. App. Civ. Cas. § 458; Texas, etc., R. Co. v. Davis, 2 Tex. App. Civ. Cas. § 191; Missouri Pac. R. Co. v. Ivey, 71 Tex. 409, 10 Am. St. Rep. 758, 9 S. W. 346; Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 28 Am. & Eng. R. Cas. 107; Missouri Pac. R. Co. v. Cornwall, 70 Tex. 611, 8 S. W. 312.

Vt.—Davis v. Central Vermont R. Co., 66 Vt. 290, 44 Am. St. Rep. 852, 61 Am. & Eng. R. Cas. 197; Cutts v. Brainard, 42 Vt. 566, 1 Am. Rep. 353; Mann v. Birchard, 40 Vt. 326; Farmers', etc., Bank v. Champlain Transp. Co., 18 Vt. 131, 23 Vt. 186, 56 Am. Dec. 68; Blumenthal v. Brainard, 38 Vt. 402, 91 Am. Dec. 350.

Va.—Virginia, etc., R. Co. v. Sayers, 26 Gratt. (Va.) 328.

W. Va.—Baltimore, etc., R. Co. v. Rathbone, 1 W. Va. 87, 88 Am. Dec.

lines of road from liability, save for the negligence of the party sought to be charged,⁹⁷ and the possession of such a receipt raises the presumption of the owner's assent to the risk.⁹⁸ But a common carrier is not released from damages occurring through his own negligence, by stipulating that the goods are shipped "at the owner's risk." At most this would only protect him against loss occurring from the ordinary and known risks of transportation.⁹⁹ It will not relieve from liability for delay in delivering goods.¹

§ 17. The New York rule.—In New York it was held in an early case that common carriers could not limit their liability, or evade the consequences of a breach of their legal duties as such, by an express agreement or special acceptance of the goods to be transported.² The ruling in this case was subsequently overruled and it became the doctrine of the courts of this State that it was competent for a common carrier and an owner of property, by an express agreement fairly entered into between themselves, to establish conditions of liability for loss or damage, different from those imposed by the common law.³ Later the Court of Appeals of this State took the advanced ground that the power of

664; Baltimore, etc., R. Co. v. Skeels, 3 W. Va. 556.

Wis.—Ullman v. Chicago, etc., R. Co., 112 Wis. 168, 88 N. W. 41; Cream City, etc., R. Co. v. Chicago, etc., R. Co., 21 Am. & Eng. R. Cas. 70; Betts v. Farmers' Loan, etc., Co., 21 Wis. 80; Boorman v. American Express Co., 21 Wis. 152; Falvey v. Northern Transp. Co., 15 Wis. 129; The Sultana v. Chapman, 5 Wis. 454.

96. Missouri Pac. R. Co. v. Smith (Tex.), 16 S. W. 803.

97. Kiff v. Atchison, etc., R. Co., 32 Kan. 263, 18 Am. & Eng. R. Cas. 618. When the defense that the goods were carried at the owner's risk is interposed, a waiver of all other grounds of defense and an admission that the goods were damaged while in the possession of the carrier may be inferred. South, etc., Alabama R. Co.

v. Wilson, 78 Ala. 587, 27 Am. & Eng. R. Cas. 41.

98. Morrison v. Phillips, etc., Const. Co., 44 Wis. 405, 28 Am. Rep. 599, 19 Am. Ry. Rep. 312.

99. Nashville, etc., R. Co. v. Johnson, 6 Heisk. (Tenn.) 271, 12 Am. Ry. Rep. 54; The Hugo, 57 Fed. 403.

1. Goldsmith v. Great Eastern R. Co., 44 L. T. N. S. 181, 29 W. R. 651; Stevens v. Great Western R. Co., 52 L. T. 324; D'Arc v. London, etc., R. Co., L. R. 9 C. P. 325, 22 W. R. 919, 30 L. T. N. S. 763; Lewis v. Great Western R. Co., 26 W. R. 255.

2. Gould v. Hill, 2 Hill (N. Y.) 623.

3. Parsons v. Monteath, 13 Barb. (N. Y.) 353; Moore v. Evans, 14 Barb. (N. Y.) 524; Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485, 62 Am. Dec. 125; Stoddard v. Long Island R. Co., 5 Sandf. (N. Y.) 180.

the common carrier to limit its liability by special contract extends so far as to enable it to exonerate itself from the effects of any degree of negligence on the part of its servants, agents, or employes, even gross negligence, where the contract expressly provides for such exemption and where the contract is founded upon a valuable consideration, such as abatement in whole or in part of the ordinary freight rate, fare or charge.⁴ Such contracts, however, are not favored by the courts, and a contract will not be construed as exempting from a liability for negligence, unless it is expressed in unequivocal terms; and every presumption is against such an intention. Thus, it has been held that a contract releasing the carrier "from damage or loss to any article from or by fire or explosion of any kind" does not release it from liability for damage by those means resulting from the carrier's own negligence.⁵ And exemption from damages occasioned by delays from

4. *Wells v. New York Cent. R. Co.*, 24 N. Y. 181; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196, 82 Am. Dec. 282; *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442, 82 Am. Dec. 369; *Nelson v. Hudson River R. Co.*, 48 N. Y. 498; *Guillaume v. Hamburgh, etc., Packet Co.*, 42 N. Y. 212, 1 Am. Rep. 512; *Westcott v. Fargo*, 63 Barb. (N. Y.) 349, 61 N. Y. 542, 19 Am. Rep. 300; *Poucher v. New York Cent. R. Co.*, 49 N. Y. 263, 10 Am. Rep. 364; *Nicholas v. New York Cent., etc., R. Co.*, 89 N. Y. 370, 9 Am. & Eng. R. Cas. 103; *Mynard v. Syracuse, etc., R. Co.*, 7 Hun (N. Y.) 399, 71 N. Y. 180, 27 Am. Rep. 28; *Heineman v. Grand Trunk R. Co.*, 31 How. Pr. (N. Y.) 430, 1 Shield. (N. Y.) 95; *Wilson v. New York Cent., etc., R. Co.*, 97 N. Y. 87, where the contract provided that the carrier should not be liable for the negligence of its servants, and the validity of the exemption was sustained.

In *Cragin v. New York Cent. R. Co.*, 51 N. Y. 61, 10 Am. Rep. 559, 4 Am. Rey. Rep. 418, the contract expressly exempted the carrier from all lia-

bility, and this was held to cover a liability for the loss of certain live stock caused by negligence in failing to water them.

5. *Steinweg v. Erie R. Co.*, 43 N. Y. 123, 3 Am. Rep. 673; *Holsapple v. Rome, etc., R. Co.*, 86 N. Y. 275; *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500; *Rawson v. Holland*, 59 N. Y. 611, 17 Am. Rep. 394; *Alexander v. Green*, 7 Hill (N. Y.), 533; *Giles v. Fargo*, 60 N. Y. Super. Ct. 117; *Ghormley v. Dinsmore*, 51 N. Y. Super. Ct. 196; *Knell v. United States, etc., S. Co.*, 33 N. Y. Super. Ct. 423; *Prentice v. Decker*, 49 Barb. (N. Y.) 21.

But where the bill of lading contains a general exemption from liability for loss by fire, and the loss occurred from this cause, it is incumbent on the owner of the property, in order to avoid the effect of the exemption, to show that the fire was the result of the carrier's negligence or that the loss resulted from some breach of the carrier's duty. *Whitworth v. Erie R. Co.*, 87 N. Y. 419; *Van Akin v. Erie R. Co.*, 92

any cause does not cover a loss by the negligent delay of the carrier.⁶ An exemption from all claims for any damage or injury "from whatsoever cause arising" does not include a loss arising from the carrier's negligence.⁷ The doctrine of such contracts firmly established by the decisions of the courts of this State is that in order to secure to a common carrier immunity from its negligence or that of its servants, it must be so expressed in unmistakable language in the contract and it must not be left to a presumption to be drawn from the language. General words in the contract of a carrier, either of persons or of goods, limiting its responsibility, will not be construed as exempting it from liability for negligence, if fairly capable of other construction.⁸ Where by the contract of transportation, the property is shipped "at the owner's risk," these words will not be held to exempt the carrier for loss caused by its negligence.⁹ A provision in a bill of lading that the carrier shall not be liable for any loss or breakage does not exempt the carrier from the consequences of its own negligence.¹⁰ A contract for the transportation of

App. Div. (N. Y.) 23, 87 N. Y. Supp. 871.

So, a contract for the carriage of goods, providing that the carrier should not be liable for any loss or damage by change in weather, heat, frost, wet, or decay, did not relieve the carrier from liability for damage caused by negligence, but did impose on the owner the burden of establishing that injury from wet was caused by the carrier's negligence. *Thyll v. New York, etc., R. Co.*, 92 App. Div. (N. Y.) 513, 87 N. Y. Supp. 345, modg. 84 N. Y. Supp. 175.

6. *Nicholas v. New York, etc., R. Co.*, 89 N. Y. 370, 9 Am. & Eng. R. Cas. 103; *McKinney v. Jewett*, 90 N. Y. 267, 9 Am. & Eng. R. Cas. 209.

7. *Magnin v. Dinsmore*, 56 N. Y. 168; *Westcott v. Fargo*, 61 N. Y. 543; *Mynard v. Syracuse, etc., R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28.

8. *Rathbone v. New York Cent., etc., R. Co.*, 140 N. Y. 48, 61 Am. &

Eng. R. Cas. 150; *Kenney v. New York Cent., etc., R. Co.*, 125 N. Y. 422; *Fowler v. Liverpool, etc., Steam Co.*, 87 N. Y. 190, 9 Am. & Eng. R. Cas. 235; *Canfield v. Baltimore, etc., R. Co.*, 93 N. Y. 532, 45 Am. Rep. 268, 16 Am. & Eng. R. Cas. 152; *Blair v. Erie R. Co.*, 66 N. Y. 313, 23 Am. Rep. 55; and cases cited in preceding notes to this section. See also *Fasy v. International Nav. Co.*, 177 N. Y. 591, 70 N. E. 1098, affg. 77 App. Div. (N. Y.) 469, 79 N. Y. Supp. 1103.

9. *Canfield v. Baltimore, etc., R. Co., supra*; *Wells v. Steam Nav. Co.*, 8 N. Y. 380; *Mynard v. Syracuse, etc., R. Co., supra*; *Nicholas v. New York Cent. R. Co., supra*; *Moore v. Evans, supra*; *Alexander v. Greene*, 7 Hill (N. Y.), 546; *French v. Buffalo, etc., R. Co.*, 4 Keyes (N. Y.), 113; *McCaffrey v. Twenty-third St. R. Co.*, 47 Hun (N. Y.), 404.

10. *Hutkoff v. Pennsylvania R. Co.*,

goods, stipulating that the carrier shall not be liable for any damage in excess of a specified amount, nor, in any event, for more than the true value of the property, does not, by the attempt to limit the carrier's liability, relieve it from liability for a loss occasioned by its negligence.¹¹ And a contract exempting the carrier from liability for injuries caused by the negligence of the carrier's servants in the execution of the contract will not excuse a deliberate, intentional act constituting a breach of the contract.¹²

§ 18. Rule in Illinois and Wisconsin.—In Illinois and Wisconsin the rule seems to be that carriers may by special contract exempt themselves from liability when the loss or injury results from their negligence or the negligence of their servants, except when such negligence is gross.¹³ Railroad companies have a right to restrict their liability as common carriers by such contracts as may be agreed on specially, they still remaining liable for gross negligence or willful misfeasance, against which morals and public policy forbid that they be permitted to stipulate.¹⁴ In accepting live stock for transportation, the carrier undertakes to use ordinary care for its safety commensurate with its nature and condition, and all contracts in which the carrier undertakes to

29 Misc. Rep. (N. Y.) 770, 61 N. Y. Supp. 254.

11. Marquis v. Wood, 29 Misc. Rep. (N. Y.) 590, 61 N. Y. Supp. 251.

12. Keeney v. Grand Trunk R. Co., 47 N. Y. 525, 1 Am. Ry. Rep. 466.

13. Ill.—Chicago, etc., R. Co. v. Davis, 159 Ill. 53; Wabash R. Co. v. Brown, 51 Ill. App. 656, 152 Ill. 484; Wabash, etc., R. Co. v. Peyton, 106 Ill. 534, 46 Am. Rep. 705, 18 Am. & Eng. R. Cas. 1; Merchants' Despatch Transp. Co. v. Thielbar, 86 Ill. 71; Erie, etc., Transp. Co. v. Dater, 91 Ill. 195, 33 Am. Rep. 51, 8 Cent. L. J. 293; Erie R. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451, 16 Am. Ry. Rep. 457; Chicago, etc., R. Co. v. Montfort, 60 Ill. 175; Illinois Cent. R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301; Adams

Express Co. v. Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Merchants' Despatch, etc., Co. v. Moore, 88 Ill. 136, 30 Am. Rep. 541; Chicago, etc., R. Co. v. Chapman, 30 Ill. App. 504, 133 Ill. 96, 23 Am. St. Rep. 587, 42 Am. & Eng. R. Cas. 392; Illinois Cent. R. Co. v. Jonte, 13 Ill. App. 424; Chicago, etc., R. Co. v. Harmon, 17 Ill. App. 640; Chicago, etc., R. Co. v. Hawk, 42 Ill. App. 322.

Wis.—Abrams v. Milwaukee, etc., R. Co., 87 Wis. 485, 41 Am. St. Rep. 55; Lawson v. Chicago, etc., R. Co., 64 Wis. 455, 54 Am. Rep. 634; Black v. Goodrich Transp. Co., 55 Wis. 319, 42 Am. Rep. 713; Cream City R. Co. v. Chicago, etc., R. Co., 63 Wis. 93, 53 Am. Rep. 267.

14. Baltimore, etc., R. Co. v. Ross, 105 Ill. App. 54.

limit its liability to less than the use of ordinary care for the safety of such stock may be rejected.¹⁵

§ 19. The English and Canadian rule.—The English courts at an early period adopted the rule that carriers might limit their liability either by contract or by general public notice for losses caused by their own negligence,¹⁶ except where the negligence was gross.¹⁷ By the English Carrier's Act of 1830 it was provided in substance that no common carrier by land for hire should be liable for a loss or injury to any article of property specified in the statute, if the value should exceed ten pounds, not occasioned by the felonious acts of his servants or his own personal negligence unless, at the time of shipment, its nature and value should be stated and an increased charge paid for its transportation; that no public notice should have the effect of limiting the carrier's liability as to any articles other than those specified in the act; and that the act should not be so construed as in any wise to affect any special contract with the carrier. Under this act the courts still maintained the rule that carriers might, by special contract, stipulate against liability for any loss resulting from their own negligence, except where there was wilful negligence or misfeasance.¹⁸ The Carrier's Act was modified in 1854 by the Railway

15. United States Express Co. v. Burke, 94 Ill. App. 29.

16. Gibbons v. Paynton, 4 Burr. 2298; **Downs v. Fromont,** 4 Campb. 40; **Maving v. Todd,** 4 Campb. 225, 1 Stark. 72, 2 E. C. L. 37; **Alfred v. Horne,** 3 Stark. 136, 14 E. C. L. 168; **Peek v. North Staffordshire R. Co.,** 9 Jur. N. S. 914, 10 H. L. Cas. 473, 32 L. J. Q. B. 241; **Covington v. Willan,** Gow. 115, 5 E. C. L. 481; **Garnett v. Willan,** 5 B. & Ald. 53, 7 E. C. L. 19; **Bignold v. Waterhouse,** 1 M. & S. 255; **Mayhew v. Eames,** 3 B. & C. 601, 10 E. C. L. 195; **Leeson v. Holt,** 1 Stark. 186, 2 E. C. L. 77; **Butt v. Great Western R. Co.,** 11 C. B. 140, 73 E. C. L. 140. See **Fish v. Chapman,** 2 Ga. 349, 46 Am. Dec. 393.

17. Wright v. Snell, 5 B. & Ald. 350, 7 E. C. L. 127; **Sleat v. Fagg,** 5

B. & Ald. 342, 7 E. C. L. 123; **Newborn v. Just,** 2 C. & P. 76, 12 E. C. L. 34; **Beck v. Evans,** 16 East 244, 3 Campb. 267; **Birkett v. Willan,** 2 B. & Ald. 356; **Smith v. Horne,** 2 Moore 18, 8 Taunt. 144, 4 E. C. L. 50; **Beal v. South Devon R. Co.,** 3 H. & C. 337, 12 W. R. 1115; **Beckford v. Crutwell,** 5 C. & P. 242, 24 E. C. L. 300, 1 M. & Rob. 187; **Bodenham v. Bennett,** 4 Price 31; **Langley v. Brown,** 1 M. & P. 583, 17 E. C. L. 193. See also **Hollister v. Nowlen,** 19 Wend. (N. Y.) 234; **Cole v. Goodwin,** 19 Wend. (N. Y.) 251; **New York Cent. R. Co. v. Lockwood,** 17 Wall. 357; **Sager v. Portsmouth, etc., R. Co.,** 31 Me. 228.

18. Webb. v. Great Western R. Co., 26 W. R. 111; **Hughes v. Great Western R. Co.,** 14 C. B. 637, 78 E. C. L. 637; **Slim v. Great Northern R. Co.,**

and Canal Traffic Act, which applied to railways and canal traffic only, and provided in substance that such carriers could not limit their liability for negligence except by a contract signed by the shipper or his agent and adjudged by the court before whom any question relating to it should be tried to be just and reasonable.¹⁹ Under these acts, upon which the adjudications of English courts are based, the rule has become well established that contracts limiting the liability of carriers are just and reasonable and will be sustained by the courts when it has been shown that a fair and genuine alternative has been offered the shipper of having his goods carried free from restrictive conditions at a higher rate, which is not prohibitive or excessive, or at a lower rate under which the carrier is released from all responsibility except gross negligence, fraud or wilful wrong on the part of the carrier or its servants, and that a sufficient consideration has been given by the carrier for the reduced liability assumed under the contract.²⁰

14 C. B. 647, 78 E. C. L. 647; York, etc., R. Co. v. Crisp, 14 C. B. 527, 78 E. C. L. 527; Morville v. Great Northern R. Co., 16 Jur. 528, 7 Railw. Cas. 830, 21 L. J. Q. B. 319; Carr v. Lancashire, etc., R. Co., 7 Exch. 707, 7 Railw. Cas. 426, 17 Jur. 397; Wilton v. Atlantic, etc., Nav. Co., 10 C. B. N. S. 453, 100 E. C. L. 453, 8 Jur. N. S. 232, 9 W. R. 748; Dodson v. Grand Trunk R. Co., 7 Canada L. J. N. S. 263; The Duero, 22 L. T. N. S. 37; Stewart v. London, etc., R. Co., 3 H. & C. 135, 10 Jur. N. S. 805, 12 W. R. 689; Hoare v. Great Western R. Co., 37 L. T. N. S. 186, 25 W. R. 63; Chippendale v. Lancashire, etc., R. Co., 15 Jur. 1106, 7 Railw. Cas. 824; Great Western R. Co. v. Glenister, 22 W. R. 72, 29 L. T. N. S. 422; Ronan v. Midland R. Co., L. R. 14 Ir. 157; Lewis v. Great Western R. Co., 3 Q. B. Div. 195, 47 L. J. Q. B. Div. 131, 37 L. T. N. S. 774, 26 W. R. 255, 15 Am. Ry. Rep. 601.

19. Robinson v. London, etc., R. Co., 19 C. B. N. S. 51, 115 E. C. L. 51, 11 Jur. N. S. 390, 13 W. R. 660.

20. Gallagher v. Great Western R. Co., 8 Ir. R. C. L. 326; Taubman v. Pacific Steam Nav. Co., 26 L. T. 704; Peek v. North Staffordshire R. Co., 10 H. L. Cas. 473, 9 Jur. N. S. 914, 11 W. R. 1023; Garton v. Bristol, etc., R. Co., 1 B. & S. 112, 101 E. C. L. 112, 7 Jur. N. S. 1234; Lloyd v. Waterford, etc., R. Co., 15 Ir. C. L. R. 37; Steele v. State Line Steamship Co., L. R. 3 App. 72; Hill v. Scott, 2 Q. B. 371; Norman v. Binnington, 25 Q. B. Div. 475; Foreman v. Great Western R. Co., 38 L. T. N. S. 851; Great Western R. Co. v. McCarthy, L. R. 12 App. 218, 29 Am. & Eng. R. Cas. 87; Great Western R. Co. v. Glenister, 29 L. T. N. S. 422, 22 W. R. 72; Manchester, etc., R. Co. v. Brown, L. R. 8 H. L. 703, 16 Am. & Eng. R. Cas. 174; Beal v. South Devon R. Co., 3 H. & C. 337, 12 W. R. 1115, 11 L. T. N. S. 184; Aldridge v. Great Western R. Co., 15 C. B. N. S. 582, 109 E. C. L. 582; MacAndrew v. Electric Tel. Co., 17 C. B. 3, 84 E. C. L. 3, 1 Jur. N. S. 1073; McManus v. Lancashire, etc., R. Co., 4 H. & N.

The rule in Canada is practically the same.²¹ As it has been expressed by the courts, there are no fixed or established rules by which the courts can be governed in concluding whether or not particular conditions in contracts of this character are just and reasonable or not, but each case must be determined upon its own circumstances.²²

§ 20. Reasons upon which the different rules are based.—The New York doctrine is founded upon the principle that it is a matter of personal right that an individual should be permitted to make his own agreement as to the terms upon which he shall have his goods transported, and that it is not a matter of public concern that he should be deprived of this right on the theory that it is necessary for his protection or benefit, except in so far as it is necessary to protect him from fraud or imposition.²³ The

327, 5 Jur. N. S. 651; Ashenden v. London, etc., R. Co., 28 W. R. 511; Baxendale v. Great Eastern R. Co., 10 B. & S. 212; Lord v. Midland R. Co., L. R. 2 C. P. 339, 15 W. R. 405, 36 L. J. C. P. 170; Ronan v. Midland R. Co., L. R. 14 Ir. 157; Moore v. Midland R. Co., 8 Ir. R. C. L. 232, 9 Ir. R. C. L. 20; Harris v. Midland R. Co., 25 W. R. 63; Haynes v. Great Western R. Co., 41 L. T. N. S. 436; Doolan v. Midland R. Co., L. R. 2 App. 792, 37 L. T. N. S. 317; Robinson v. London, etc., R. Co., 19 C. B. N. S. 51, 115 E. C. L. 51, 11 Jur. N. S. 790; Pardington v. South Wales R. Co., 1 H. & N. 392, 26 L. J. C. P. 105; Harrison v. London, etc., R. Co., 2 B. & S. 122, 110 E. C. L. 122, 31 L. J. Q. B. 113; White v. Great Western R. Co., 2 C. B. N. S. 7, 89 E. C. L. 7, 26 L. J. C. P. 158; D'Arc v. London, etc., R. Co., L. R. 9 C. P. 325, 22 W. R. 919.

21. Farr v. Great Western R. Co., 35 U. C. Q. B. 534; Hamilton v. Grand Trunk R. Co., 23 U. C. Q. B. 600; Hood v. Grand Trunk R. Co., 20 U. C. C. P. 361; Henry v. Canadian Pac. R. Co., 1 Manitoba 210; Grand

Trunk R. Co. v. Vogel, 11 Can. Sup. Ct. 612, 27 Am. & Eng. R. Cas. 18; Spettigue v. Great Western R. Co., 15 U. C. C. P. 315; Scarlett v. Great Western R. Co., 41 U. C. C. P. 211; Scott v. Great Western R. Co., 23 U. C. C. P. 182.

A condition in a shipping bill that the company is not to be liable for damage occasioned by fire not resulting from its negligence, need not be just and reasonable in order to be valid. McMorrin v. Canadian Pac. R. R. Co. (Can.), 1 Ont. Law Rep. 561.

22. Simons v. Great Western R. Co., 18 C. B. 805, 86 E. C. L. 805, 26 L. J. C. P. 25; Lewis v. Great Western R. Co., 47 L. J. Q. B. Div. 131, 3 Q. B. Div. 195; Gregory v. West Midland R. Co., 33 L. J. Exch. 155, 2 H. & C. 944; Rooth v. North Eastern R. Co., 36 L. J. Exch. 83, L. R. 2 Exch. 173, 15 L. T. N. S. 624.

23. In Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485, 62 Am. Dec. 125, the court said: "To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter in

opposing doctrine supported by the great weight of authority is based mainly upon the fact that the parties to such contracts stand upon an unequal footing, carriers generally being corporations of a *quasi* public nature, and that public policy and the common good demand that the privilege of the right of private contract should not be conferred upon such corporations to the extent of enabling them thus to secure exemption from their just obligations as public servants, by securing absolute immunity from the results of their own negligence.²⁴

no way affecting the public morals or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right."

In Parsons v. Monteath, 13 Barb. (N. Y.) 353, Welles, J., says: "If I have goods to transport, and the common carrier tells me he will carry them for a particular price without incurring the risk of loss or damage by inevitable accident, but that if he takes such risks he must add a percentage to the price of transportation, I really cannot see what the public have to do with our negotiations, nor why we should not be permitted to make a valid contract, with such conditions and stipulations as we choose."

In Smith v. New York Cent. R. Co., 24 N. Y. 222, Allen, J., says: "No principle is better settled than that a party to whom any benefit is secured by contract, by statute, or even by the Constitution, may waive such benefit, and the public are not interested in protecting him or benefiting him against his wishes. . . . The public have no interest in the question which of the two, A. or B., shall take the risk of the seaworthiness of a ship, or the fitness of a railway carriage, or the care and faithfulness of a third person employed in the performance of a duty in which either or both have an interest, although by

certain general rules the law has declared that, in the absence of any contract, the risk shall be upon A. and not upon B. But if B. elects to relieve A., and to assume his risks and liabilities, the public are not at all concerned, and have no occasion to forbid such contracts."

24. In New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, the court, by Mr. Justice Bradley, says: "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business. . . . If the customer had any real freedom of choice; if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment—then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the

§ 21. Liabilities subject to limitation.—As has already been stated, in New York and a few other jurisdictions, the carrier may release itself by contract from its common law liability, except in case of fraud or culpable negligence amounting to fraud.²⁵ Elsewhere the rule is well established, as we have seen, that, except as to losses resulting from its own negligence or wilful misconduct, or that of its servants, the carrier may by express contract stipulate against liability for any loss occurring from any cause whatever.²⁶ It may stipulate that it shall not be liable for losses occasioned by fire and a shipper is bound by such a provision in a bill of lading, where he was chargeable with knowledge that the bill contained such a clause and made no objection thereto, and it is not shown that the loss resulted from the carrier's negligence.²⁷ It may stipulate against losses occasioned by

modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse, to say the least, to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness."

In *Little Rock, etc., R. Co. v. Cravens*, 57 Ark. 112, 55 Am. & Eng. R. Cas. 650, the court says: "The individual feels that transportation is necessary to his success and that unless he gets it promptly he will suffer

inconvenience and perhaps loss. He regards the probability of loss in transit as remote, and knows that if there is no loss, the contract is immaterial. Under such circumstances, he will assume the risk of contingent future loss rather than sustain a loss that is certain and present, as men usually are prone to sacrifice contingent future interest to satisfy present wants. So we think it should be held, as a matter of law, that the parties stand upon a footing of inequality, and that individuals desiring to make shipments are under a necessity sufficient, in the ordinary affairs of life, to amount to compulsion, where it is pressed."

25. *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442; *Wells v. New York Cent. R. Co.*, 24 N. Y. 181; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196. See also §§ 17 and 18, *ante*, and cases there cited.

26. See § 1, *ante*, and cases there cited.

27. *Cau v. Texas, etc., R. Co.*, 113 Fed. 91; *Charnock v. Texas, etc., R. Co.*, 113 Fed. 92; *Steinweg v. Erie R. Co.*, 43 N. Y. 123, 3 Am. Rep. 673; *Bostwick v. Baltimore, etc., R. Co.*, 45

strikes of its employes.²⁸ It may, by special contract, limit its liability for loss of or injury to goods of a specified class, unless the shipper has complied with certain conditions.²⁹ A provision in a bill of lading limiting the carrier's liability to damages resulting only from negligence of itself or its agents is reasonable and binding.³⁰ An agreement that a carrier shall not be responsible for loss or damage from one of certain specified causes, other than its own negligence is valid.³¹ The carrier may stipulate that it will not be liable for loss or injury of goods after they have passed from its hands into those of a connecting line³² It may stipulate that it will not be liable for the loss of goods unless at the time they are received for shipment a memorandum in writing stating the character and value of the articles is delivered by the shipper and an extra compensation paid; but such a provision will not relieve the carrier from liability for negligence, if it is informed before shipment of the special and unusual value of the goods shipped.³³ Carriers have the right to contract against their assumption of liability that accrues to them merely as bailees, and in common with other bailees, and not as carriers.³⁴ Where no duty rests upon the carrier under the common law or by reason of a statute to receive and transport the goods, it may limit its liability to any extent except for wilful injury, negligence or misfeasance, as, for example, for losses occasioned in the transportation of dangerous

N. Y. 712; Lamb v. Camden, etc., R. Co., 46 N. Y. 271, 7 Am. Rep. 327; Stedman v. Western Transp. Co., 48 Barb. (N. Y.) 97; Davis v. Central Vermont R. Co., 66 Vt. 290, 44 Am. St. Rep. 852; New Orleans Mut. Ins. Co. v. New Orleans, etc., R. Co., 20 La. Ann. 302; St. Louis, etc., R. Co. v. Bone, 52 Ark. 26; Seller v. Steamship Pacific, 1 Or. 409; Levy v. Pontchartrain R. Co., 23 La. Ann. 477; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (U. S.) 344; McMorris v. Canadian Pac. R. Co. (Can.) 1 Ont. Law Rep. 561.

28. Gulf, etc., R. Co. v. Gatewood, 79 Tex. 89; International, etc., R. Co. v. Server, 3 Tex. App. Civ. Cas. §

441. See Liability for delay, § 1, chap. 8.

29. Georgia, etc., R. Co. v. Reid, 91 Ga. 377; Illinois Cent. R. Co. v. Scruggs, 69 Miss. 418; Atchison, etc., R. Co. v. Bryan (Tex. Civ. App.), 28 S. W. 98; Virginia, etc., R. Co. v. Sayers, 26 Gratt. (Va.) 328.

30. Louisville, etc., R. Co. v. Landers (Ala.), 33 So. 482.

31. Morse v. Canadian Pac. R. Co., 97 Me. 77, 53 Atl. 874.

32. See Connecting Carriers, chap. 17.

33. Rathbone v. New York Cent., etc., R. Co., 140 N. Y. 48.

34. Chicago, etc., R. Co. v. Schuld (Neb.), 92 N. W. 162.

explosives,³⁵ or for losses not occurring on its own line or originating there,³⁶ or for losses in the transportation of a circus train loaded with wild animals.³⁷ A carrier and a shipper have a right to stipulate in advance the value of goods shipped, and to limit the carrier's liability in case of their loss or damage from any cause except collision or from cars being thrown from the track.³⁸ Though a common carrier can make a valid agreement fixing the value of shipments in case of loss by its negligence, such agreement must be reasonable, and it cannot stipulate that it shall be liable for an amount less than the value of property lost by its negligence, thereby exempting itself *pro tanto* from liability, the measure of damages being the amount of the loss.³⁹ In all such cases, the burden of proof is upon the shipper and the carrier will not be liable for any loss or injury to goods shipped within the terms of the exemption in the contract, except upon proof that the loss or injury was the result of the carrier's negligence.⁴⁰

§ 22. Mode or form of limitation—Bill of lading or shipping receipt.—The acceptance of a receipt limiting the liability of a carrier for goods received by it for carriage makes a contract

35. California Powder Works v. Atlantic, etc., R. Co., 113 Cal. 329.

36. See Connecting Carriers, chap. 17.

37. Where a railroad company agreed to haul certain cars of the proprietor of a circus according to a special schedule, and for a price less than the regular rates for such services, the carrier's servants having no right to direct the loading or unloading, which was in the exclusive charge of the employes of the circus company, an express contract between the parties, exempting the carrier from liability for the negligence of its employes, and releasing the carrier from liability for loss and damage to any of the circus company's property, menagerie, cars, or equipment while in transit, and to indemnify the carrier against damage or injury to any of the circus company's officers,

agents, performers, or employes, was not invalid, as contrary to public policy. Wilson v. Atlantic, etc., R. Co., 129 Fed. 774. Citing New York Cent. R. Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627; Chicago, etc., R. Co. v. Wallace, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161; Coup v. Wabash, etc., R. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; Robertson v. Old Colony R. Co., 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482. Following Railway Co. v. Wright, 176 U. S. 498, 20 S. Ct. 385, 44 L. Ed. 560.

38. Hill v. Northern Pac. R. Co., 33 Wash. 697, 74 Pac. 1054.

39. Gardiner v. Southern R. Co., 127 N. C. 293, 37 S. E. 328.

40. See Burden of Proof where special contract is set up, § 5, chap. 14.

binding on both parties.⁴¹ But, an express company acting as a collector cannot limit its liability as such for accepting a draft instead of money to that of a forwarder, nor to a definite sum, by stipulations in its receipt given for the claim to be collected.⁴² Where a package is delivered to a carrier, to be delivered in another State, the company's receipt, stating that it shall not be liable to the holder beyond a certain sum, at which the article forwarded is valued, which is not signed by the shipper, and no statement is made by him as to its value, is not a valid stipulation against the negligent loss of such package.⁴³ But where a shipping receipt, entered into in consideration of a reduced rate of shipment, stipulates that no carrier shall be liable for damages by water not due to its own negligence or that of its servants, an objection in an action against one of the carriers for damages to the freight by water that the instrument is a mere receipt, and not a binding contract, is untenable.⁴⁴ An initial carrier, issuing a bill of lading stipulating for the carriage of goods to their destination if on its road, otherwise to deliver the same to another carrier on the route to said destination, and providing that no carrier shall be liable for loss not occurring on its own road, nor after the property is ready for delivery to the next carrier or consignee, is not liable for the failure of the connecting carrier to deliver the goods.⁴⁵ Exemptions from liability will not be presumed, but must be found clearly expressed in the contract, and, if there be any ambiguity, it will be resolved against the carrier,⁴⁶ and the burden of proving such exemption is upon the carrier.⁴⁷ If, by its terms, the contract of carriage covers all the lines between the point of shipment and the destination of the goods, then the initial carrier becomes liable for the faithful performance of duty by all the carriers, and each is entitled to such exemption as is contained in the contract of carriage.⁴⁸ But where the first carrier

41. Adams Express Co. v. Carnahan (Ind. App.), 63 N. E. 245, 64 N. E. 647.

42. Gowling v. American Express Co., 102 Mo. App. 366, 76 N. W. 712.

43. Jacobson v. Adams Express Co., 1 O. C. D. 212.

44. Mears v. New York, etc., R. Co. (Conn.), 52 Atl. 610, 56 L. R. A. 884.

45. American Hay Co. v. Bath, etc., R. Co., 85 N. Y. Supp. 341.

46. Edsall v. Camden, etc., R. Co., 50 N. Y. 661.

47. Jennings v. Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394.

48. Jennings v. Grand Trunk R. Co., *supra*.

only contracts to carry to and deliver to another carrier, such connecting carrier is not entitled to any exemptions by virtue of that contract of carriage; and the fact that it was known at the time of shipment that the goods would go over different lines does not change the liability of the carrier, unless it stipulate therefor.⁴⁹ Under a statute, providing that, when any property is delivered to a common carrier to be transported, it shall not be lawful for the carrier to limit its common law liability by any stipulation expressed in the receipt given for the property, the mere delivery of a receipt restricting the indemnity to the consignor, the carrier having full means of knowledge of the character of the consignment, and in the absence of any express agreement limiting the liability, does not restrict the right of the owner, suffering loss from the negligence of the carrier, to recover full compensation.⁵⁰ But, notwithstanding such a statute, a contract signed by the shipper, providing that, in consideration of the lower rate of freight, his recovery, in case of damage, shall be limited to a specified amount, is binding on him, he knowing of the provision, though the railroad clerk told him the clause "did not amount to anything," and was "only a matter of form," such statement not being within the line of the servant's duties, and the contract informing the shipper of the two rates, that the lower was in consideration of the limited liability, that the shipper could be bound only by written contract, and that a special contract could only be made by a general officer.⁵¹

§ 23. Limitation of time in which to bring suit.—A limitation of the time of suit for loss or damage to goods transported, contained in a bill of lading, is not invalid on the mere ground that it contravenes the statute of limitations.⁵² And the fact that a statute prohibits a carrier from limiting its common law liability by contract does not render such a stipulation invalid.⁵³ Stipulations in the contracts of carriers limiting the time within which suit must be brought have been held valid by the courts when the period of time fixed is reasonable under the circumstances of

49. Aetna Insurance Co. v. Wheeler, 49 N. Y. 616; Robinson v. New York, etc., S. Co., 63 App. Div. (N. Y.) 211, 71 N. Y. Supp. 424.

50. Powers Mercantile Co. v. Wells, Fargo & Co. (Minn.), 100 N. W. 735.

51. Jennings v. Smith, 99 Fed. 189.

52. Central Vermont R. Co. v. Soper, 59 Fed. 879, 8 C. C. A. 341.

53. Gulf, etc., R. Co. v. Trawick, 68 Tex. 314, 2 Am. St. Rep. 494, 30 Am. & Eng. R. Cas. 49.

the particular case.⁵⁴ It has been held to be generally a question for the jury.⁵⁵ Similar clauses in policies of insurance are held valid.⁵⁶ Likewise in contracts of telegraph companies and for like considerations.⁵⁷ The object of such a clause, like one requiring claim to be presented or notice of loss given within a specified time, is to enable the carrier to search for the missing goods or find out the true cause of the loss or injury; finding the missing goods, it may either deliver them to the consignee, or redeliver them to the shipper; failing to discover the goods, it can place the responsibility for the loss where it properly belongs and seek indemnity from the persons guilty of the wrong; finding the real facts as to the loss or injury it may be in a position to defend itself where lapse of time might have deprived it of all facilities for ascertaining the true cause of the loss or injury. The law recognizes that the purpose is reasonable and just and hence sustains the validity of such clauses when the time and conditions are reasonable under all the circumstances.⁵⁸ Under a statute in Texas no such stipulation is valid which limits the time in which

54. Southern Express Co. v. Capterton, 44 Ala. 101, 4 Am. Rep. 118; Texas, etc., R. Co. v. Klepper (Tex. Civ. App.), 24 S. W. 567, a reduced rate of freight was held sufficient consideration to support a limitation to forty days; McCarty v. Gulf, etc., R. Co., 79 Tex. 33; Gulf, etc., R. Co. v. McCarty, 82 Tex. 608; Gulf, etc., R. Co. v. White (Tex. Civ. App.), 32 S. W. 323; Gulf, etc., R. Co. v. Gatewood, 79 Tex. 89; Gulf, etc., R. Co. v. Clarke, 5 Tex. Civ. App. 547. See also Riddlesbarger v. Hartford Ins. Co., 7 Wall. (U. S.) 386; Cray v. Hartford F. Ins. Co., 1 Blatchf. (U. S.) 280.

55. Texas, etc., R. Co. v. Hawkins (Tex. Civ. App.), 30 S. W. 1113.

56. Wilkinson v. First Nat. Fire Ins. Co., 72 N. Y. 499; Steen v. Niagara Fire Ins. Co., 89 N. Y. 315.

57. Young v. Western Union Tel. Co., 1 Am. Electl. Cas. 187, 34 N. Y. Super. Ct. 390, 65 N. Y. 165; Cole v. Western Union Tel. Co., 1

Am. Electl. Cas. 707, 33 Minn. 227, 22 N. W. 385; Wolf v. Western Union Tel. Co., 62 Pa. St. 83, 1 Am. Rep. 387; Hill v. Western Union Tel. Co., 3 Am. Electl. Cas. 614, 85 Ga. 425, 21 Am. St. Rep. 166, 30 Am. & Eng. Corp. Cas. 590; Western Union Tel. Co. v. Brown, 84 Tex. 54.

58. Security Trust Co. v. Wells, Fargo & Co. Express, 178 N. Y. 620, 81 App. Div. (N. Y.) 426, 80 N. Y. Supp. 830; Kaiser v. Hoey, 1 N. Y. Supp. 429; Hirschberg v. Dinsmore, 12 Daly (N. Y.), 429; Southern Express Co. v. Caldwell, 21 Wall. (U. S.) 264; Marrus v. New Haven Steamboat Co., 30 Misc. Rep. (N. Y.) 421, 62 N. Y. Supp. 474; St. Louis, etc., R. Co. v. Hurst, 67 Ark. 407; Norfolk, etc., R. Co. v. Reeves, 97 Va. 284; Cleveland, etc., R. Co. v. Newlin, 74 Ill. App. 638; Cox v. Vermont Cent. R. Co., 170 Mass. 129, 49 N. E. 97; Popham v. Barnard, 77 Mo. App. 619; Chicago, etc., R. Co. v. Bozarth, 91 Ill. App. 68.

suits may be brought to less than two years and the statute does not apply to interstate commerce.⁵⁹ Nor will the shipper be precluded from bringing suit after the expiration of the time limited, where he was induced to delay action by the fraud or misrepresentation of the carrier.⁶⁰ Upon the same principle it is held in New York that a shipping receipt limiting the liability of a carrier to claims presented within a fixed time does not relieve it of liability for a wrongful delivery, though the claim was not presented until long after the time limited, where it was in fact presented as soon as the consignor discovered the fraud.⁶¹ Such a stipulation will be waived by the carrier's agreement, after examining into the alleged injury, to pay a fixed sum in satisfaction of the injury, and recovery may be had for the amount so agreed upon.⁶²

§ 24. Requirement of notice of loss or presentation of claim within fixed time.—The carrier may lawfully, by contract with the shipper made by clause or stipulation in the bill of lading or shipping receipt or otherwise, provide a reasonable time within which the shipper shall present his claim or give notice of claim for loss or damage, and the manner of giving such notice or presenting his claim, and limit its liability to cases in which the claim shall be presented or notice given in accordance with the terms of the contract.⁶³ Such agreements are not against the

59. St. Louis, etc., R. Co. v. Williams (Tex. Civ. App.), 32 S. W. 225; Reeves v. Texas, etc., R. Co., 11 Tex. Civ. App. 514; Gulf, etc., R. Co. v. Elliott (Tex. Civ. App.), 26 S. W. 636; Gulf, etc., R. Co. v. Stanley, 33 S. W. 110; Gulf, etc., R. Co. v. Hume, 87 Tex. 211.

60. Galveston, etc., R. Co. v. Kelley (Tex. Civ. App.), 26 S. W. 470; Galveston, etc., R. Co. v. Slegman (Tex. Civ. App.), 23 S. W. 298; Gulf, etc., R. Co. v. Trawick, *supra*.

61. Security Trust Co. v. Wells, Fargo & Co. Express, *supra*.

62. Chicago, etc., R. Co. v. Katzenbach, 118 Ind. 174, 38 Am. & Eng. R. Cas. 375; International, etc., R. Co.

v. Underwood, 62 Tex. 21, 21 Am. & Eng. R. Cas. 143.

63. N. Y.—Osterhoudt v. Southern Pac. Co., 47 App. Div. (N. Y.) 146, 62 N. Y. Supp. 134; Jennings v. Grand Trunk R. Co., 127 N. Y. 438, 49 Am. & Eng. R. Cas. 98; Kaiser v. Hoey, 1 N. Y. Supp. 429.

Ark.—St. Louis, etc., R. Co. v. Hurst, 67 Ark. 407, 55 S. W. 215.

Dak.—Hartwell v. Northern Pac. Express Co., 5 Dak. 463, stipulation valid when signed by shipper.

Ill.—Chicago, etc., R. Co. v. Bozarth, 91 Ill. App. 68; Black v. Wabash, etc., R. Co., 111 Ill. 351, 53 Am. Rep. 628, 25 Am. & Eng. R. Cas. 388; Coles v. Louisville, etc., R. Co., 41

policy of the law and of the right to make conditions of this character there is now no question. They do not relieve carriers from any part of their obligation as common carriers. As such they are bound to the same diligence, fidelity and care as they would be required to exercise if no such stipulation had been made. All

Ill. App. 607; *Chicago, etc., R. Co. v. Simms*, 18 *Ill. App.* 68.

Ind.—*United States Express Co. v. Harris*, 51 Ind. 129; *Adams Express Co. v. Reagan*, 29 Ind. 21, 92 Am. Dec. 332; *Baltimore, etc., R. Co. v. Ragsdale*, 14 Ind. App. 406; *Case v. Cleveland, etc., R. Co.*, 11 Ind. App. 517. Delivery of a shipment of goods at the wrong place without fault of the consignor constitutes a conversion which deprives the carrier of an exemption from liability by the consignor's failure to present a verified claim for damages within 10 days. *Cleveland, etc., R. Co. v. C. & A. Potts & Co.* (*Ind. App.*), 71 N. E. 685.

Kan.—*Atchison, etc., R. Co. v. Morris*, 65 Kan. 532, 70 Pac. 651; *Sprague v. Missouri Pac. R. Co.*, 34 Kan. 347, 23 Am. & Eng. R. Cas. 684; *Goggin v. Kansas Pac. R. Co.*, 12 Kan. 416.

Ky.—*Owen v. Louisville, etc., R. Co.*, 87 Ky. 626.

Minn.—*Armstrong v. Chicago, etc., R. Co.*, 53 Minn. 183.

Miss.—*Southern Express Co. v. Hunnicutt*, 54 Miss. 566, 28 Am. Rep. 385.

Mo.—*Dawson v. St. Louis, etc., R. Co.*, 76 Mo. 514; *Rice v. Kansas Pac. R. Co.*, 63 Mo. 314, 20 Am. Ry. Rep. 424; *D. Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164, 2 Mo. App. Rep. 545, but a clause in a contract of carriage, requiring the shipper to give five days' notice of his claim for loss and damage, does not apply to loss occurring through the carriers' failure to deliver the goods

in a reasonable time, but to injury during shipment.

Where a contract of shipment provided that all claims for damages by the consignee must be reported in writing to the delivering line within 36 hours after he has been notified of the arrival of the freight, failure to give the notice will not defeat his right to recover for goods lost in transit, since notice of their arrival could not have been given, and written notice will be waived; the carrier having acted on the verbal notice of the consignee that the goods were lost, and delegated a claim agent to search for them. *Ward v. Missouri Pac. R. Co.*, 158 Mo. 226, 58 S. W. 28.

N. C.—*Wood v. Southern R. Co.*, 118 N. C. 1056; *Capehart v. Seaboard, etc., R. Co.*, 77 N. C. 355. A clause in a bill of lading releasing the carrier from liability for loss or damage of the goods if notice is not presented in writing within 30 days after the delivery thereof, or after due time for such delivery, is unreasonable and void. *Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co.*, 128 N. C. 280, 38 S. E. 894.

Pa.—*Pavitt v. Lehigh Valley R. Co.*, 153 Pa. St. 302; *Weir v. Adams Express Co.*, 5 Phila. (Pa.) 355.

Tenn.—*Southern Express Co. v. Glenn*, 16 Lea (Tenn.) 472.

Tex.—*Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314, 2 Am. St. Rep. 494, 30 Am. & Eng. R. Cas. 49.

U. S.—*Southern Express Co. v. Caldwell*, 21 Wall. (U. S.) 264.

Eng.—*Lewis v. Great Western R.*

that the stipulation requires is that the shipper shall make his claim in season to enable the carrier to ascertain the facts, and it specifies what that time shall be. The only question that can arise is as to whether the condition is a reasonable one with reference to the circumstances of any particular case. Such contracts when the time and conditions are not unreasonable are universally upheld by the courts, and the right to recover on a claim for loss or damage will be barred, if the conditions of the contract are not complied with.⁶⁴ That a shipping contract required a presentation of claims within an unreasonably short time, however, does not relieve the shipper from presenting his claims within a reasonable time.⁶⁵ Such stipulations may be waived by the carrier.⁶⁶ And

Co., 5 H. & N. 867, 29 L. J. Exch. 425; Simons v. Great Western R. Co., 18 Q. B. 805, 86 E. C. L. 805; Moore v. Great Northern R. Co., L. R. 8 Ir. 95; Nicholson v. Willan, 5 East 507.

Can.—Grand Trunk R. Co. v. McMillan, 16 Can. Sup. Ct. 543, 42 Am. & Eng. R. Cas. 468; Kyle v. Buffalo, etc., R. Co., 16 U. C. C. P. 76.

Contra.—Southern Express Co. v. Tupelo Bank, 108 Ala. 517.

Connecting lines.—Where the contract requires notice to the carrier at the destination of the goods, and the goods are sent over several lines, the shipper or consignee is not bound to give notice to the initial carrier at the point where the goods left its line. Atchison, etc., R. Co. v. Grant, 6 Tex. Civ. App. 674; Wichita, etc., R. Co. v. Koch, 47 Kan. 753, 55 Am. & Eng. R. Cas. 452.

64. Osterhoudt v. Southern Pac. Co., *supra*; Jennings v. Grand Trunk R. Co., *supra*; Browning v. Long Island R. Co., 2 Daly (N. Y.), 117; Central Vermont R. Co. v. Soper, 59 Fed. 879, 61 Am. & Eng. R. Cas. 151; Adams Express Co. v. Reagan, *supra*; Goggin v. Kansas Pac. R. Co., *supra*; Pacific Express Co. v. Darnell (Tex.), 6 S. W. 765; Harned v. Mis-

souri Pac. R. Co., 51 Mo. App. 482; Sanford v. Housatonic R. Co., 11 Cush. (Mass.) 155; St. Louis, etc., R. Co. v. Hurst, *supra*.

That the question of reasonableness of the time limit is for the jury has been held in several Texas cases: Texas, etc., R. Co. v. Adams, 78 Tex. 372, 22 Am. St. Rep. 56; Texas, etc., R. Co. v. Barber (Tex. Civ. App.) 30 S. W. 500; Gulf, etc., R. Co. v. Wright, 1 Tex. Civ. App. 402. Also whether the contract is one for an interstate or domestic shipment, International, etc., R. Co. v. Garrett, 5 Tex. Civ. App. 540.

65. Osterhoudt v. Southern Pac. R. Co., *supra*; Matthews v. American Cent. Ins. Co., 154 N. Y. 449, 48 N. E. 751, 39 L. R. A. 433.

66. Pavitt v. Lehigh Valley R. Co., 153 Pa. St. 302; Wood v. Southern R. Co., 118 N. C. 1056; Wabash, etc., R. Co. v. Brown, 152 Ill. 484; International, etc., R. Co. v. Underwood, 62 Tex. 21, 21 Am. & Eng. R. Cas. 143; Hess v. Missouri Pac. R. Co., 40 Mo. App. 202; Central R. Co. v. Pickett, 87 Ga. 734, 55 Am. & Eng. R. Cas. 337; Hudson v. Northern Pac. R. Co., 92 Iowa, 231; Bennett v. Northern Pac. Express Co., 12 Or. 49; Rice v.

where the shipper has been prevented from or delayed in filing a claim for the goods within the time prescribed, by the carrier's falsely informing him that the goods were still in its possession and would be returned, or by the carrier's promising to find the goods, or by similar representations, the carrier is estopped from pleading the condition in the bill of lading or shipping receipt as a defense to the action.⁶⁷ Such a condition of a contract of shipment applies to the carrier's conduct as a warehouseman since such relation is properly incident to that of carrier.⁶⁸ Most of the authorities sustain such stipulations even where the loss is one caused by the defendant company's negligence.⁶⁹ In Texas such a stipulation is held to be a limitation of the common law liability of the carrier and of no effect where the loss is one resulting from the carrier's negligence.⁷⁰ In New York such a stipulation is held not to be in the nature of a condition precedent to the plaintiff's right to recover but rather of the nature of a statute of limitations, which should be set up in the defendant's answer.⁷¹ The time specified in such a stipulation begins to run and is to be reckoned, not from the day when the loss occurs, or when it has been reported that the goods are lost and the carrier is endeavoring to trace them, but from the day when their actual loss is ascertained and the effort to trace them has been abandoned.⁷²

§ 25. To what damages stipulation does not apply.—A stipulation or clause in a contract of shipment providing that, should

Kansas Pac. R. Co., 63 Mo. 314, 20 Am. Ry. Rep. 424; Merrill v. American Express Co., 62 N. H. 514.

67. Marrus v. New Haven Steam boat Co., 30 Misc. Rep. (N. Y.) 421 62 N. Y. Supp. 474; Sécurity Trust Co. v. Wells, Fargo & Co. Express, *supra*; Memphis, etc., R. Co. v. Holloway, 9 Baxt. (Tenn.) 188. Or where the plaintiff is induced to postpone action by pretended offers of compromise, Gulf, etc., R. Co. v. Gatewood, 79 Tex. 89. A person who, on delivery of goods to a carrier, accepts a paper that "amounts simply to a voucher," which he may use to identify his goods, he having no notice that it contains limitations of the

carrier's liability or other special contract, is not bound by such limitations. Strong v. Long Island R. Co., 91 App. Div. (N. Y.) 442, 86 N. Y. Supp. 911.

68. Armstrong v. Chicago, etc., R. Co., 53 Minn. 183, 54 N. W. 1059.

69. See cases already cited under this section.

70. Missouri Pac. R. Co. v. Harris, 67 Tex. 166, 28 Am. & Eng. R. Cas. 108.

71. Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300.

72. Ghormley v. Dinsmore, 51 N. Y. Super. Ct. 196; Wilson v. Wabash, etc., R. Co., 23 Mo. App. 50.

loss or damages of any kind occur to the property while in the possession of the carrier, the shipper shall within a specified number of days give notice in writing or present his claim to the carrier as a condition of the latter's liability for such loss or damage, does not extend to damages accruing from change of market during a delay to deliver.⁷³ Such a stipulation has no application where the carrier was, of necessity, aware of the loss and its extent, as where the claim is for damages caused by the negligent delay of the carrier's agent in forwarding the goods from the point of shipment,⁷⁴ or where there has been no actual delivery,⁷⁵ or where the injury to the goods or live stock was examined by the carrier's agent in person for the purpose of ascertaining its extent.⁷⁶ Such a stipulation does not apply to damages which accrued prior to the making of the contract, or to a claim for the value of a portion of a shipment of goods not delivered.⁷⁷ It will not be enforced unless its terms afford to the shipper a reasonable opportunity to present his claim.⁷⁸ Under the Texas statute prohibiting a railroad company or other common carrier from limiting its common law liability by special contract, it has been held that such a stipulation is valid, it not being a limitation of liability contemplated by the statute, but a matter affecting simply the shipper's remedy.⁷⁹ Under the Dakota statute such a stipulation is not valid unless signed by the shipper.⁸⁰ Under the Constitution of Kentucky a stipulation requiring such notice is invalid.⁸¹

73. Leonard v. Chicago, etc., R. Co., 54 Mo. App. 293.

74. Atchison, etc., R. Co. v. Temple, 47 Kan. 7; Baltimore, etc., Express Co. v. Cooper, 66 Miss. 558, 14 Am. St. Rep. 586, 40 Am. & Eng. R. Cas. 97; Cross v. Graves, 4 Tex. App. Civ. Cas. § 100; Steele v. Grand Trunk R. Co., 31 U. C. C. P. 260.

75. Porter v. Southern Express Co., 4 S. C. 135, 16 Am. Rep. 762; Central R. Co. v. Pickett, 87 Ga. 734, 55 Am. & Eng. R. Cas. 337.

76. Harned v. Missouri Pac. R. Co., 51 Mo. App. 482; Richardson v. Chicago, etc., R. Co., 1 Mo. App. Rep. 401; Owen v. Louisville, etc., R. Co. 87 Ky. 626.

77. Missouri, etc., R. Co. v. Graves (Tex. App.), 16 S. W. 102; McCarty v. Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164.

78. Galveston, etc., R. Co. v. Ball, 80 Tex. 603, 16 S. W. 441.

79. Missouri Pac. R. Co. v. Harris, 67 Tex. 166; Missouri Pac. R. Co. v. Paine (Tex. Civ. App.), 21 S. W. 78; St. Louis, etc., R. Co. v. Turner (Tex. Civ. App.), 20 S. W. 1008.

80. Gulf, etc., R. Co. v. Trawick, 68 Tex. 314, 2 Am. St. Rep. 494, 30 Am. & Eng. R. Cas. 49.

81. Hartwell v. Northern Pac. Express Co., 5 Dak. 463.

82. Ohio, etc., R. Co. v. Tabor (Ky.), 32 S. W. 168, 36 S. W. 18.

§ 26. Limitation of liability as ground of defense—Pleading.—A common carrier, to avail itself of the stipulation of a bill of lading as a modification of its common law liability for loss of or injury to the goods of another while in its charge, must specially plead such stipulation as a defense.⁸³ Where a carrier seeks to escape responsibility for loss or injury on the ground that it was within the exception provided by a special contract, the contract itself must be specifically pleaded and proved.⁸⁴ Where suit is brought on the special contract the plaintiff must set out the contract in his declaration. But if he sues merely for breach of common law duty, the carrier must plead the special contract in order to have the benefit of its provisions.⁸⁵

§ 27. Limitation of liability as ground of defense—Presumptions and burden of proof.—A carrier has the burden of showing that the shipper did not comply with the terms of a contract as to time of notice of loss or damages to the goods transported.⁸⁶ It must allege and prove sufficient facts to show that the shipper had opportunity to give such notice.⁸⁷ Such a contract is unreasonable and cannot be enforced unless it is made to appear that the person to be notified is so conveniently accessible to the person who is to give the notice that the latter can reasonably discharge the duty within the time limited by the contract by the exercise of fair diligence.⁸⁸ The carrier is required to prove that it had

83. Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300; Pennsylvania Co. v. Yoder, 25 Ohio C. C. R. 32.

84. Louisville, etc., R. Co. v. Cunningham, 88 Ill. App. 289; Missouri Pac. R. Co. v. Wichita Wholesale Grocery Co., 55 Kan. 525; Atchison, etc., R. Co. v. Ditmars, 3 Kan. App. 459; Clyde Steamship Co. v. Burrows, 36 Fla. 121; Halliday v. St. Louis, etc., R. Co., 74 Mo. 159, 41 Am. Rep. 311; Oxley v. St. Louis, etc., R. Co., 65 Mo. 629; Clark v. St. Louis, etc., R. Co., 64 Mo. 447; Atchison, etc., R. Co. v. Bryan (Tex. Civ. App.), 28 S. W. 98; International, etc., R. Co. v. Moody, 71 Tex. 614, 35 Am. & Eng. R. Cas. 607.

85. Snow v. Indiana, etc., R. Co.,

109 Ind. 422, 28 Am. & Eng. R. Cas. 77; Tuggle v. St. Louis, etc., R. Co., 62 Mo. 425.

86. St. Louis, etc., R. Co. v. Hays, 13 Tex. Civ. App. 577, 35 S. W. 476.

87. Houston, etc., R. Co. v. Davis, 88 Tex. 593, 2 Am. & Eng. R. Cas. N. S. 512, 33 S. W. 510, denying writ of error in 2 Am. & Eng. R. Cas. N. S. 487, 32 S. W. 163.

88. Missouri Pac. R. Co. v. Paine, 1 Tex. Civ. App. 621, 21 S. W. 78. See also Missouri Pac. R. Co. v. Harris, 67 Tex. 167, 28 Am. & Eng. R. Cas. 107; Fort Worth, etc., R. Co., v. Greathouse, 82 Tex. 104, 49 Am. & Eng. R. Cas. 157; Missouri Pac. R. Co. v. Childers (Tex. Civ. App.), 29 S. W. 559; Engesether v. Great Nor-

an agent or officer at the place of destination to whom the notice might have been given and in the absence of such proof the stipulation will be held unreasonable and void.⁸⁹ Such stipulations like all those which seek to limit a right of action, must be definite in order to be effective. A clause which provides that the shipper will give notice "to some officer" of the carrier,⁹⁰ or that a claim must be presented within a specified time "in order to receive attention,"⁹¹ is too vague and uncertain for a failure to present a claim to deprive a party of a right of action and will be held void for uncertainty. Compliance with the stipulation is a condition precedent to any right of action on the part of the shipper,⁹² and the shipper in order to recover, must show such compliance with the stipulation on his part, or a substantial compliance therewith.⁹³

§ 28. Stipulation requiring claim to be made before removal of the goods.—A stipulation or condition in a contract of shipment, whether of goods or live stock, at special rates, that the shipper will give notice in writing of any claim for loss or injury to the goods or stock, to an officer of the company or its nearest station agent, before removal of the stock or goods from the place of destination or delivery and its mingling with other stock or goods, is not unreasonable, and is valid.⁹⁴ But a notice within

thern R. Co. (Minn.), 68 N. W. 4; Galveston, etc., R. Co. v. Short (Tex. Civ. App.), 25 S. W. 142; St. Louis, etc., R. Co. v. Turner, 1 Tex. Civ. App. 625.

89. Galveston, etc., R. Co. v. Boothe, 3 Tex. Civ. App. Cas. § 363; Galveston, etc., R. Co. v. Thompson (Tex. Civ. App.), 23 S. W. 930; Good v. Galveston, etc., R. Co. (Tex.), 11 S. W. 854, 40 Am. & Eng. R. Cas. 98; Galveston, etc., R. Co. v. Williams (Tex. Civ. App.), 25 S. W. 1019; Missouri Pac. R. Co. v. Cornwell, 70 Tex. 611.

90. Smitha v. Louisville, etc., R. Co., 86 Tenn. 198.

91. Dunn v. Hannibal, etc., R. Co., 68 Mo. 268. See Sanford v. Housatonic R. Co., 11 Cush. (Mass.) 155.

92. Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300.

93. Atchison, etc., R. Co. v. Crittenden, 4 Kan. App. 512; Texas, etc., R. Co. v. Jackson, 3 Tex. Civ. App. § 41; Northern Pac. Express Co. v. Martin, 26 Can. Sup. Ct. 135; Harned v. Missouri Pac. R. Co., 51 Mo. App. 482; Atchison, etc., R. Co. v. Temple, 47 Kan. 7, 55 Am. & Eng. R. Cas. 337.

94. Selby v. Wilmington, etc., R. Co., 113 N. C. 588, 18 S. E. 88, 37 Am. St. Rep. 635. See Capehart v. Seaboard, etc., R. Co., 81 N. C. 438, 31 Am. Rep 505, where a clause requiring goods to be examined before leaving the station, as applied to a car load of cotton, was held to be invalid as being unreasonable. See also Carriers of Live Stock, chap.

such reasonable time after removal of freight as secures the carrier from fraud is sufficient under a stipulation that the shipper must give written notice before removing the freight from the place of delivery, if he could not discover the injury before removal.⁹⁵ A provision of a bill of lading that "the shipowner is not to be liable * * * for any claim, notice of which is not given before the removal of the goods," even if conceded to be unreasonable and void as to the time within which it requires the notice to be given, is valid, and will be enforced to the extent of requiring notice to be given, and it must be given within a reasonable time, or the right to recover on a claim for damage to the goods will be barred.⁹⁶

§ 29. Limitation of liability to forwarder or warehouseman.— A carrier may agree with a shipper of goods that the liability of the carrier from the time of the arrival of the goods at the station or port at their place of destination, shall be that of a warehouseman only, and such stipulations have been held by the courts to be reasonable and valid.⁹⁷ A carrier may, by special contract, limit its liability for goods sent C. O. D., while in its possession for purposes of collection only, to that of a warehouseman.⁹⁸ A shipping receipt limiting the liability of an express company for loss as forwarders only, and within its own lines of communication, and not for any default of connecting companies, does not relieve it of liability for a wrongful delivery.⁹⁹ Where a carrier gave a shipper a receipt providing that the carrier acted as a forwarder only, and should not be liable for any loss or damage except from fraud or gross negligence, the stipulation did not govern the liabil-

18, as to contracts for the transportation of cattle wherein stipulations of this character are usually found.

95. Western R. Co. v. Harwell (Ala.), 45 Am. & Eng. R. Cas. 358, 8 So. 649; Ormsby v. Union Pac. R. Co., 4 Fed. 170, 706; Memphis, etc., R. Co. v. Holloway, 9 Baxt. (Tenn.) 188.

96. The St. Hubert, 102 Fed. 362.

97. Feige v. Michigan Cent. R. Co., 62 Mich. 1; Constable v. National Steamship Co., 154 U. S. 51, 38 L.

Ed. 903, 14 Sup. Ct. Rep. 1062; Western R. Co. v. Little, 86 Ala. 159, 37 Am. & Eng. R. Cas. 660; South, etc., Alabama R. Co. v. Wood, 66 Ala. 167, 41 Am. Rep. 749, 9 Am. & Eng. R. Cas. 419; Husten v. Peters, 1 Metc. (Ky.), 558. Compare Louisville, etc., R. Co. v. Oden, 80 Ala. 38, 60 Ark. 100.

98. Pacific Express Co. v. Wallace, 60 Ark. 100.

99. Security Trust Co. v. Wells, Fargo & Co. Express, 178 N. Y. 620, 70 N. E. 1109, 81 App. Div. (N. Y.) 426. 80 N. Y. Supp. 830.

ity of the carrier for failure to return the goods, when ordered so to do by the shipper, during their transportation.¹

§ 30. Limitation of amount of liability.—The early English cases held that a carrier might limit the amount of its liability by a simple notice.² The early New York cases recognized this right while holding that a carrier could not restrict its common law liability in other respects, even by express contract.³ The later cases are somewhat at variance as to whether the liability of the carrier as to amount can be limited by notice to the shipper. While a public notice is generally held insufficient to discharge the common carrier from its legal liability, unless expressly assented to by the shipper, in respect to those duties designed simply to enjoin good faith and fair dealing, a notice alone, if distinctly brought home to the knowledge of the owner of the property delivered for carriage, will be sufficient.⁴ But it is now almost universally held, following the leading case,⁵ that a common car-

1. Rosenthal v. Weir, 54 App. Div. (N. Y.) 275, 66 N. Y. Supp. 841.

2. Maving v. Todd, 1 Stark. 72; Harris v. Packwood, 3 Taunt. 264; Batson v. Donovan, 4 B. & Ald. 21.

3. Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Cole v. Goodwin, 19 Wend. (N. Y.) 251; Orange County Bank v. Brown, 9 Wend. (N. Y.) 85.

4. Doyle v. Baltimore, etc., R. Co., 126 Fed. 841; Moses v. Boston, etc., R. Co., 24 N. H. 85, 55 Am. Dec. 222; Farmers, etc., Bank v. Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68; Oppenheimer v. United States Express Co., 69 Ill. 62, 18 Am. Rep. 96; Western Transp. Co. v. Newhall, 24 Ill. 466, 72 Am. Dec. 760. See § 3 and cases there cited.

5. Hart v. Pennsylvania R. Co., 112 U. S. 331, 18 Am. & Eng. R. Cas. 604. In this case the court said: "There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agree-

ment that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value in this case stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract."

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The

rier may, by special contract, limit the amount of its liability for loss occurring even from its own negligence, the contract being fairly made, signed or agreed to by the shipper, and the rate of freight charged being based on the agreed valuation. Such a contract is in no sense a limitation of the carrier's liability for the results of its own negligence, but, fairly entered into, leaves the carrier responsible for its negligence and simply fixes the rate of freight and liquidates the damages.⁶ In some of the States a

shipper is estopped from saying that the value is greater. The articles have no greater value for the purpose of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

6. U. S. A written contract between a shipper and a common carrier, by which it is stipulated, in consideration of a reduced rate of carriage, that the value of the articles shipped shall be limited to a stated amount, is not void as against public policy, as relieving the carrier from liability for negligence. *Jennings v. Smith*, 106 Fed. 139, 45 C. C. A. 249. See also *Muser v. Holland*, 17 Blatchf. (U. S.) 412, 1 Fed. 382; *Earnest v. Express Co.*, 1 Woods (U. S.) 573; *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64. *Compare Eells v. St. Louis*, etc., R.

Co., 52 Fed. 903; *Scruggs v. Baltimore*, etc., R. Co., 18 Fed. 318.

Ala.—The limitation as to amount is valid where it is a fair valuation of the goods shipped and is virtually a liquidation of the damages. *Western R. Co. v. Harwell*, 97 Ala. 341. And this although the loss may have been due to the carelessness of the carrier's servants. *Louisville*, etc., R. Co. v. *Sherrod*, 84 Ala. 178, 4 So. 29. A shipper may agree, in consideration of special rates or privileges, on values in case of loss or injury, if the agreed values are not unreasonable or arbitrary, and no agreement is made exempting the carrier from the consequences of negligence or bad faith. *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36, 8 So. 62; *Alabama*, etc., R. Co. v. *Little*, 71 Ala. 611, 12 Am. & Eng. R. Cas. 37; *Mobile*, etc., R. Co. v. *Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *South*, etc., *Alabama R. Co. v. Henlein*, 52 Ala. 615, 23 Am. Rep. 578; *Louisville*, etc., R. Co. v. *Grant*, 99 Ala. 325, 55 Am. & Eng. R. Cas. 356; *Louisville*, etc., Co. v. *Kelsey*, 89 Ala. 287, 42 Am. & Eng. R. Cas. 584.

Ark.—*St. Louis*, etc., R. Co. v. *Weakly*, 50 Ark. 397, 7 Am. St. Rep. 104, 35 Am. & Eng. R. Cas. 635; *St. Louis*, etc., R. Co. v. *Lesser*, 46 Ark. 236.

Conn.—A statement of the value of a horse shipped, made by the ship-

stipulation fixing an amount beyond which the carrier will not be liable is not enforceable where the loss results from the negli-

per in answer to the carrier's inquiry, which value is inserted in the bill of lading, is conclusive on him as to the value of the horse in an action against the carrier for its loss, although the bill of lading is silent as to the effect of such valuation on the carrier's liability, and the shipper has no actual information, and did not suppose that his statement would affect the amount of the carrier's liability. *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 55 Am. & Eng. R. Cas. 381, 15 L. R. A. 534, 33 Atl. 870.

Del.—A rule of a carrier that its liability is limited by the rate of freight paid on shipments is binding on shippers having notice. *Klair v. Wilmington Steamboat Co.* (*Del. Super.*), 54 Atl. 694.

Ga.—Though a railway company in its capacity as a common carrier may, as the basis for fixing its charges and limiting the amount of its corresponding liability, lawfully make with a shipper a contract of affreightment embracing an actual and *bona fide* agreement as to the value of the property to be transported, and in such case the latter, when loss, damage, or destruction occurs, will be bound by the "agreed valuation," a mere general limitation as to value expressed in a bill of lading, and amounting to no more than "arbitrary preadjustment of the measure of damages," will not, though the shipper assents in writing to the terms of the document, serve to exempt a negligent carrier from liability for the true value. *Central of Georgia R. Co. v. Murphrey*, 113 Ga. 514, 53 L. R. A. 720, 38 S. E. 970. See also *Wood v. Southern Express*

Co., 95 Ga. 451; *Georgia R. etc., Co. v. Keener*, 93 Ga. 808, 44 Am. St. Rep. 197; *Savannah, etc., R. Co. v. Sloat*, 93 Ga. 808.

Ill.—As to losses resulting from the gross negligence of the carrier such a provision is void, but as to all other losses it is valid, if freely and fairly entered into by the shipper or his agent. *Chicago, etc., R. Co. v. Chapman*, 133 Ill. 96, 23 Am. St. Rep. 587, 42 Am. & Eng. R. Cas. 392; *Oppenheimer v. United States Express Co.*, 69 Ill. 62; *Adams Express Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; *Chicago, etc., R. Co. v. Harmon*, 12 Ill. App. 54.

Ind.—Where the parties to a contract of shipment fix the value of the property to be transported, by a contract freely and fairly made, and supported by a good consideration, such value, so fixed, may be made the measure of the carrier's liability; but, in order to make the stipulation effective, there must be some other consideration than the original contractual relations between the parties. *Evansville, etc., R. Co. v. Kevekordes* (*Ind. App.*), 69 N. E. 1022; *Adams Express Co. v. Carnahan* (*Ind. App.*), 63 N. E. 245, 64 N. E. 647. See also *Rosenfeld v. Peoria, etc., R. Co.*, 103 Ind. 121, 53 Am. Rep. 500, 21 Am. & Eng. R. Cas. 89; *Adams Express Co. v. Harris*, 120 Ind. 73, 16 Am. St. Rep. 315, 40 Am. & Eng. R. Cas. 151; *Michigan Southern, etc., R. Co. v. Heaton*, 37 Ind. 448, 10 Am. Rep. 89; *Baltimore, etc., R. Co. v. Ragsdale*, 14 Ind. App. 406; *Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281, 18 Am. & Eng. R. Cas. 549.

Kan.—A contract fixing the value

gence of the carrier. In such cases the shipper or owner may prove the full value of the property and recover accordingly.⁷

of the goods delivered to the carrier, or fixing a limitation of damage in case of loss or injury, is clearly reasonable as affecting the risk and the degree of care required concerning the property to be transported. *Pacific Express Co. v. Foley*, 46 Kan. 457, 26 Am. St. Rep. 107, 46 Am. & Eng. R. Cas. 690. See also *Atchison, etc., R. Co. v. Dill*, 48 Kan. 210, 55 Am. & Eng. R. Cas. 375; *Kansas City, etc., R. Co. v. Simpson*, 30 Kan. 645, 16 Am. & Eng. R. Cas. 158, 46 Am. Rep. 104; *Kallman v. United States Express Co.*, 3 Kan. 205, overruled by case first cited.

Mass.—*Hill v. Boston, etc., R. Co.*, 144 Mass. 284, 28 Am. & Eng. R. Cas. 87; *Graves v. Lake Shore, etc., R. Co.*, 137 Mass. 33, 50 Am. Rep. 282; *Squire v. New York Cent. R. Co.*, 98 Mass. 245, 93 Am. Dec. 162; *Judson v. Western R. Co.*, 6 Allen (Mass.), 486.

Mich.—*Smith v. American Express Co. (Mich.)*, 66 N. W. 479.

Mo.—A contract limiting a right of recovery to a sum agreed upon by the parties does not in any degree exempt the carrier from the consequences of its own negligence, and is binding. *Harvey v. Terre Haute, etc., R. Co.*, 74 Mo. 538. But not unless made in consideration of a reduced rate. *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, 1 Am. St. Rep. 721, 30 Am. & Eng. R. Cas. 17. See also *Connover v. Pacific Express Co.*, 40 Mo. App. 31. Stipulations in a bill of lading, that in case the goods are lost or damaged, the amount of the loss or damage shall be computed at the place and time of shipment, apply to injury during shipment, and do

not apply to loss occurring through the carrier's failure to deliver the goods in a reasonable time. *D. Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164, 2 Mo. App. Rep'r. 545.

Ohio.—A contract limiting the amount of the liability of a common carrier for the loss of goods carried, even if the loss is due to negligence, is not contrary to public policy. *Ballou v. Earle*, 27 Ohio L. J. 83, 22 Atl. 1113, 14 L. R. A. 433, 48 Am. & Eng. R. Cas. 31.

N. H.—*Duntley v. Boston, etc., R. Co.*, 66 N. H. 263; *Durgin v. American Express Co.*, 66 N. H. 277, 45 Am. & Eng. R. Cas. 327.

R. I.—*Ballou v. Earle*, 17 R. L. 441, 33 Am. St. Rep. 881, 48 Am. & Eng. R. Cas. 31.

S. C.—*Johnstone v. Richmond, etc., R. Co.*, 39 S. C. 55, 55 Am. & Eng. R. Cas. 346.

Tenn.—*Starnes v. Louisville, etc., R. Co.*, 91 Tenn. 516, 55 Am. & Eng. R. Cas. 355; *Louisville, etc., R. Co. v. Sowell*, 90 Tenn. 17, 49 Am. & Eng. R. Cas. 166. But see *Louisville, etc., R. Co. v. Gilbert*, 88 Tenn. 431, 42 Am. & Eng. R. Cas. 372; *Louisville, etc., R. Co., v. Wynn*, 88 Tenn. 330, 45 Am. & Eng. R. Cas. 312; *Coward v. East Tennessee, etc., R. Co.*, 16 Lea. (Tenn.) 225, 57 Am. Rep. 227.

Va.—*Richmond, etc., R. Co. v. Payne*, 86 Va. 481, 42 Am. & Eng. R. Cas. 370.

W. Va.—*Zouch v. Chesapeake, etc., R. Co.*, 36 W. Va. 524, 49 Am. & Eng. R. Cas. 712; *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180, 35 Am. Rep. 748.

7. Iowa.—*McCune v. Burlington, etc., R. Co.*, 52 Iowa. 600. The limi-

But in such cases a distinction is made between contracts limiting the liability of the carrier for loss or damage to the subject of

tation, in a contract of shipment of a horse, of the carrier's liability to \$100, the "released value of the horse" named in the contract, rendering the contract void, under Code, §. 2074, providing no contract shall exempt a railway from liability of a common carrier which would exist had no contract been made, fraud of the shipper in making representations to secure a cheaper rate of freight will not prevent his proving the full value of the horse. *Lucas v. Burlington, etc. R. Co., (Iowa), 84 N. W. 673.*

Ky.—*Baughman v. Louisville, etc., R. Co., 94 Ky. 150, 55 Am. & Eng. R. Cas. 353; Louisville, etc., R. Co. v. Owen, 93 Ky. 201, 19 S. W. 590; Adams Express Co. v. Hoeing, 88 Ky. 376; Orndorff v. Adams Express Co., 3 Bush (Ky.) 194, 96 Am. Dec. 207.*

Minn.—A carrier cannot limit its liability for its own negligence by contract, either as to the right or the amount of recovery. *Boehl v. Chicago, etc., R. Co., 44 Minn. 191, 45 Am. & Eng. R. Cas. 351, 46 N. W. 333; Moulton v. St. Paul, etc., R. Co., 31 Minn. 86, 47 Am. Rep. 781, 12 Am. & Eng. R. Cas. 13.*

A stipulation fixing the value of live stock in a carrier's contract, if fairly made as the basis of the rate of compensation for the carrier's services and risks, will constitute the limit of recovery for loss of the stock, although it is caused by the carrier's negligence; but such limitation is invalid in case of negligence, if its purpose was merely to limit the amount of the carrier's liability. *Alair v. Northern Pac. R. Co., 53 Minn. 160, 39 Am. St. Rep. 588, 55*

Am. & Eng. R. Cas. 357, 19 L. R. A. 764, 54 N. W. 1072. See also *J. J. Douglass Co. v. Minnesota Transfer R. Co., 62 Minn. 288, 30 L. R. A. 860, 64 N. W. 899, 2 Am. & Eng. R. Cas. N. S. 671.*

Miss.—*Southern Express Co. v. Seide, 67 Miss. 613, 42 Am. & Eng. R. Cas. 398; Chicago, etc., R. Co. v. Abels, 60 Miss. 1024, 21 Am. & Eng. R. Cas 105; Chicago, etc, R. Co. v. Moss, 60 Miss. 1003, 45 Am. Rep. 428; Southern Express Co. v. Moon, 39 Miss. 822.*

Neb.—*Chicago, etc., R. Co. v. Witty, 32 Neb. 275, 29 Am. St. Rep. 436, 49 Am. & Eng. R. Cas. 169.*

Ohio.—*United States Express Co. v. Backman, 28 Ohio St. 144; Ambach v. Baltimore, etc., R. Co., 30 Ohio L. J. 111.*

Pa.—If the valuation is an agreed one, made in consideration of reduced charges, it will bind the shipper. But otherwise any stipulation fixing the limit of the carrier's liability in case of loss or injury is void, if the loss is the result of the carrier's negligence. *Weiller v. Pennsylvania R. Co., 134 Pa. St. 310, 19 Am. St. Rep. 700, 42 Am. & Eng. R. Cas. 390, 26 W. N. C. (Pa.) 27; Grogan v. Adams Express Co., 114 Pa. St. 523, 60 Am. Rep. 360, 30 Am. & Eng. R. Cas. 10.* See also *Elkins v. Empire Transp. Co., 81 Pa. St. 315; American Express Co. v. Sands, 55 Pa. St. 140; Farnham v. Camden, etc., R. Co., 55 Pa. St. 53; Adams Express Co. v. Holmes (Pa.), 9 Atl. 166, 30 Am. & Eng. R. Cas. 14.*

Stipulation in a contract to carry goods that, in case of damage through the carrier's negligence, it

carriage to an arbitrary sum of money not fixed with reference to the agreed actual or maximum value of the property, which are held to be an unlawful limitation of the carrier's liability for negligence, and contracts, fairly made between the carrier and shipper, liquidating such loss or damage in advance on an actual or maximum value basis agreed on and stated in the contract, and constituting the basis upon which freight charges are calculated, which are held to be valid as simply limiting the liability for loss or damage, attributable to the carrier's negligence, to actual loss on such a basis, the agreed value being taken as the maximum or actual value of the property.⁸ The carrier has the right to demand from the consignor such information as will enable it to decide on the proper compensation to charge for the risk, and the degree of care to bestow on its trust, and a limitation of its liability in a bill of lading to a specified amount, unless the value of goods forwarded is truly stated if coupled with compensating advantages to the consignor and brought to his knowledge, and the latter has the alternative of getting rid of the limitation by paying a reasonably higher freight rate, is reasonable and con-

shall have the benefit of any insurance effected on the goods, is valid, so as to entitle the carrier to a deduction for insurance paid the shipper. *Roos v. Philadelphia, etc., R. Co.*, 199 Pa. 378, 49 Atl. 344.

Tex.—A stipulation in the contract of carriage limiting the carrier's liability to a value fixed in the contract is not binding, when the goods are injured through the carrier's negligence, in the absence of a statute permitting such a limitation of liability. *Southern Pac. Co. v. Anderson* (Tex. Civ. App.), 63 S. W. 1023. See also *Louisville, etc., R. Co. v. Robbins*, 4 Tex App. Civ. Cas., § 43.

A stipulation in the contract of shipment limiting the liability to value at the place of shipment will be disregarded, as against public policy, notwithstanding it was an interstate shipment, where it is shown that the loss was the result of the

carrier's negligence. *Southern Pac. Co. v. D'Arcais* (Tex. Civ. App.), 64 S. W. 813.

Wis.—Even the transportation of goods at an agreed valuation, if it can be construed into a simple agreement limiting the liability of the carrier, will have no application where the goods are lost or injured through the carrier's negligence. *Black v. Goodrich Transp. Co.*, 55 Wis. 319, 42 Am. Rep. 713. See also *Abrams v. Milwaukee, etc., R. Co.*, 87 Wis. 485, 41 Am. St. Rep. 55; *Boorman v. American Express Co.*, 21 Wis. 154.

8. Ullman v. Chicago, etc., R. Co., 112 Wis. 168, 88 N. W. 41; *Louisville, etc., R. Co. v. Wynn*, 88 Tenn. 330, 45 Am. & Eng. R. Cas. 312; *Johnstone v. Richmond, etc., R. Co.*, 39 S. C. 55, 55 Am. & Eng. R. Cas. 346. See also cases cited under last preceding note.

sistent with public policy.⁹ In New York the rule is now well settled that where a shipper of property enters into a contract with a common carrier whereby, in consideration of an agreement of the latter to transport the property at reduced rates, it is stipulated that, in the event of loss or injury resulting from causes which would make the carrier liable, the liability will be limited to an amount not exceeding a valuation specified, the shipper in case of loss or injury is not entitled to recover more than the sum specified, and that such a limitation in the bill of lading will protect the carrier even though the loss or injury is the result of negligence.¹⁰ But the courts do not favor these contracts, and general words will not be construed to accomplish this result. Considerations of public policy demand that common carriers should discharge fully their duties to the public, and give adequate notice of any immunity from the common law obligations, and conditions of bills of lading or other contracts intended to limit liability come properly within the rule that the words are to be taken most strongly against the party whose language they are, and who is in an advantageous position in fixing the terms of the contract.¹¹ But the courts make the distinction that the common carrier has two distinct liabilities,—the one for losses by accident or mistake, where it is liable by the custom of the realm or the common law, as an insurer; the other, for losses by default or negligence, where it is answerable as an ordinary bailee.¹² In

9. Oppenheimer v. United States Express Co., 69 Ill. 62, 18 Am. Rep. 596; Louisville, etc., R. Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. 314; Richmond, etc., R. Co. v. Payne, 86 Va. 481, 42 Am. & Eng. R. Cas. 366, 10 S. E. 749, 6 L. A. R. 849, 14 Va. L. J. 82. See also cases cited note 6, *supra*.

10. Zimmer v. New York, etc., R. Co., 137 N. Y. 460, 55 Am. & Eng. R. Cas. 354; Magnin v. Dinsmore, 70 N. Y. 410, 20 Am. Rep. 608; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575, and in the absence of fraud, concealment or improper practice, the legal presumption is that stipulations limiting the common law liability of

common carriers, contained in a receipt given by them for freight were known and assented to by the party receiving it. So held also of stipulations contained in the ticket of a passenger by steamship for a foreign port. Steers v. Liverpool, etc., R. Co., 57 N. Y. 1, 15 Am. Rep. 453.

11. Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300.

12. Wheeler v. Oceanic Steam Nav. Co., 125 N. Y. 155, 26 N. E. 248, 21 Am. St. Rep. 729; Dorr v. New Jersey Steam Nav. Co., 4 Sandf. (N. Y.) 145, 11 N. Y. 485, 62 Am. Dec. 125; Lamb v. Camden, etc., R. Co., 46 N. Y. 278, 7 Am. Rep. 387. See also Kenney v. New York Cent.,

cases where the property transported is of unusual or extraordinary value, a notice that the carrier will not be responsible for loss if the true character or value of the articles is not stated at the time of shipment unless extra freight is paid, will operate to exempt the carrier from liability even for its own negligence, on the theory that silence on the part of the shipper, under such circumstances, is such a fraudulent concealment from the carrier of a material fact affecting its liability as to exempt it from its obligation to transport with due care.¹³ But where a bill of lading limited the liability of a carrier simply as a carrier of goods, its liability as bailee for hire remained unimpaired, so that, though it was not liable as carrier beyond the amount named in the contract, it was liable as bailee for the full value of the goods when negligently injured.¹⁴ It is violated duty that furnishes the ground for an action of negligence,¹⁵ and the damages in an action of negligence cannot be fixed by the contract of carriage, unless the carrier show its immunity on the face of its agreement.¹⁶ An action against a common carrier to recover

etc., R. Co., 125 N. Y. 422, 26 N. E. 626; Jennings v. Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394.

13. Rathbone v. New York Cent., etc., R. Co., 140 N. Y. 48, 35 N. E. 418.

14. Bermel v. New York, etc., R. Co., 172 N. Y. 639, 65 N. E. 1113, affg. 62 App. Div. (N. Y.) 389, 70 N. Y. Supp. 804. See also New York authorities cited in preceding notes to this section.

15. Brewer v. New York, etc., R. Co., 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. Rep. 647.

16. Nicholas v. New York Cent., etc., R. Co., 89 N. Y. 370; Wells v. Steam Nav. Co., 8 N. Y. 375.

Where a carrier loses all trace of goods admittedly received by it, it is liable to the owner for their value, and such liability is not affected by a receipt providing for a liability of \$50 only unless a greater value is stated; such receipt containing no stipulation relieving the carrier from

negligence. Blum v. Monahan, 36 Misc. Rep. (N. Y.) 179, 73 N. Y. Supp. 162.

Such a receipt does not protect the carrier against its own negligence, especially in the absence of explanation of non-delivery. Simon v. Dunlap's Express Co., 38 Misc. Rep. (N. Y.) 775, 78 N. Y. Supp. 1136.

But a carrier can claim the benefit of a contract of carriage limiting its liability to a certain sum, unless the true value of the goods is stated, where it showed that, where the value of the goods was stated or known to be in excess of that sum, it took special care of them, and made special arrangements for their delivery, and made an additional charge, and the shippers failed to show any affirmative act of wrongdoing on the carrier's part. Hirsch v. New York Dispatch & Delivery Co., 85 N. Y. Supp. 198; Rowan v. Wells Fargo & Co., 80 App. Div. (N. Y.) 31, 80 N. Y. Supp. 226; Mag-

damages for its negligence in delivering goods after a proper and timely notice from the shipper to stop them *in transitu*, which it agreed to do, is founded upon the tortious act of the carrier, not upon the contract of carriage under which the goods had been shipped, which must be regarded as having ended upon the receipt of the notice and the possession of the goods as having revested in the shipper, the carrier holding them as bailee; and, therefore, a limitation in the contract of carriage of the carrier's liability for loss to an amount specified therein will not preclude a recovery to the extent of the value of the goods.¹⁷ But where a package given an express company was lost by it, and no explanation given, and the receipt issued by the carrier stipulated that the carrier should not be liable for damages unless the result of gross negligence or fraud, and that the shipper should not demand more than \$50, unless otherwise expressed in the receipt, and the shipper made no statement of value, and none was expressed in the receipt, the shipper could recover no more than \$50, though the actual value of the package was greater, where the loss resulted from ordinary negligence.¹⁸

§ 31. Stipulations that measure of damages shall be invoice value or market value at place of shipment.—A stipulation or clause in a bill of lading that, in case of loss, damage or non-delivery, the carrier shall not be liable for more than the invoice value of the goods, or that the value of the goods shall be estimated at the place of shipment, instead of at the place of destination, is valid, when freely and fairly entered into, whether the loss be

nin v. Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608.

17. Rosenthal v. Weir, 170 N. Y. 148, 63 N.E. 65, affg. 54 App. Div. (N. Y.) 275, 66 N. Y. Supp. 841; Cross v. O'Donnell, 44 N. Y. 661, 4 Am. Rep. 721; Pennsylvania R. Co. v. American Oil Works, 126 Pa. St. 485, 12 Am. St. Rep. 885, 17 Atl. 671; Reynolds v. Railroad Co., 43 N. H. 580; Jones v. Earl, 37 Cal. 630, 99 Am. Dec. 338; Litt v. Cowley, 7 Taunt. 169, 23 Eng. R. Cas. 411.

18. Wilson v. Platt, 84 N. Y.

Supp. 143; Bernstein v. Weir, 40 Misc. Rep. (N. Y.) 635, 83 N. Y. Supp. 48. In the latter case the shippers filled out in their own blank freight receipt books, printed by an express company, a receipt, describing the freight, the consignee, and his address, and tendered it to an employe of the express company for signature, at the shipper's store, and the employe signed and returned it, and it was held to constitute a special contract, whose conditions were binding on the principals.

the result of the carrier's negligence or not.¹⁹ The courts of Texas, however, hold that any contract by which a carrier receiving freight for shipment relieves itself from liability for the full value for loss through its own negligence is invalid, and regard such a stipulation as an attempt, on the part of the carrier, to limit its liability for the consequences of its own negligence, and for that reason unlawful, where it is shown that the loss was the result of the carrier's negligence.²⁰ In Minnesota it is held that a condition in a bill of lading, providing that the amount of loss or damages incurred by the carrier shall be computed upon the value of the property at the place of shipment, and which makes no provision for repayment of the freight charges received by the carrier is unreasonable, against public policy, and void.²¹ In some jurisdictions the carrier is liable for the actual damages to property injured in transportation, not exceeding the sum named in a stipulation in a contract of shipment limiting its liability and fixing such sum as their value, although the property in its damaged condition sold for more than such sum,²² while in others the

19. Phoenix Ins. Co. v. Erie, etc., Transp. Co., 117 U. S. 314; The Aline, 25 Fed. 562; The Lydia Monarch, 23 Fed. 298; Rosenfeld v. Peoria, etc., R. Co. (Ind.), 2 N. E. 344; South, etc., Alabama R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578, 56 Ala. 368, 19 Am. Ry. Rep. 200; Brown v. Cunard S. S. Co., 16 N. E. 717; Rogan v. Wabash R. Co., 51 Mo. App. 665; Louisville, etc., R. Co. v. Oden, 80 Ala. 38; Chicago, etc., R. Co. v. Harmon, 17 Ill. App. 640; Caples v. Louisville, etc., R. Co., 17 Mo. App. 14.

20. Houston, etc., R. Co. v. Williams (Tex. Civ. App.), 31 S. W. 556; Houston, etc., R. Co. v. Davis (Tex. Civ. App.), 31 S. W. 308; Galveston, etc., R. Co. v. Ball, 80 Tex. 603; Fort Worth, etc., R. Co. v. Greathouse, 82 Tex. 104, 49 Am. & Eng. R. Cas. 157; Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, 13 Am. St. Rep. 776, 35 Am. & Eng. R. Cas. 666; Gulf, etc., R. Co. v. Key, 4 Tex. App.

Civ. Cas., § 257; Southern Pac. R. Co. v. Maddox, 75 Tex. 300, 42 Am. & Eng. R. Cas. 528; Taylor, etc., R. Co. v. Montgomery, 4 Tex. App. Civ. Cas., § 238; Taylor, etc., R. Co. v. Sublett (Tex. App.) 16 S. W. 182; Missouri Pac. R. Co. v. Edwards, 78 Tex. 307; St. Louis, etc., R. Co. v. Robbins, 4 Tex. App. Civ. Cas., § 43; International, etc., R. Co. v. Anderson, 3 Tex. Civ. App. 8; Gulf, etc., R. Co. v. Booton, 4 Tex. App. Civ. Cas., § 230; Eells v. St. Louis, etc., R. Co., 52 Fed. 903, 55 Am. & Eng. R. Cas. 339.

Where the loss is not shown to have been caused by the negligence of the carrier such a stipulation is valid and binding. Missouri Pac. R. Co. v. Ryan, 2 Tex. App. Civ. Cas., § 430.

21. Shea v. Minneapolis, etc., R. Co., 63 Minn. 228, 65 N. W. 458.

22. Starnes v. Louisville, etc., R. Co., 91 Tenn. 516, 19 S. W. 675, 55 Am. & Eng. R. Cas. 354; Georgia R.

shipper is only entitled to recover as damages for the injury an amount bearing the same proportion to the actual damages that the stipulated value bears to the actual value.²³ The provision of a bill of lading limiting damages for injury to property during transportation is waived by a settlement of the damages, in which the property is taken and a larger sum agreed to be paid therefor,²⁴ and where the carrier has compromised a claim made against it, it cannot afterwards avoid the compromise by claiming that it finds that it was not liable.²⁵

§ 32. Construction of special contracts.—It is generally held by the courts, upon considerations of public policy and the relative position of the parties to such contracts, that clauses inserted in a contract granting immunity to the carrier from its common law obligations, should be strictly construed against the carrier, whose language they are presumed to be and who is in an advantageous position in fixing the terms of the contract. Without such restrictive clauses the carrier would be liable, and to render them valid, they must be clearly within the meaning and intent of the parties, reasonable in themselves, and not against public policy.²⁶ Such clauses must be clear and distinct expressions, free from ambiguity, leaving nothing to implication or inference.²⁷ The contract,

etc., Co. v. Reid, 91 Ga. 377, 17 S. E. 934, 55 Am. & Eng. R. Cas. 363.

23. St. Louis, etc., R. Co. v. Lessor, 46 Ark. 236.

24. Chicago, etc., R. Co. v. Katzenbach, 118 Ind. 174, 20 N. E. 709, 38 Am. & Eng. R. Cas. 375; International, etc., R. Co. v. Underwood, 62 Tex. 21, 21 Am. & Eng. R. Cas. 143.

25. Grinnell v. Wisconsin Cent. R. Co., 47 Minn. 569.

26. Bermel v. New York; etc., R. Co., 172 N. Y. 639, 65 N. E. 1113, affg. 62 App. Div. (N. Y.) 389, 70 N. Y. Supp. 804; Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300; Mynard v. Syracuse, etc., R. Co., 71 N. Y. 180, 27 Am. Rep. 28; Edsall v. Camden, etc., R. Co., 50 N. Y. 661; Alexander v. Greene, 7 Hill N. Y.) 533; Steele v. Townsend, 37 Ala.

255, 79 Am. Dec. 49; Louisville, etc., R. Co. v. Meyer, 78 Ala. 600; Louisville, etc., R. Co. v Touart, 97 Ala. 514, 55 Am. & Eng. R. Cas. 600; Hooper v. Wells, 27 Cal. 11, 85 Am. Dec. 211; Chicago, etc., R. Co. v. Davis, 159 Ill. 53; Atwood v. Reliance Transp. Co., 9 Watts (Pa.) 87, 34 Am. Dec. 503; Deming v. Merchants Cotton-press, etc., Co., 90 Tenn. 306; Thomas v. Lancaster Mills, 71 Fed. 481; Cream City R. Co. v. Chicago, etc., R. Co., 63 Wis. 93, 53 Am. Rep. 267; Hawkins v. Great Western R. Co., 17 Mich. 57, 97 Am. Dec. 179; Kansas City, etc., R. Co. v. Holland, 68 Miss. 351; Menzell v. Chicago, etc., R. Co., 1 Dill (U. S.) 531; Coupland v. Housatonic R. Co., 61 Conn. 531.

27. Westcott v. Fargo, *supra*; Ber-

so far as it purports to exempt the carrier from liability for its negligence, must be construed so as not to include any kind or sort of negligence not specifically and expressly stated in it. However broad or general may be the language of the contract which does not specifically and in express terms release the carrier from the consequences of his own negligence, it will not effect such release, if the general words may operate without including such negligence.²⁸ Some of the rulings of the courts as to exemptions from particular risks or causes of loss are stated in the note below.²⁹ Generally, the courts will not construe a contract so as

mel v. New York, etc., R. Co., *supra;* *New Jersey Steam Nav. Co. v. Merchants' Bank,* 6 How. (U. S.) 344.

A clause in a bill of lading providing that merchandise on wharf, awaiting shipment or delivery, shall be at shipper's risk of loss or damage by fire or flood, must be given the meaning the language plainly expresses, and is applicable where the goods were burned after being placed on the wharf, but before shipment. *Washburne-Crosby Co. v. William Johnston & Co.*, 125 Fed. 273, 60 C. C. A. 187.

28. *Kenny v. New York Cent., etc., R. Co.*, 125 N. Y. 422, 26 N. E. 626; *Holsapple v. Rome, etc., R. Co.*, 86 N. Y. 278; *Nicholas v. New York Cent., R. Co.*, 89 N. Y. 370; *Mynard v. Syracuse, etc., R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28; *Zimmer v. New York Cent., etc., R. Co.*, 137 N. Y. 462, affg. 42 St. Rep. (N. Y.) 63, 16 N. Y. Supp. 631; *Hawkins v. Great Western R. Co.*, 17 Mich. 57, 97 Am. Dec. 179; *Central R., etc., Co. v. Anderson*, 59 Ga. 393, 16 Am. Rep. 85.

29. Theft, barratry, etc.— Where a quantity of gold coin was shipped on a steamship, under a bill of lading exempting the carrier from liability for loss by "barratry of master or mariners," and the proof

indicated that some of the money was stolen on the passage by the purser, the loss was held to be within the exemption. *Spinetti v. Atlas Steamship Co.*, 80 N. Y. 71, 36 Am. Rep. 579, following the doctrine laid down as to similar clauses in a policy of insurance in *American Ins. Co. v. Bryan*, 1 Hill (N. Y.), 25, 26 Wend. (N. Y.) 563, 37 Am. Dec. 278; *Atlantic Ins. Co. v. Storror*, 5 Paige (N. Y.) 285, and controverting the contrary doctrine of the English cases, *De Rothschild v. Royal Mail Packet Co.*, 7 Exch. 734, 21 L. J. Exch. 273; *Taylor v. Liverpool, etc., Steam Co.*, L. R. 9 Q. B. 546, 22 W. R. 752, 43 L. J. Q. B. 205.

Limiting liability after freight had reached its destination.—Notwithstanding a bill of lading provided that the railroad company would not be liable as a common carrier after the freight had reached its destination, public policy so modified the contract as to give the consignee a reasonable time within which to remove the goods after arrival before such liability ceased. *Tallassee Falls Mfg. Co. v. Western Ry. of Alabama* (Ala.), 29 So. 203. See also *Ayres v. Western R. Corp.*, 14 Blatchf. (U. S.) 9; *The Majestic*, 56 Fed. 244.

Loss of cotton by fire.—A pro-

to render it illegal if it will bear another construction, as for example, where the carrier is exempted from liability for certain

vision of a bill of lading that "cotton is excepted from any clause herein on the subject of fire, and the carrier shall be liable as at common law for loss or damage of cotton by fire," affects not only such other provisions of the contract as relate to the subject of fire, but the latter clause applies to all other provisions which modify the common-law liability of the carrier, such as that it shall not be liable for loss or damage to the property after it is ready for delivery to another carrier or the consignee, or shall only be liable under certain circumstances as warehouseman; and where the subject of the shipment is cotton, and it is destroyed by fire, the liability of the carrier is in all respects governed by the common law. Texas, etc., R. Co. v. Callendar, 98 Fed. 538, 39 C. C. A. 154.

Cases where loss of cotton by fire while in a compress not owned or operated by the carrier have been held within an exemption in the bill of lading are: Lancaster Mills v. Merchants' Cotton-press Co., 89 Tenn. 1, 24 Am. Rep. 586, 45 Am. & Eng. R. Cas. 423; Missouri Pac. R. Co. v. Sherwood, 84 Tex. 125. Compare Deming v. Merchants' Cotton-press Co., 90 Tenn. 306.

Breach of agreement to furnish cars.—A limitation from liability contained in a drover's pass does not constitute a defense to a breach, prior to its delivery, of an agreement to furnish cars for transportation. Hastings v. New York, etc., R. Co., 53 Hun (N. Y.), 638, 6 N. Y. Supp. 836.

Dangers of fire, collision and navigation.—Such a clause will embrace a loss caused by the vessel's running into a newly formed sand reef, no negligence on the part of the carrier being shown. Hibernia Ins. Co. v. St. Louis Transp. Co., 120 U. S. 166; Selby v. Wilmington, etc., R. Co., 113 N. C. 588. But it is not applicable to a loss by fire after the goods have been unloaded and stored in a warehouse, but only to loss by fire occurring on shipboard. Black v. Ashley, 80 Mich. 90, 42 Am. & Eng. R. Cas. 428.

"**Unavoidable dangers of river navigation excepted**" will cover a loss through collision with another boat, through the negligence of such other boat, and without fault on the part of the contracting carrier. Hayes v. Kennedy, 2 Pittsb. (Pa.) 262.

An exception from "dangers of the river" will not cover a loss of goods by robbery, or forcible or illegal seizure without fault or neglect of the carrier. Boon v. Steamboat Belfast, 40 Ala. 184, 88 Am. Dec. 161. See also Steele v. McTyer, 31 Ala. 677, 70 Am. Dec. 516.

An exception of losses from "stowage" or from "perils of the sea" will not cover an injury to cattle through the insufficiency of the cattle fittings. The Brantford City, 29 Fed. 373. An exemption from losses caused by "any act, neglect or default whatever of master or crew in the navigation of the ship and in the ordinary course of the voyage" will not include such an injury after the ship had reached her destination

specified causes, the contract will not be construed to relieve it from ordinary negligence on its part,³⁰ and where the contract relieves it from negligence, it will not be held to exempt the carrier from liability for wilful acts or misconduct.³¹ The validity of a contract of shipment, fixing the value of the property shipped, depends on the facts connected therewith; and, the issue of its invalidity being tendered by plaintiff, he is entitled to have it determined as an issue of fact.³² A provision limiting a carrier's liability, purporting to have been entered into as a basis for his charges, is not conclusive on the question whether it was fairly entered into, but extrinsic evidence is admissible in determining that question.³³ Though contracts limiting the liability of common carriers are strictly construed against the carrier, evidence and findings in cases involving the construction of such contracts are not measured by any different rules than in cases to which carriers are not parties.³⁴

and while the cargo was being discharged. *The Accomac*, 15 Prob. Div. 208. But see *The Carron Park*, 15 Prob. Div. 203.

Injury received "while at depots."—A clause excepting from "damages incident to railroad transportation, loss or damage by fire, or the elements, while at depots excepted," refers only to depots en route to the place of destination and not to the depot at the end of the route. *E. O. Stannard Milling Co. v. White Line Cent. Transit Co.*, 122 Mo. 258, 61 Am. & Eng. R. Cas. 192.

"Accidents to boilers or machinery" includes the breaking of the axle of a car. *Fairbank v. Cincinnati*, etc., R. Co., 66 Fed. 471.

Exemption from "damage or loss by reason of breaking, chafing, weather, fire or water" will not include breaking of an animal's leg, caused by its being thrown down by a violent side movement of the car. *Menzell v. Chicago*, etc., R. Co., 1 Dill. (U. S.) 531.

Exemption from "loss on perishable property" will not include mature, merchantable corn. *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83.

The words "contents and value unknown," intended to apply to packages the contents of which are concealed, will not cover a shipment of corn in bulk, the character of which is obvious to the carrier. *Tibbits v. Rock Island*, etc., R. Co., 49 Ill. App. 567.

30. *Welch v. Boston*, etc., R. Co., 41 Conn. 333, 6 Am. Ry. Rep. 95; *Nicoll v. East Tennessee*, etc., R. Co., 89 Ga. 260.

31. *Ronan v. Midland R. Co.*, L. R. 14 Ir. 157.

32. *Evansville*, etc., R. Co. v. Kevekordes (Ind. App.), 69 N. E. 1022.

33. *O'Malley v. Great Northern R. Co.*, 86 Minn. 580, 90 N. W. 974.

34. *Adams Express Co. v. Carnahan* (Ind. App.), 63 N. E. 245, 64 N. E. 647.

§ 33. When stipulations of contract become inoperative.—Limitations in a contract of shipment upon the liability of the carrier are rendered inoperative and the shipper is released therefrom, the carrier becoming subject to its full common law liability as an insurer, where it deviates from the contract by carrying the property by freight, instead of complying with the provision that it shall be carried by passenger train service,³⁵ or in failing to carry the shipper, where by its terms he is entitled to ride free on the train with his stock.³⁶

§ 34. Fraudulent concealment or misrepresentation of value by shipper.—A carrier has the right to demand from a consignor such information as will enable it to decide as to the proper compensation to charge for the risk, and the degree of care to bestow in discharging its trust; and a limitation of its liability to a certain amount, unless the value of the goods forwarded is truly stated, if brought to the knowledge of the consignor, is reasonable and consistent with public policy.³⁷ Where the consignor ships goods, taking a receipt containing such a stipulation limiting the liability of the carrier, and fails to state the value, and in consequence thereof is charged a less premium than otherwise would have been required, independently of the qualifying words in the receipt, the carrier would be exempt from liability on the ground of want of good faith in not disclosing the value of the goods.³⁸ If the shipper use any artifice whatever to conceal from the carrier the true value of the contents of a package delivered to it for transportation, the carrier is relieved from liability for ordinary negligence to a greater extent than the value indicated by the external appearance of the package, or, where there is a contract limiting liability to a specified amount, to a larger amount than

35. Pavitt v. Lehigh Valley R. Co., 153 Pa. St. 302, 32 W. N. C. 65, 25 Atl. 1107.

36. Texas, etc., R. Co. v. Davis, 2 Tex. App. Civ. Cas. § 191.

37. Oppenheimer v. United States Express Co., 69 Ill. 62; Magnin v. Dinsmore, 51 How. Pr. (N. Y.) 457; Baldwin v. Liverpool, etc., Steamship Co., 74 N. Y. 125, 30 Am. Rep. 277; Brown v. Camden, etc., R. Co.,

83 Pa. St. 316; Little v. Boston, etc., R. Co., 66 Me. 239; Norfolk, etc., R. Co. v. Irvine, 85 Va. 217.

38. Oppenheimer v. United States Express Co., *supra*; Graves v. Lake Shore, etc., R. Co., 137 Mass. 33, 16 Am. & Eng. R. Cas. 108, 50 Am. Rep. 282; J. J. Douglass Co. v. Minnesota Transfer R. Co., 62 Minn. 288; M'Cance v. London, etc., R. Co., 7 H. & N. 477.

is specified in the contract,³⁹ and is liable only in case of a conversion, or gross, wanton or wilful negligence for the full value.⁴⁰ This qualification is just and reasonable. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than claimed after loss. Such a concealment of the value of an article destroys all just claim to indemnity, for it goes to deprive the carrier of the compensation it is entitled to, in proportion to the value of the article intrusted to its care and the consequent risk it incurs, and it tends to lessen the vigilance the carrier would otherwise bestow. The shipper has no right, in order to cheapen the freight, which is the usual inducement, to expose the carrier to an increased risk, as must inevitably be the case where the nature and value of the article are studiously concealed. The strict rule of the carrier's liability is for this reason subject to this qualification that the shipper, in such cases, cannot hold the carrier liable for the loss of his goods beyond their apparent value, or the agreed value specified in the contract.⁴¹ The courts do not state accurately

39. Warner v. Western Transp. Co., 5 Robt. (N. Y.) 490; Orange County Bank v. Brown, 9 Wend. (N. Y.) 116, 24 Am. Dec. 129; Pardee v. Drew, 25 Wend. (N. Y.) 459; Hayes v. Wells, 23 Cal. 185, 83 Am. Dec. 89; Chicago, etc., R. Co. v. Thompson, 19 Ill. 578; St. John v. Southern Express Co., 1 Woods (U. S.) 612; The Ionic, 5 Blatchf. (U. S.) 538; Everett v. Southern Express Co., 46 Ga. 303; Phillips v. Earle, 8 Pick. (Mass.) 182; Earnest v. Southern Express Co., 1 Woods (U. S.) 573; South, etc., Alabama R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578, 56 Ala. 368; Cooper v. Berry, 21 Ga. 526, 68 Am. Dec. 468; Charleston, etc., R. Co. v. Moore, 80 Ga. 522, 35 Am. & Eng. R. Cas. 623; United States Express Co. v. Koerner (Minn.), 68 N. W. 608; Gibbon v. Paynton, 4 Burr, 2298; Crouch v. London, etc., R. Co., 14 C. B. 255, 78 E. C. L. 255, 18 Jur. 148, 7 Railw.

Cas. 717; Edwards v. Sherratt, 1 East 604; Batson v. Donovan, 4 B. & Ald. 21, 6 E. C. L. 373; Belfast, etc., R. Co. v. Keys, 9 H. L. Cas. 556; Bradley v. Waterhouse, M. & M. 154.

40. Rice v. Indianapolis, etc., R. Co., 3 Mo. App. 27; Zouch v. Chesapeake, etc., R. Co., 36 W. Va. 524, 49 Am. & Eng. R. Cas. 712. See other cases cited in notes to this section.

41. Hart v. Pennsylvania R. Co., 112 U. S. 331, 18 Am. & Eng. R. Cas. 604; Relf v. Rapp, 3 W. & S. (Pa.) 21, 37 Am. Dec. 528, 9 Am. & Eng. R. Cas. 73; Coxe v. Heisley, 19 Pa. St. 243; Chicago, etc., R. Co. v. Shea, 66 Ill. 471; Harvey v. Terre Haute, etc., R. Co., 74 Mo. 541, 6 Am. & Eng. R. Cas. 293; Hyde v. New York, etc., Steamship Co., 17 La. Ann. 29; Elkins v. Boston, etc., R. Co., 19 N. H. 337, 51 Am. Dec. 184; Savannah, etc., R. Co. v. Collins, 77 Ga. 376, 4 Am. St. Rep. 87; Galt v. Adams Express Co., McArthur & M. (D. C.) 124.

what will amount to fraudulent concealment, but it is held that fraud may be as effectually practiced on the carrier by silence as by a positive and express representation, and a neglect or failure to disclose the real value of a package and the nature of its contents, if there be anything in its form, dimensions or outward appearance calculated to deceive and mislead the carrier is fraudulent concealment.⁴² And mere silence on the part of the shipper as to the real value of the goods, although there was no inquiry by the carrier and no artifice used to deceive, has been held to be concealment without design, by failure to observe an implied condition that the contract of carriage is free from misrepresentation or concealment, which will relieve the carrier from a loss caused by ordinary negligence.⁴³ A carrier carrying goods of much greater value than they were represented to be, and at the rate chargeable for a package of the value represented, cannot recover the additional compensation which would have been charged for the package if its true value had been stated, since its liability cannot exceed the value represented, but is entitled to compensation for the increase of risk of loss, up to that amount, by reason of the greater value of the package.⁴⁴ And where a common carrier received a package for transportation, agreeing to carry it for a stipulated sum prepaid, without inquiry into its value, or notice of a limited liability on account of value, and without misrepresentation, deceit or artifice on the part of a shipper, and discovering that the package was of greater value than

A distinction between money as baggage and as freight is made by the courts. A passenger may place a reasonable amount of money in his trunk without communicating the fact to the carrier, but he is guilty of concealment or fraud in so doing where the trunk is shipped as freight. Missouri Pac. R. Co. v. York (Tex.), 18 Am. & Eng. R. Cas. 623; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Dunlap v. International, etc., R. Co., 98 Mass. 371.

42. Shaekt v. Illinois Cent. R. Co., 94 Tenn. 665, disapproving Kuter v. Michigan Cent. R. Co., 1 Biss. (U.

S.) 35; Rosenfeld v. Peoria, etc., R. Co., 103 Ind. 121, 53 Am. Rep. 500, 21 Am. & Eng. R. Cas. 89.

43. Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 42, 70 N. Y. 410, 26 Am. Rep. 608.

44. United States Express Co. v. Koerner, 65 Minn. 540, 33 L. R. A. 600, 4 Am. & Eng. Corp. Cas. N. S. 646, 68 N. W. 181. But see Rice v. Indianapolis, etc., R. Co., 3 Mo. App. 27; Missouri, etc., R. Co. v. Trinity County Lumber Co., 1 Tex. Civ. App. 553, holding that the carrier may recover of the consignee the usual charges.

it supposed, refused to deliver it to the consignee without additional compensation, which the consignee paid, the latter may maintain an action to recover it back.⁴⁵ But a consignee, though a factor only, is liable for any balance of freight due, according to the statements in the bill of lading, on account of the excess of the real value of the goods over that named in the bill of lading, which was known to him but concealed from the carrier, although on delivery of the goods he paid all the freight which the carrier then supposed to be due.⁴⁶

§ 35. Carrier's duty to inquire as to value of property.— Where a carrier has given no notice limiting its liability or imposing any condition on the shipper of property to disclose its value, it becomes its duty if it desires to be informed of such value to make inquiry, and having accepted the goods for carriage without seeking such information and without qualification, it would be presumptively liable as a common carrier upon common law principles, for a full value. Thus, under a receipt for an article of furniture capable of containing other goods, the carrier is liable for the contents, where there is no fraud.⁴⁷ But if any means were used to conceal the value or nature of the article, as, for example, the delivery of a trunk without any information as to its more than ordinarily valuable contents, thereby creating the impression that it contained only the ordinary baggage of a passenger, this would be a fraudulent concealment which would release the carrier from liability for any amount in excess of what is ordinarily carried for traveling expenses;⁴⁸ or where the ship-

45. Baldwin v. Liverpool, etc., Steamship Co., 74 N. Y. 125, 30 Am. Rep. 277.

46. North German Lloyd v. Heule, 44 Fed. 100, 10 L. R. A. 814. And see Gates v. Ryan, 37 Fed. 154; Neilsen v. Jessup, 30 Fed. 138; The Bermuda, 29 Fed. 399; Elwell v. Skiddy, 77 N. Y. 282; The Denmark, 27 Fed. 141; Philadelphia, etc., R. Co. v. Barnard, 3 Ben. (U. S.) 39; Allen v. Coltart, 11 Q. B. Div. 782; Sanders v. Vanzeller, 4 Q. B. 294, 45 E. C. L. 294.

47. Harmon v. New York, etc., R.

Co., 28 Barb. (N. Y.) 323; Walker v. Jackson, 10 M. & W. 168; Lebeau v. General Steam Nav. Co., L. R. 8 C. P. 88. This rule does not extend to carriers of letters, it being practically impossible for the carrier to make inquiry of a shipper. Hayes v. Wells, 23 Cal. 185, 83 Am. Dec. 89.

48. Orange County Bank v. Brown, 9 Wend. (N. Y.) 85, 24 Am. Dec. 129; Hawkins v. Hoffman, 6 Hill (N. Y.), 586; Galt v. Adams Express Co., McArthur & M. (D. C.) 124.

But where the shipper informed the carrier that a package shipped by

per deceives the carrier by his own carelessness in treating the parcel shipped as a thing of no value.⁴⁹ Where there is anything in the external appearance of the package calculated to create a doubt as to its value or indicating that it contains articles of great value, it is the duty of the carrier to make some inquiry of the shipper; it cannot claim exemption but is responsible for its loss, in the absence of fraud, imposition or disguise.⁵⁰ But when the value appears in the package itself and the carrier can determine it for itself such an inquiry would be useless, and a voluntary statement unnecessary.⁵¹

§ 36. Shipper's duty to state value and character of goods.—

It is well settled that when the carrier has not given notice that he would not be answerable for parcels, beyond a specified amount, unless informed of the value, or has made a special acceptance, it is not the duty of the shipper to state the quality or the value, but, when there is neither notice nor special acceptance, the carrier is bound to make inquiry as to the value and character of the article or package received, and the owner must then answer truly, at his peril. And if such inquiries are not made, and the property is received at such price for transportation as is asked with reference to its bulk, weight or external appearance, the

him was valuable, but did not state that it contained money, fraud could not be properly imputed. *Allen v. Sewall*, 2 Wend. (N. Y.) 327.

49. *Relf v. Rapp*, 3 W. & S. (Pa.) 21, 37 Am. Dec. 528; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 18 Am. & Eng. R. Cas. 604; *Houston, etc., R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808, 9 Am. & Eng. R. Cas. 73.

50. *Gorham Mfg. Co. v. Fargo*, 45 How. Pr. (N. Y.) 90, 3 J. & Sp. (N. Y.) 434; *Phillips v. Earle*, 8 Pick. (Mass.) 182; *MERCHANTS' DESPATCH TRANSP. CO. v. BOLLES*, 80 Ill. 473; *Gulf, etc., R. Co. v. Clark*, 2 Tex. App. Civ. Cas. § 512, 18 Am. & Eng. R. Cas. 628; *Kuter v. Michigan Cent. R. Co.*, 1 Biss. (U. S.) 35.

51. *Van Winkle v. Adams Express*,

Co., 3 Robt. (N. Y.) 59; *Boscowitz v. Adams Express Co.*, 93 Ill. 523, 9 Cent. L. J. 389, 34 Am. Rep. 191, 5 Cent. L. J. 58; *Dwight v. Brewster*, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; *Orndorff v. Adams Express Co.*, 3 Bush (Ky.), 194, 96 Am. Dec. 207; *Southern Express Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140; *Moses v. Boston, etc., R. Co.*, 24 N. H. 71, 55 Am. Dec. 222.

A connecting carrier, having no means of ascertaining the value of packages shipped, is entitled to regard them of the value they appear to be, no value being stated in the bill of lading, and is responsible accordingly. *Marquette v. Kirkwood*, 45 Mich. 51, 40 Am. Rep. 453, 9 Am. & Eng. R. Cas. 85.

carrier is responsible for its loss, whatever may be its value.⁵² But an exception to the rule is made where the articles are dangerous or of a fragile nature requiring special care.⁵³ A shipper of goods for carriage is bound by an agreed valuation in the bill of lading, and a stipulation that such valuation is to be the limit of recovery in case of loss;⁵⁴ and this is held to be the rule where he makes a statement of the value of the property in answer to the carrier's inquiry, although he did not suppose that his statement would affect the amount of the carrier's liability;⁵⁵ and where he is silent as to the real value, when he accepts a receipt containing such a stipulation, although there is no inquiry by the carrier, and no artifice to conceal the value or deceive the carrier.⁵⁶ The presumption of law is that a party receiving an instrument of this

52. Baldwin v. Liverpool, etc., Steamship Co., 74 N. Y. 125, 30 Am. Rep. 277; Gorham Manf. Co. v. Fargo, 35 N. Y. Super. Ct. 434; Sewall v. Allen, 6 Wend. (N. Y.) 349; Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; Southern Express Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; Galt v. Adams Express Co., MacArthur & M. (D. C.) 124; Merchants' Despatch Transp. Co. v. Bolles, 80 Ill. 473; Boscowitz v. Adams Express Co., 93 Ill. 523, 34 Am. Rep. 191, 16 Am. & Eng. R. Cas. 102; Parmalee v. Lowitz, 74 Ill. 116, 24 Am. Rep. 276; Baldwin v. Collins, 9 Rob. (La.) 468; Fassett v. Ruerk, 3 La. Ann. 694; Levois v. Gale, 17 La. Ann. 302; Little v. Boston, etc., R. Co., 66 Me. 239; Sheldon v. Robinson, 7 N. H. 157; Brown v. Camden, etc., R. Co., 83 Pa. St. 316; Camden, etc., R. Co. v. Baldauf, 16 Pa. St. 67, 55 Am. Dec. 481; Relf v. Rapp, 3 W. & S. (Pa.) 21, 37 Am. Dec. 528; McCune v. Burlington, etc., R. Co., 52 Iowa, 600; Texas Express Co. v. Scott, 2 Tex. App. Civ. Cas. § 72; Gulf, etc., R. Co. v. Clark, 2 Tex. App. Civ. Cas. § 512, 18 Am. & Eng. R. Cas. 628; Batson v. Donovan, 4 B. & Ald. 29,

6 E. C. L. 373; Wallace v. Jackson, 10 M. & W. 168; Phillips v. Earle, 8 Pick. 182; Brooke v. Pickwick, 4 Bing. 218, 13 E. C. L. 404; Macklin v. Waterhouse, 5 Bing. 212, 15 E. C. L. 421, 2 M. & P. 319; Sleat v. Fagg, 5 B. & Ald. 342, 7 E. C. L. 123. See Hayes v. Wells, 23 Cal. 185, an express company which carries letters is not liable for the loss of any article of special value contained in a letter envelope, unless at the time of its delivery to them they are informed of its value.

53. American Express Co. v. Perkins, 42 Ill. 458; Crouch v. London, etc., R. Co., 14 C. B. 255, 78 E. C. L. 255, 18 Jur. 148, 7 Railw. Cas. 717.

54. Graves v. Lake Shore, etc., R. Co., 137 Mass. 33, 16 Am. & Eng. R. Cas. 108, 50 Am. Rep. 282; Judson v. Western R. Corp., 6 Allen (Mass.), 486, 83 Am. Dec. 646; J. J. Douglass Co. v. Minnesota Transfer R. Co., 62 Minn. 288, 30 L. R. A. 860, 64 N. W. 899, 2 Am. & Eng. R. Cas. N. S. 671.

55. Coupland v. Housatonic R. Co., 61 Conn. 531, 15 L. R. A. 534, 23 Atl. 870, 55 Am. & Eng. R. Cas. 380.

56. Magnin v. Dinsmore, 50 N. Y. 168, 62 N. Y. 35, 20 Am. Rep. 442, 70 N. Y. 410, 26 Am. Rep. 608.

character in the transaction of business, in the absence of fraud, imposition, concealment, or improper practice or conduct of any kind on the part of the carrier or its agents in the progress of the transaction, is acquainted with its contents.⁵⁷ And understanding that he is securing transportation at a reduced rate by stipulating as to value and assuming a portion of the risk of carriage himself, the shipper cannot subsequently insist that the goods are of greater value for the purpose of increasing his claim for damages for the loss.⁵⁸

57. Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575. 58. Durgin v. American Express Co., 66 N. H. 277.

CHAPTER XI.

CARRIER'S RELATION TO GOODS AND AUTHORITY OF AGENTS.

SECTION 1. Carrier's relation to goods.

2. Power and authority of carrier's general freight agents.
3. Powers and authority of local agents.
4. Authority of other agents and employes.

§ 1. **Carrier's relation to goods.**—A common carrier cannot sell goods so as to divest the title of the consignee, and the consignee may follow up the goods, and recover them, or recover the price thereof, from one who has purchased of the carrier and sold them.¹ If a common carrier sells the goods intrusted to it for conveyance, without other authority than that which he has as carrier, he can pass no title. Though he sells the goods for a fair price to one who purchases in good faith, the title of the owner is not affected by the sale, and the purchaser will be responsible to him for them.² But the carrier has the right and it is its duty to sell perishable goods for the benefit of their owner when their further transportation becomes impossible and they are about to perish from decay.³ And it may sell goods by virtue of its lien for charges, but must sell them, in each case, in the manner prescribed by law.⁴ It was formerly held that a common carrier could not dispute the shipper's title to goods delivered to it for transportation, and could not, except in cases of fraud or insolvency of the shipper, have an interpleader between the party from whom it received the goods and an adverse claimant.⁵ The best considered cases now hold that the right of a third person to which the bailee has yielded, by delivering the property, may be interposed in all cases as a defense to an action brought by the bailor subsequently for the property, and that when the true owner comes

1. *Ely v. Ehle*, 3 N. Y. 506; *Crumbacker v. Tucker*, 9 Ark. 365. 4. See Carrier's lien for charges, chap. 16.
2. *Bailey v. Shaw*, 24 N. H. 297, 55 Am. Dec. 241. 5. *McGaw v. Adams*, 14 How. Pr. (N. Y.) 461.
3. *American Express Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 561.

and demands his property it is the duty of the carrier to deliver it, and the law will not adjudge the performance of this duty tortious as against a consignor or bailor having no title.⁶ But in an action for negligence in not delivering goods consigned to it by the plaintiff, the carrier cannot defend by showing that the real title to the property is in a third person, who bailed them to the consignor, unless the property has been taken from the carrier's possession by the bailor without injury to the consignor.⁷ Where a carrier delivers property shipped over its road to a third person, under the mistaken belief that he is the person entitled to receive the goods, or delivers to the proper person without requiring the performance of conditions required precedent to delivery, it may maintain an action to recover possession but cannot do so on a simple demand for the return of the property, without returning to such third person the freight charges paid by him on the delivery of the property.⁸ A carrier has such a special property in the goods that it may maintain an action, in its own name, for an injury to property intrusted to it for transportation.⁹ A carrier, though it has not received freight, or paid the loss may yet recover damages from another who has caused the loss.¹⁰ If the goods are wrongfully taken from its possession, it may bring

6. *Western Trans. Co. v. Barber*, 56 N. Y. 544; *Western Transp. Co. v. Hoyt*, 69 N. Y. 230; *Mullins v. Chickering*, 110 N. Y. 514; *German Exchange Bank v. Commissioners*, 57 How. Pr. (N. Y.) 187, 6 Abb. N. C. (N. Y.) 394; *The Idaho*, 93 U. S. 575; *Knapp v. Sprague*, 9 Mass. 262; *Whittier v. Smith*, 11 Mass. 210; *Ogle v. Atkinson*, 5 Taunt. 759; *Wells v. American Express Co.*, 55 Wis. 23, 6 Am. & Eng. R. Cas. 300, 42 Am. Rep. 695; *Sheridan v. New Quay Co.*, 4 C. B. N. S. 618, 93 E. C. L. 618; *Biddle v. Bond*, 6 B. & S. 221.

7. *Great Western R. Co. v. McCormas*, 33 Ill. 185.

A consignor of goods may sue a carrier for breach of the contract of carriage, the contract having been

made by the consignor. If he has, in fact, no interest, he may recover for the benefit of the consignee or actual party in interest. *Illinois Cent. R. Co. v. Schwartz*, 13 Ill. App. 490. See also *Brill v. Grand Trunk R. Co.*, 20 U. C. C. P. 440.

8. *Walker v. Louisville, etc.*, R. Co., 111 Ala. 233, 4 Am. & Eng. R. Cas. N. S. 658, 20 So. 358; *Jones v. Anderson*, 82 Ala. 302; *Jeffersonville R. Co. v. White*, 6 Bush (Ky.), 251; *Evans v. Gale*, 17 N. H. 573, 43 Am. Dec. 614; *Brown v. Hodgson*, 4 Taunt. 189. Compare *Young v. East Alabama R. Co.*, 80 Ala. 100.

9. *Merrick v. Brainard*, 38 Barb. (N. Y.) 574; *Steamboat Co. v. Atkins*, 22 Pa. St. 522; *The Beaconsfield*, 158 U. S. 303.

10. *White v. Bascom*, 28 Vt. 268.

action to recover possession or for a wrongful conversion,¹¹ and will be entitled in the latter action, if it recover the full value of the goods, to its interest in the goods, and will hold the balance in trust for the owner, unless it has satisfied such owner for his loss.¹² The right conferred upon the carrier by reason of his special property is not inconsistent with a co-existing right of action for the same cause in the general owner;¹³ but a recovery by the carrier will be a bar to a subsequent action by such general owner.¹⁴ The damages recovered in such cases takes the place of the property converted or destroyed, and, upon satisfaction of the judgment recovered by either, the title to the property passes to the party against whom the recovery was had.¹⁵

§ 2. Power and authority of carrier's general freight agents.— The general freight agent of a common carrier, in the absence of any notice of a limitation of his authority, should be deemed, as to the public or third parties, to have been authorized by the carrier and clothed with all the power to make contracts for freight, or in respect to the carrying and delivery of freight, that the carrier itself has, and to have the power, therefore, to make valid contracts for the delivery of property at places on other roads beyond the terminus of the carrier's own route.¹⁶ A shipper dealing with

11. Wingard v. Banning, 39 Cal. 543.

12. Ingersoll v. Van Bokkelin, 7 Cow. (N. Y.) 670; Woodman v. Nottingham, 49 N. H. 387; Steamboat Farmer v. McCraw, 26 Ala. 189.

13. Booth v. Terrell, 16 Ga. 20; Morgan v. Ide, 8 Cush. (Mass.) 420.

14. Ingersoll v. Van Bokkelin, 7 Cow. (N. Y.) 670; Lyle v. Barker, 5 Bin. (Pa.) 457.

15. Root v. Chandler, 10 Wend. (N. Y.) 110; Strong v. Adams, 30 Vt. 221; Spence v. Mitchell, 9 Ala. 744; Hart v. Hyde, 5 Vt. 328; Bryant v. Clifford, 13 Metc. (Mass.) 138; Lovejoy v. Murray, 3 Wall. (U. S.) 1; Overby v. McGee, 15 Ark. 459; Bishell v. Huntingdon, 2 N. H. 142; Chesley v. St. Clair, 1 N. H. 189.

16. Burtis v. Buffalo, etc., R. Co., 24 N. Y. 274; Grover & B. Sewing Mach. Co. v. Missouri Pac. R. Co., 70 Mo. 672, 35 Am. Rep. 444.

The general eastern freight agent of a western railroad being operated by receivers, having his office in New York, has apparent power, by virtue of his position, to contract for the through carriage of goods over his line of road and a connecting steamship line across the Pacific, and a contract so made by him, when clear in its terms, will bind the receivers, when the shipper has no notice of any limitation on his authority, and no knowledge that the steamship line is not owned by the railroad company and operated by the receivers. Farmers Loan & T.

one who, with the knowledge of his principal, publicly advertises himself as the general agent of a railroad company, both for passengers and freight, having an office in a great commercial center, with employees under him, is warranted in concluding that he had authority to contract.¹⁷ Where a railroad corporation is operated in connection with other roads, and is a part of the system, it is bound by the acts and declarations of the agents of other companies which form a part of such system, and which are made to induce shipments over the system.¹⁸ An agent, employed to solicit traffic for a foreign railroad company having no line of road in the State, has implied authority to bind his principal for the safe delivery of goods at a point beyond its own lines, and to contract over what road beyond that line the property shall be transported.¹⁹ But a general agent for the State, of a common carrier, has no apparent authority to waive in favor of a particular shipper a condition imposed by the rules of the company as to free insurance of shipments, where he had never before exceeded his actual instructions in that respect, and the shipper was aware of the instructions from the carrier which required compliance with such condition, although the agent stated to him that it only applied to large shippers, and not to him; and the carrier is not bound by the agent's attempted waiver.²⁰ Where a traveling freight agent of a common carrier, with authority to solicit freight business, and with special authority to contract for shipments of freight on special conditions as to movements of trains, contracts for the shipment of freight, without disclosing the conditions

Co. v. Northern Pac. R. Co., 120 Fed. 873, 57 C. C. A. 533, revg. 112 Fed. 829. A person who has been held out to the public as a general freight agent, for more than a year, may bind the company by a contract to furnish a certain number of cars, on a specified day, for the transportation of freight. Baker v. Kansas City, etc., R. Co., 91 Mo. 152, 28 Am. & Eng. R. Cas. 61.

17. St. Louis, etc., R. Co. v. Elgin Condensed Milk Co, 175 Ill. 557, 51 N. E. 911, affg. 74 Ill. App. 619.

18. Missouri, etc., R. Co. v. Wells (Tex. Civ. App.), 58 S. W. 842.

And in an action for delay and negligence in executing a contract for carriage of stock, evidence of statements and representations made by the general agent of the system to induce such shipment is inadmissible. Id.

19. Fremont, etc., R. Co. v. New York, etc., R. Co. (Neb.), 92 N. W. 131; New York, etc., R. Co. v. Fremont, etc., R. Co. Id.

20. Leinkauf v. Lombard, A. & Co., 12 App. Div. (N. Y.) 302, 42 N. Y. Supp. 391.

limiting his authority, the principal is bound by his act, and is liable for resulting damages.²¹ Where, on the question of a soliciting freight agent's authority to bind the company by a time contract as to freight, it was shown that, with authority, he had negotiated a settlement arising out of a previous contract with the same shipper, that the company had recognized the settlement, and paid the amount stipulated, which was part consideration of the new contract, and for a month carried out the new contract, it was held, that the shipper was justified in regarding him as general agent for that branch of the business.²² A person contracting with a carrier, through its agent, for the transportation of goods, is not chargeable with notice of limitation of the agent's right to contract, when he is a general agent of the company in charge of its business at the place where the contract is made and the contract is the kind usually made by such agents. A statement in the blanks and literature issued by the agent of a steamship company that insurance on consigned goods was free when the value was declared before the sailing of the steamer does not charge a shipper having knowledge thereof with notice that the agent has no authority to insure goods without such valuation.²³ But the unauthorized issuance by the agent of a steamship company of bills of lading to a purchaser for goods then in a public warehouse, subject to the orders of the seller, who is bound by the terms of the sale to deliver the same on board, does not bind the company, so as to make it responsible for the goods while in the warehouse and before their actual delivery into its custody; and even an acceptance of the goods on board ship is a ratification of the contract of carriage made by the bills of lading only from the time of such delivery.²⁴ The general rule is that where an entire business is placed under the management of an agent,

21. Baker & Penniston v. Chicago, etc., R. Co. (Minn.), 97 N. W. 650.

22. Graves v. Miami S. S. Co., 29 Misc. Rep. (N. Y.) 645, 61 N. Y. Supp. 115. See Brandenstein v. Douglass, 105 Ga. 845; Drohan v. Lumber Co., 75 Minn. 251.

23. Lowenstein v. Lombard, Ayres & Co., 164 N. Y. 324, 58 N. E. 44, revg. 45 N. Y. Supp. 286.

24. Cunard S. S. Co. v. Kelly, 115 Fed. 678.

The company does not ratify such act and make the bills its own by receiving on board one of its vessels goods purporting to be those described in the bills, where by reason of a fraudulent substitution in the warehouse, of which it was ignorant, the goods actually delivered to it are not the same. *Id.*

the authority of the agent may be presumed to be commensurate with the necessities of the situation. The powers of the agent are, *prima facie*, co-extensive with the business entrusted to his care and will not be narrowed by limitations not communicated to the person with whom he deals. The authority of an agent may be implied in many cases from his official designation, the position in which he is placed, and the duties which naturally appertain thereto. Parties may deal with the agents of corporations upon the presumption that they possess the powers usually assigned to the office they hold, and the principal is bound as to third persons acting in good faith, by the act of an agent within his apparent authority, although in the particular instance it was unauthorized. The implied authority of an agent in the absence of notice to the contrary is the measure of his apparent authority.²⁵

§ 3. Powers and authority of local agents.—*Prima facie* a station agent or baggage master, as such, can bind his company only by contracts of carriage to the end of its road; and authority to bind the company by contracts beyond such point must be shown in order to hold the company liable.²⁶ A local station agent has no power to make a special agreement extending the liability of his company for shipments beyond its own line, unless it has been expressly conferred upon him or may be implied from the course of business, or the company has held itself out as a common carrier to such points.²⁷ A station agent authorized to

25. Lowenstein v. Lombard, Ayres & Co., 164 N. Y. 324, 58 N. E. 44; Isaacson v. New York Cent., etc., R. Co., 94 N. Y. 278, 46 Am. Rep. 142; Talcott v. Wabash R. Co., 159 N. Y. 461; Trimble v. New York Cent., etc., R. Co., 162 N. Y. 84.

26. Marmonstein v. Pennsylvania R. Co., 13 Misc. Rep. (N. Y.) 32, 65 St. Rep. (N. Y.) 877, 34 N. Y. Supp. 97, revg. 32 N. Y. Supp. 1146; Minter v. Southern Kansas R. Co., 56 Mo. App. 282; Turner v. St. Louis, etc., R. Co., 20 Mo. App. 632; Patterson v. Kansas City, etc., R. Co., 47 Mo. App. 570; Crouch v. Louisville, etc., R. Co., 42 Mo. App. 248;

White v. Missouri Pac. R. Co., 19 Mo. App. 400; Loomis v. Wabash, etc., R. Co., 17 Mo. App. 340; Hansen v. Flint, etc., R. Co., 73 Wis. 346, 9 Am. St. Rep. 791.

27. Hoffman v. Cumberland Valley R. Co., 85 Md. 391, 37 Atl. 214; Grover & B. Mach. Co. v. Missouri Pac. R. Co., 70 Mo. 672; Burroughs v. Norwich, etc., R. Co., 100 Mass. 26; Wolfe v. Lehigh Valley R. Co., 9 Kulp (Pa.), 401, and such authority will not be implied from previous acts and conduct; Ogdensburg, etc., R. Co. v. Pratt, 22 Wall. (U. S.) 124.

receive and forward freight may bind the company by a contract which is beyond his real authority, but within the scope of his apparent authority, unless the other party had knowledge of the fact that he was acting beyond his actual authority.²⁸ A local station agent is not presumed to have had authority to bind his company to a contract to ship property over connecting lines from the mere fact that he collected the freight for the entire distance.²⁹ A station agent's authority to bind a railroad in a contract of carriage to a point on the line of a connecting carrier must be proved in order to hold his company liable for loss or damage occurring on the line of the connecting carrier. Such authority may be inferred from evidence of a previous course of dealing between the shipper and the carrier.³⁰ A railway station agent, authorized to receive and forward freight or invested with a general power to contract for transportation, has implied authority to contract to furnish a certain number of cars at his station on a specified day,³¹ or to have cars on hand at a certain time to

28. Gann v. Chicago, etc., R. Co., 72 Mo. App. 34; Miller v. Chicago, etc., R. Co., 1 Mo. App. Rep. 474.

29. Coates v. Chicago, etc., R. Co., 8 S. D. 173, 65 N. W. 1067; Sutton v. Chicago, etc., R. Co. (S. D.), 84 N. W. 396.

30. Faulkner v. Chicago, etc., R. Co. (Mo. App.), 73 S. W. 927.

A station agent who has for six months been issuing bills of lading to points beyond the line of his employer's road has ostensible authority to make a contract of shipment for such a point, although he has instructions from his principal not to make such contracts, where the shipper did not know or could not have known, by the exercise of proper diligence, of the existence of such instructions. Gulf, etc., R. Co. v. Cole, (Tex. Civ. App.), 28 S. W. 391. The conclusion that a station agent at a certain city the business establishments of which extend over a considerable territory, not all within the

city limits, had authority to contract for the carriage of freight from one of such establishments, outside the city limits, on another railroad, and not contiguous to his company's tracks, is supported by evidence that he and his predecessors had always represented the company in its dealings with freighters on the tracks of other roads, and with reference to certain of such establishments outside the city limits, and by correspondence as to the transaction in question between him and the company's general freight agent, showing the understanding of both that any such dealings which the company might have fell within his province and duty. Bigelow v. Chicago, etc., R. Co., 104 Wis. 109, 80 N. W. 95. See Gulf, etc., R. Co. v. Dinwiddie, 21 Tex. Civ. App. 339; Rudell v. Ogdensburg Transit Co., 117 Mich. 568, 5 Det. L. N. 497, 76 N. W. 380, 44 L. R. A. 415.

31. Gulf, etc., R. Co. v. Irvine &

carry certain goods,³² or to forward freight without delay,³³ or to ship and unload live stock,³⁴ the shipper having no knowledge or notice of any limitation of such power. Station agents are presumed to have power to make contracts for their railroads for the transportation of freight. The limitations on their powers the public cannot take notice of, unless they are conveyed to the public in such a manner as to authorize the inference that shippers are apprised of them.³⁵ But a station agent at one point on a railroad has no implied authority to make a contract for furnishing cars at another station.³⁶ Where the contract for furnishing cars for shipment of stock, or for other purposes, is one within the apparent scope of the agent's authority, its validity will not be affected by the fact that the agent had special instructions limiting his authority in such matters, no knowledge of such instructions by the shipper being shown.³⁷ A shipper contracting with a

Woods, (Tex. Civ. App.) 73 S. W. 540; Harrison v. Missouri Pac. R. Co., 74 Mo. 364, 41 Am. Rep. 318; Gulf, etc., R. Co. v. Wright, 1 Tex. Civ. App. 402; Gulf, etc., R. Co. v. Martin, (Tex. Civ. App.) 28 S. W. 576.

32. Stoner v. Chicago, etc., R. Co., 109 Iowa, 551, 80 N. W. 569; Wood v. Chicago, etc., R. Co., 68 Iowa 491, 24 Am. & Eng. R. Cas. 91, 56 Am. Rep. 861, revg. 59 Iowa 196, 21 Am. & Eng. R. Cas. 38.

33. Harrell v. Wilmington, etc., R. Co., 106 N. C. 258, 42 Am. & Eng. R. Cas. 421; Deming v. Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267, so held, although such agent testified that he only had charge of the receiving and forwarding and had no authority to make contracts of afreightment, and no control of the locomotive power of the road.

34. Lake Erie etc., R. Co. v. Rosenberg, 31 Ill. App. 47.

35. Pruitt v. Hannibal, etc., R. Co., 62 Mo. 527; Newport News, etc., R. Co. v. Mercer, 96 Ky. 475; Chica-

go, etc., R. Co. v. Wolcott, 141 Ind. 267; Gelvin v. Kansas City, etc., R. Co., 21 Mo. App. 273. Compare Missouri Pac. R. Co. v. Carpenter, 44 Kan. 257.

36. Gulf, etc., R. Co. v. Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829; Easton v. Dudley, 78 Tex. 236, 45 Am. & Eng. R. Cas. 340; Voorhees v. Chicago, etc., R. Co., 71 Iowa, 735, 60 Am. Rep. 823, 29 Am. & Eng. R. Cas. 822; Missouri Pac. R. Co. v. Stults, 31 Kan. 752, 15 Am. & Eng. R. Cas. 97. But see Miller v. Chicago, etc., R. Co., 1 Mo. App. Rep. 474, holding that station agent may bind his company by a contract to furnish cars at another station at a specified time to a shipper of stock.

37. International, etc., R. Co. v. True, (Tex. Civ. App.) 57 S. W. 977; Cross v. Graves, 4 Tex. App. Civ. Cas., § 100; New York L. Ins. Co. v. Rohrbough, 2 Tex. App. Civ. Cas., § 217; Watkins v. Morley, 2 Tex. App. Civ. Cas., § 727; Lillard v. Mitchell, 3 Tex. Civ. App. Cas., §

railroad station agent for the transportation of freight is under no legal obligation to make inquiries concerning the station agent's instructions or powers.³⁸ Where the agent of an express company has followed certain methods of doing business for a long period of years, the express company will be presumed to know and approve of the methods, and is liable for the acts of the agent.³⁹ A station agent cannot bind his company by a contract to forward freight by a passenger train,⁴⁰ or beyond what may be fairly presumed, from the character of his employment, to be his authority,⁴¹ as, for example, permitting goods to remain in its warehouse, after they have been delivered to the owner and his receipt taken therefor;⁴² nor even to the latter extent, if the consignor has notice of his special and limited authority.⁴³ Admissions made by the carrier's agent after a loss has occurred do not bind the company and are not admissible to prove negligence on the part of the carrier.⁴⁴ An agent cannot bind his company when acting in fraud of the company's rights or in plain contravention of his duty, as where he acknowledges the receipt of goods which were never received;⁴⁵ nor when acting in defiance to the known course of busi-

457; *Page v. London, etc., R. Co.*, 16 W. R. 566.

When a railroad company issued explicit orders to a local agent of its road as to the rates to be charged on different classes of freight, it will not be liable for delay in transportation of freight under a contract with the agent as shipper in violation of such instructions. *Central of Georgia R. Co. v. Felton*, 110 Ga. 597, 36 S. E. 93.

38. *San Antonio, etc., R. Co. v. Williams*, (Tex. Civ. App.) 57 S. W. 883. Since an oral contract by a railroad station agent for the transportation of stock is binding unless the shipper has knowledge that the agent has no authority to make such contract, it was not error, in an action against a railroad on such a contract, to refuse to charge on defendant's plea setting up the agent's want of authority to enter into an oral contract. *Id.*

39. *Springer v. Westcott*, 166 N. Y. 117, 59 N. E. 693.

40. *Elkins v. Boston, etc., R. Co.*, 23 N. H. 275.

41. *Great Western R. Co. v. Willis*, 18 C. B. N. S. 748, 114 E. C. L. 748, 34 L. J. C. P. 195; *Horne v. Midland R. Co.*, L. R. 8 C. P. 131, 42 L. J. C. P. 59.

42. *Mulligan v. Northern Pac. R. Co.*, 4 Dak. 315, 27 Am. & Eng. R. Cas. 33.

43. *Walker v. York, etc., R. Co.*, 2 El. & Bl. 750, 75 E. C. L. 750, 23 L. J. Q. B. 73.

44. *Boston, etc., R. Co. v. Ordway*, 140 Mass. 510, 25 Am. & Eng. R. Cas. 413, note; *Branch v. Wilmington, etc., R. Co.*, 88 N. C. 573, 18 Am. & Eng. R. Cas. 621.

45. *Coleman v. Riches*, 16 C. B. 104, 81 E. C. L. 104, 24 L. J. C. P. 125.

ness of the company.⁴⁶ A contract by a carrier to deliver goods at destination at a certain time, which allows the usual period for making the trip, is within the general authority of the carrier's agent.⁴⁷ An agent of a railroad company may, where it has become impossible to perform a contract for the shipment of stock, because of a strike on the railroad, enter into a new agreement with the shipper to pay the expenses incurred by the latter in taking care of and feeding the stock until they can be shipped, where the original contract does not require the shipper to perform any services in connection with the transportation of the stock.⁴⁸ Special authority from the carrier must be shown in order to make any act of the carrier's agent binding on the carrier, when such act is beyond the ordinary and usual powers of the agent.⁴⁹ The acts of a station agent as the representative of a shipper by whom he is employed to purchase goods for him and hold and ship them under his directions, do not bind the carrier, though he is also the carrier's local agent, since he cannot assume to act in a dual capacity where the interests of the parties are conflicting.⁵⁰ Where the defendant, through its station agent, contracted to carry plaintiff's goods to a point in Canada, plaintiff had a right to rely on the agreement by the agent that the company would advance the customs duties, unless he had notice that the agent had no such authority.⁵¹ Where a local agent has transcended his authority in making a contract, yet if the carrier has availed itself of the benefits of the contract made by the agent, it cannot afterwards repudiate the agreement on the ground that the agent has exceeded his authority.⁵² A railroad company is not

46. *Slim v. Great Northern R. Co.*, 14 C. B. 647, 78 E. C. L. 647, 23 L. J. C. P. 166; *Belfast, etc., R. Co. v. Keys*, 9; *H. L. Cas.* 556.

47. *Rudell v. Ogdensburg Transit Co.*, 117 Mich. 568, 5 Det. L. N. 497, 76 N. W. 380, 44 L. R. A. 415.

48. *Carstens v. Burleigh*, 20 Wash. 283, 55 Pac. 221.

49. *Giles v. Taff Vale R. Co.*, 2 El. & Bl. 822, 75 E. C. L. 822, 18 Jur. 510, 23 L. J. Q. B. 43.

50. *Sumner v. Charlotte, etc., R. Co.*, 78 N. C. 289.

51. *Waldron v. Canadian Pac. R. Co.*, 22 Wash. 253, 60 Pac. 653. Citing *Wood v. Chicago, etc., R. Co.*, 68 Iowa, 491, 27 N. W. 473; *Deming v. Grand Trunk R. Co.*, 48 N. H. 455; *Pruitt v. Hannibal, etc., R. Co.*, 62 Mo. 527; *Harrison v. Missouri Pac. R. Co.*, 74 Mo. 364; *Guesnard v. Railroad Co.*, 23 Am. & Eng. Cas. 691.

52. *Toledo, etc., R. Co. v. Elliott*, 76 Ill. 67; *Nashville, etc., R. Co. v. Smith*, (Ala.) 31 So. 481.

bound by the assent of its station agent to a shipper's written instruction as to the selection of a connecting carrier, when the agent told the shipper that the "office at H. (the terminal) generally took their own route, and would not pay any attention to him," the assent thereto being insufficient.⁵³

§ 4. Authority of other agents or employes.—Where shippers of freight filled out in their own blank freight receipt books, printed by an express company, a receipt, describing the freight, the consignee, and his address, and tendered it to an employe of the express company, for signature, at the shipper's store, and the employe signed and returned it, it constituted a special contract, whose conditions were binding on the principals.⁵⁴ Defendant having made an express contract with plaintiff to get his trunk in C. and deliver it to him in L., and the trunk having been delivered afterwards for plaintiff to a person who was acting as an agent employed by defendant to get it, defendant is liable for the loss.⁵⁵ One held out by a railroad company as its freight claim agent has authority to waive a requirement in a live stock contract that a claim for loss shall be verified by the affidavit of the shipper.⁵⁶ The agent of a terminal route who receives, hauls, and delivers consignment of goods, is in respect thereto an agent of the connecting line.⁵⁷ A railroad company is not bound by a promise made by the clerk of its auditor to pay the consignor for goods delayed in transportation, and subsequently refused by the consignee, in the absence of any evidence of his authority.⁵⁸ In the absence of the local agent at the station to which goods represented by a bill of lading are consigned, a demand upon any agent of the company in general control is sufficient to justify suit against the company for the goods.⁵⁹ The shipping report

53. Wm. H. Blessing & Co. v. Houston, etc., R. Co., (Tex. Civ. App.) 80 S. W. 639.

Where the contract between a carrier and a shipper, as evidenced by the bill of lading, is that the goods shall be transported over the carrier's line to a certain place, and delivered to another carrier for transportation to their destination, the receiving carrier is not bound by the statements of its station agent as to the rate that would be charged by the connecting carrier. McLagan v. Chicago, etc., R. Co., (Iowa) 89 N. W. 233.

54. Bernstein v. Weir, 40 Misc. Rep. (N. Y.) 635, 83 N. Y. Supp. 48.

55. Hamil v. New York, etc., Exp. Co., 177 Mass. 474, 59 N. E. 75.

56. Cleveland, etc., R. Co. v. Heath, 22 Ind. App. 47, 1 Repr. 752, 53 N. E. 198.

57. St. Louis, etc., R. Co. v. Elgin Condensed Milk Co., 175 Ill. 557, 51 N. E. 911.

58. Gulf, etc., R. Co. v. Jacobs, 3 Tex. Civ. App. 485, 23 S. W. 145.

59. Walters v. Western, etc., R. Co., 66 Fed. 862, affg. 63 Fed. 391.

signed by the plaintiff and the agent of the connecting line at the connecting point could not change or affect the written contracts between plaintiff and defendant.⁶⁰ Where a charter party provides a liability for demurrage for delay in unloading at a foreign port, which is within easy cable communication with the owner, the master cannot settle the claim for such demurrage for less than the sum due.⁶¹

§ 5. Carrier and insurance company.—The carrier may insure goods intrusted to it, not only for the amount of its special property in them, but for the full amount of their value, but in such case the amount of the insurance, over and above the amount due it by the owner for freight, advances, and any sums paid to the owner for the loss of or damage to the goods, inures to the benefit of the owner.⁶² And the carrier may stipulate with the owner that it shall be entitled to the benefit of any insurance which the shipper may have effected on the goods, and in such case may maintain the same action on the policy as the shipper himself might maintain.⁶³ But the carrier cannot insist upon the owner or shipper insuring the goods for its benefit as a condition precedent to its receiving the goods for transportation.⁶⁴ An underwriter is entitled to recover from the carrier money advanced under a policy of marine insurance where it appeared that there had been a loss due to negligence and the amount thereof was advanced by the underwriter as a loan.⁶⁵

60. San Antonio, etc., R. Co. v. Barnett, (Tex. Civ. App.) 66 S. W. 474.

61. Randall v. Brodhead, 60 App. Div. (N. Y.) 567, 70 N. Y. Supp. 43.

62. Waring v. Indemnity Fire Ins. Co., 45 N. Y. 606, 6 Am. Rep. 146; Savage v. Corn Exch. F., etc., Co., 4 Bosw. (N. Y.) 1, 36 N. Y. 655; Stillwell v. Staples, 19 N. Y. 401; Chase v. Washington Mut. Ins. Co., 12 Barb. (N. Y.) 595; Van Natta v. Mutual Security Ins. Co., 2 Sandf. (N. Y.) 490; Eastern R. Co. v. Relief F. Ins. Co., 98 Mass. 420; Phoenix Ins. Co. v. Erie, etc., Transp. Co., 10 Biss. (U. S.) 18; Pennifeather v. Baltimore Steam Packet Co., 58 Fed. 481; Minneapolis, etc., R. Co. v. Home Ins. Co., 55 Minn. 236.

63. Fayerweather v. Phoenix Ins.

Co., 118 N. Y. 324, and the assured cannot recover where he has accepted a bill of lading containing such a stipulation; Rintoul v. New York Cent., etc., R. Co., 17 Fed. 905, 21 Blatchf. (U. S.) 439; Hart v. Western R. Corp., 13 Metc. (Mass.) 99; British, etc., Ins. Co. v. Gulf, etc., R. Co., 63 Tex. 475; Missouri Pac. R. Co. v. International Marine Ins. Co., 84 Tex. 149. See also Liverpool, etc., Steam Co. v. Phœnix Ins. Co., 129 U. S. 397; Liverpool, etc., Steam Co. v. Ins. Co. of N. A., 129 U. S. 464.

64. Inman v. South Carolina R. Co., 129 U. S. 128; Insurance Co. of N. A. v. Easton, 73 Tex. 167. See also Willock v. Pennsylvania R. Co., 166 Pa. St. 184.

65. Bradley v. Lehigh Val. R. Co., (U. S. S. D. N. Y.) N. Y. Law Journal, March 10, 1906.

CHAPTER XII.

NEGLIGENCE OF CARRIER.

- S**ection 1. General rule of liability as to negligence of carrier.
2. Negligence must have been proximate cause of injury.
3. Negligence in stowage of goods.

§ 1. General rule of liability as to negligence of carrier.—By negligence is meant a failure to use such care and precaution as a person of ordinary care and prudence would use under like circumstances.¹ In order to maintain an action for injury to person or property arising from negligence, there must be shown to exist some obligation or duty toward the plaintiff which the defendant has left undischarged.² Every defendant is to be held liable for all those consequences which might have been seen and expected as the result of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into consideration.³ All distinctions in the degrees of negligence are

1. *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; *Patton v. Southern R. Co.*, 82 Fed. 979, 42 U. S. App. 567, 27 C. C. A. 287; *Missouri, etc., R. Co. v. Wood*, (Tex. Civ. App.) 81 S. W. 1187; *Hanlon v. Milwaukee*, etc., R. Co., (Wis.) 95 N. W. 100; *Louisville, etc., R. Co. v. Logsdon*, 24 Ky. L. Rep. 1566, 71 S. W. 905; *St. Louis, etc., R. Co. v. Brown*, (Tex. Civ. App.) 69 S. W. 1010; *Anderson v. Union Terminal R. Co.*, 161 Mo. 411, 61 S. W. 874; *Western, etc., R. Co. v. Vaughan*, 113 Ga. 354, 38 S. E. 851; *Bradley v. Ohio River*, etc., R. Co., 126 N. C. 735, 36 S. E. 181.

Ordinary care is the care and prudence of an ordinarily prudent man. *Ford v. Kansas City*, 181 Mo. 137, 79 S. W. 923. Such care as an ordinarily prudent person exercises

on any and all occasions, and not such as such a person usually exercises. *Chicago City R. Co. v. Schuler*, 111 Ill. App. 470.

2. *Cleveland, etc., R. Co. v. Cline*, 111 Ill. App. 416; *Baltimore, etc., R. Co. v. Cox*, 66 Ohio St. 276, 64 N. E. 119; *Hunter v. Kansas City, etc., R. Co.*, 85 Fed. 379, 54 U. S. App. 653, 29 C. C. A. 206; *Rosen v. Chicago*, etc., R. Co., 83 Fed. 300, 49 U. S. App. 647, 27 C. C. A. 534; *Baltimore, etc., R. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161; *Cleveland, etc., R. Co. v. Ballentine*, 84 Fed. 935, 56 U. S. App. 266, 28 C. C. A. 572.

3. *Loftus v. Union Ferry Co.*, 84 N. Y. 455, 38 Am. Rep. 533; *Hubbell v. Yonkers*, 104 N. Y. 434, 58 Am. Rep. 522; *Cleveland, etc., R. Co. v.*

now generally disregarded by the courts, it being held that the terms slight, ordinary and gross negligence can no longer be usefully applied in practice.⁴ Wanton or wilful negligence is such a gross want of care and regard for the rights of others as to imply a total disregard of consequences or a willingness or intention to inflict injury; and whether a particular act is wanton or wilful negligence is largely dependent on the particular circumstances of each case.⁵ There is no fixed and invariable rule for determining the duty of the carrier in respect to the care required of it in the transportation of property other than that it is required to use reasonable care and diligence for the proper and safe carriage and delivery of the property, and what is reasonable, as to care, speed, priority of transportation, etc., is necessarily dependent upon the circumstances and conditions attending each particular case, such as the nature and condition of the goods, the conditions of traffic, the state of the weather, etc.⁶ It is bound to protect the goods it

Lindsay, 109 Ill. App. 533; Gossa v. Southern Ry., 67 S. C. 347, 45 S. E. 810; Indianapolis St. Ry. Co. v. Darnell, 1 St. Ry. Rep. 237, (Ind. App.) 68 N. E. 609, it will not be inferred when the result of wrongful conduct may reasonably be attributed to negligence or inattention; Kirby v. Delaware, etc., Canal Co., 20 App. Div. (N. Y.) 473, 46 N. Y. Supp. 777; New Orleans, etc., R. Co. v. McEwen & Murray, 49 La. Ann. 1184, 38 L. R. A. 134, 7 Am. & Eng. R. Cas. N. S. 742, 22 So. 675; Mars v. Delaware, etc., Canal Co., 54 Hun (N. Y.) 625; Dicken v. Liverpool, etc., Co., 41 W. Va. 511; Charlebois v. Gogebie, etc., R. Co., 91 Mich. 59.

4. Magrane v. St. Louis, etc., R. Co., 183 Mo. 119, 81 S. W. 1158; Perkins v. New York Cent. R. Co., 24 N. Y. 196; Briggs v. Taylor, 28 Vt. 180; Stringer v. Alabama, etc., R. Co., 99 Ala. 397, 13 So. 75; Purple v. Union Pac. R. Co., 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700; Denver, etc., R. Co. v. Peterson, (Colo.) 69 Pac. 578; Steamboat New World v. King,

16 How. (U. S.) 474; Milwaukee, etc., R. Co. v. Arms, 91 U. S. 495; New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357; Hinton v. Dibble, 2 Ad. & El. N. S. 661, 42 E. C. L. 661; Nellis St. Rd. Acct. Law, 22, 23. But see Belt Ry. Co. v. Banicki, 102 Ill. App. 642; Illinois Cent. R. Co. v. Stewart, 23 Ky. L. Rep. 637, 63 S. W. 596; Chesapeake, etc., R. Co. v. Board, 25 Ky. L. R. 1118, 77 S. W. 189; Chesapeake, etc., R. Co. v. Dodge, 23 Ky. L. Rep. 1959, 66 S. W. 606.

5. Cleveland, etc., R. Co. v. Cline, 111 Ill. App. 416; Chicago, etc., Transfer R. Co. v. Gruss, 102 Ill. App. 439, 200 Ill. 195, 65 N. E. 693; Alabama, etc., R. Co. v. Moorer, 116 Ala. 642, 22 So. 900, 9 Am. & Eng. R. Cas. N. S. 742.

6. Wibert v. New York, etc., R. Co., 12 N. Y. 245; Tierney v. New York Cent., etc., R. Co., 76 N. Y. 305; Swetland v. Boston, etc., R. Co., 102 Mass. 276; Peet v. Chicago, etc., R. Co., 20 Wis. 594; American Express Co. v. Smith, 33 Ohio St. 511, 31 Am.

carries from unreasonable hazards, from extrinsic dangers;⁷ to handle with special care fragile goods whose character is indicated on the package;⁸ to exercise due care that goods are not improperly exposed to the elements;⁹ to use reasonable care for the preservation of perishable goods;¹⁰ to exercise reasonable diligence to ascertain early means of forwarding goods to their destination;^{10a} and it is not relieved from its duty or responsibility by the fact that the purpose of the shipper is an unlawful one,¹¹ or that the shipment is made in violation of a statute prohibiting the shipment or unloading of goods on Sunday.¹² Except where the facts are not disputed and but one conclusion can be drawn from them, it is always a question of fact for a jury to determine whether or not the loss or damage is the result of the carrier's negligence.¹³ The primary duty of a common carrier is to observe the instructions of the shipper and it is liable for any loss occasioned by its disobeying the shipper's express directions.¹⁴ And it cannot be charged with negligence where it transports and handles goods in the manner directed and according to instructions by the shipper.¹⁵ It is not liable where it carries the goods

Rep. 361; Illinois Cent. R. Co. v. McClellan, 54 Ill. 58, 5 Am. Rep. 83; Cunningham v. Great Northern R. Co., 49 L. T. N. S. 394, 16 Am. & Eng. R. Cas. 254.

7. Tanner v. New York Cent., etc., R. Co., 108 N. Y. 623, 32 Am. & Eng. R. Cas. 380.

8. Hastings v. Pepper, 11 Pick. (Mass.) 41.

9. Williams v. Morgan, 32 La. Ann. 168; Western, etc., R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 35 Am. & Eng. R. Cas. 602.

10. Wing. v. New York, etc., R. Co., 1 Hilt. (N. Y.) 235.

10a. McKay v. New York Cent., etc., R. Co., 50 Hun. (N. Y.) 563, 3 N. Y. Supp. 708.

11. Waters v. Richmond, etc., R. Co., 110 N. C. 338.

12. Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292; Shelton v. Merchants Despatch Transp. Co., 59 N. Y. 258, 48 How. Pr. (N. Y.) 257;

Wilde v. Merchants Despatch Transp. Co., 47 Iowa, 272.

13. Tanner v. New York Cent., etc., R. Co., 108 N. Y. 623, 32 Am. & Eng. R. Cas. 380, 1 Silv. (N. Y.) 569; Buck v. Pennsylvania R. Co., 150 Pa. St. 170, 30 Am. St. Rep. 800, 61 Am. & Eng. R. Cas. 207; Udell v. Illinois Cent. R. Co., 13 Mo. App. 254; Witting v. St. Louis, etc., R. Co., 101 Mo. 631, 20 Am. St. Rep. 636, 45 Am. & Eng. R. Cas. 369; Perishable Freight Transp. Co. v. O'Neill, 41 Ill. App. 423; Geo. C. Vagley Elevator Co. v. American Express Co., 63 Minn. 142; Congar v. Galena, etc., R. Co., 17 Wis. 477.

14. Johnson v. New York Cent. R. Co., 33 N. Y. 610, 88 Am. Dec. 416; Pavitt v. Lehigh Valley R. Co., 153 Pa. St. 302; Sager v. Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659; Mellier v. St. Louis, etc., Transp. Co., 14 Mo. App. 281.

15. Ross v. Troy, etc., R. Co., 49

in the only method practicable under the circumstances and conditions.¹⁶ That goods were carefully and securely packed when delivered to the carrier, and were in a badly damaged condition when received at their destination, raises the inference that they were not transported with ordinary care.¹⁷ On the other hand, evidence is admissible which shows that such injuries were usual to such articles so shipped, in order to prove that the injuries were not caused by the negligence of the carrier.¹⁸ Whether the shipment of goods in open cars or boats is negligent or not is to be determined from all the other circumstances of the case;¹⁹ and the custom of well managed railroads or vessels is admissible to show that such method of transportation is not necessarily negligent.²⁰ Where the contract specially provides for shipment in open cars, the carrier is still bound to use all reasonable appliances to prevent loss, and is liable for damages resulting from a failure to do so.²¹ And notice to the consignor of such intended shipment will not relieve the carrier from liability, if actual negligence be shown.²²

§ 2. Negligence must have been proximate cause of injury.— The breach of duty on which an action for loss or injury can be maintained must be the proximate cause of the loss or injury sustained; and the proximate cause of an event is that which, in a natural and continuous sequence, unbroken by any new and

Vt. 364, 24 Am. Rep. 144; Miltimore v. Chicago, etc., R. Co., 37 Wis. 190; Sloan v. St. Louis, etc., R. Co., 58 Mo. 220; Central R., etc., Co. v. Anderson, 58 Ga. 393, 16 Am. Ry. Rep. 85.

16. Burwell v. Raleigh, etc., R. Co., 94 N. C. 451, 25 Am. & Eng. R. Cas. 410.

17. Phoenix Clay Pot Works v. Pittsburgh, etc., R. Co., 139 Pa. St. 284, 27 W. N. C. 321, 20 Atl. 1058.

18. Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49.

19. Insurance Co. of N. A. v. St. Louis, etc., R. Co., 11 Fed. 380, 3 McCrary (U. S.) 233; Western, etc., R. Co. v. Exposition Cotton Mills, 81

Ga. 522; Chevalier v. Patton, 10 Tex. 344.

20. Louisville, etc., R. Co. v. Manchester Mills, 88 Tenn. 653; Kelton v. Taylor, 11 Lea (Tenn.) 264, 47 Am. Rep. 284; Rich v. Lambert, 12 How. (U. S.) 352; Clark v. Barnwell, 12 How. (U. S.) 279.

21. Chicago, etc., R. Co. v. Moss, 60 Miss. 1003, 45 Am. Rep. 428, 21 Am. & Eng. R. Cas. 98; Louisville, etc., R. Co. v. Natchez, etc., R. Co., 67 Miss. 399, 43 Am. & Eng. R. Cas. 54.

22. Montgomery, etc., R. Co. v. Edmonds, 41 Ala. 667; New Orleans, etc., R. Co. v. Falter, 58 Miss. 912.

independent cause, produces that event and without which that event would not have occurred.²³ As a general rule, the question of proximate cause is for the jury.²⁴

§ 3. Negligence in stowage of goods.—In the case of carriers by water, if due care, skill and diligence are not used in and about the stowage of the cargo, the carrier is liable for the consequences.²⁵ But a loss from stowage is not necessarily a loss from negligence, since it may be necessary in order to load the ship suitably for her intended voyage to place particular goods in a certain place, or articles whose dangerous character is unknown may be stowed in a usual and safe manner near other goods which are injured by them, without actual fault being imputed to the shipper or the carrier.²⁶ A “clear” bill of lading, or one which is silent as to the place of stowage, imports a contract that the goods are to be stowed under deck, and where the goods are stowed on deck, the carrier is liable, unless it can show that the goods were of a description which by the usage of the particular trade or general commercial usage are properly stowed in that way.²⁷ But, under such a bill of lading, a large coasting steamer carrying cotton between the main and upper decks, enclosed by iron bulwarks and wooden shutters and bulkheads, customarily used for that purpose, is not liable for injury from sea water caused by an unusual storm, which flooded the ship and broke down the bulkhead and shutters.²⁸ What will or will not constitute negligent stowage is

23. Lowery v. Manhattan Ry. Co., 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12; Hofnagel v. New York Cent., etc., R. Co., 55 N. Y. 612; Cleveland, etc., R. Co. v. Lindsay, 109 Ill. App. 533; Cleveland, etc., R. Co. v. Carey, (Ind. App.) 71 N. E. 244; Scott v. Allegheny Valley R. Co., 172 Pa. St. 646, 37 W. N. C. (Pa.) 458, 33 Atl. 712; Deming v. Merchants Cotton-press, etc., Co., 90 Tenn. 306; Martin v. St. Louis, etc., R. Co., 55 Ark. 510; McAlister v. Chicago, etc., R. Co., 74 Mo. 351, 4 Am. & Eng. R. Cas. 210. See Nellis Street Railroad Accident Law, pp. 24 to 35.

24. Cox v. London, etc., R. Co., 3 F. & F. 77.

25. Nelson v. National Steamship Co., 7 Ben. (U. S.) 340; The Maggie M., 30 Fed. 692; Paturzo v. Compagnie Francaise, 31 Fed. 611; The Bitterne, 35 Fed. 927; The Glamorganshire, 50 Fed. 840.

26. Pierce v. Winsor, 2 Cliff. (U. S.) 18.

27. The Delaware, 14 Wall. (U. S.) 579; Sproat v. Donnell, 26 Me. 185; Lapham v. Atlas Insurance Co., 24 Pick. (Mass.) 1; Rich v. Lambert, 12 How. (U. S.) 347.

28. The William Crane, 50 Fed. 444.

generally a question of fact. Evidence of the customary mode of stowage is admissible on this question.²⁹ Where the carrier has no knowledge of and no reason to suspect the dangerous character of the contents of a package, it is not liable for injuries resulting from the explosion of substances delivered to it for transportation, in the absence of proof of negligence on its part.³⁰ It is bound to use the same degree of care that merchants or insurers would exercise in handling such substances where their dangerous character is known,³¹ but the burden is on the shipper to prove that an explosion was the result of negligence or improper transportation on the part of the carrier.³²

29. Paturzo v. Campagne Francaise, 31 Fed. 611; The Chasca, 23 Fed. 156; The Invincible, 1 Lowell (U. S.) 225; Baxter v. Leland, 1 Abb. Adm. (U. S.) 348; The Portuense, 35 Fed. 670; Lamb v. Parkman, 1 Sprague (U. S.) 343.

A vessel is liable for damages to cargo caused by water in the hold, not removed because the pumps were in bad condition, and reasonable care was not taken to ascertain the depth

of the water or to remove it by other means. The Euripides, 52 Fed. 161.

30. Nitro-glycerine Case, 17 Wall. (U. S.) 524.

31. White v. Colorado Cent. R. Co., 5 Dill (U. S.) 428, 3 McCrary (U. S.) 559; Henry v. Cleveland, etc., R. Co., 67 Fed. 426.

32. Walker v. Chicago, etc., R. Co., 71 Iowa, 658, 30 Am. & Eng. R. Cas. 173.

CHAPTER XIII.

CONTRIBUTORY NEGLIGENCE OF SHIPPER.

- SECTION 1. Contributory negligence of shipper generally.
2. Defective packing or marking.
 3. Goods improperly loaded.
 4. Liability of shipper or consignee to carrier for negligence in unloading.
 5. Liability of shipper for injury caused by goods of dangerous character.

§ 1. **Contributory negligence of shipper generally.**—A shipper of goods perishable in their nature or susceptible of easy breakage must take extra care in packing and boxing, and a carrier is not liable for injury or damage to goods from insecure or imperfect packing or boxing.¹ A consignor cannot recover for loss of perishable goods shipped in bad condition, even though the carrier's negligence contributed to the loss, unless by ordinary care the former could not have avoided the consequences of the latter's negligence.² Where goods are shipped under a contract between the owner and the carrier by which the owner or his servant are to accompany the property and take care of it, the carrier will not incur any liability for the loss of the goods resulting from the shipper's breach of the contract or negligence in its performance.³

1. Goodman v. Oregon R., etc., Co., 22 Or. 14, 49 Am. & Eng. R. Cas. 87; Shriver v. Sioux City, etc., R. Co., 24 Minn. 506, 31 Am. Rep. 353, but it is liable for injuries occurring independently of the defective packing; Barbour v. South Eastern R. Co., 34 L. T. N. S. 67; Truax v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 233; Culbreth v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 392; Klauber v. American Express Co., 21 Wis. 21, 91 Am. Dec. 452.

2. Reed v. Philadelphia, etc., R.

Co., 3 Houst. (Del.) 176; American Express Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561; Illinois Cent. R. Co. v. McClellan, 54 Ill. 58, 5 Am. Rep. 83; Baldwin v. London, etc., R. Co., 9 Q. B. Div. 582, 9 Am. & Eng. R. Cas. 175.

3. Hart v. Chicago, etc., R. Co., 56 Iowa, 166, 41 Am. Rep. 93, 27 Am. & Eng. R. Cas. 59; Purcell v. Southern Express Co., 34 Ga. 315, 37 Ga. 103, 92 Am. Dec. 53; Willoughby v. Horridge, 12 C. B. 742, 74 E. C. L. 742, 17 Jur. 323.

The conduct of the shipper will not be held negligent *per se*, unless such negligence is the only inference that can be fairly drawn from the facts.⁴ When the evidence is conflicting as to the negligence of the shipper and as to whether such negligence was the proximate cause of the loss, the questions are properly for the jury.⁵ So, where there is a question as to whether the negligence of the carrier or that of the shipper caused the injury, it is for the jury to say which default was the proximate cause of the loss.⁶

§ 2. Defective packing or marking.—The fact that an article was not properly packed, when delivered to a common carrier, does not reduce its liability to that of a bailee for hire, or exempt it from making proof that a loss alleged was not attributable to its negligence.⁷ Carrying goods in a manifestly unsafe condition is negligence, and where the carrier has failed to exercise its right to refuse to transport goods defectively packed, where the defect is visible, it becomes liable, if the goods are damaged, although partly through the packing; and the defective packing only goes in reduction of damages.⁸ The carrier is not liable for errors or defects in marking or direction by reason of which goods cannot be sent to the right person or destination or may be sent to a wrong person or destination,⁹ even where the carrier addresses them wrongly by the shipper's direction.¹⁰ But the carrier has a right and it is its duty to refuse to receive the goods, if it knows the address to be insufficient or erroneous, and if it consents to carry them after notice of their imperfect marking, it assumes

4. St. Louis, etc., R. Co. v. Philadelphia Fire Assoc., 55 Ark. 163, 18 S. W. 43.

5. Cobb v. Illinois Cent. R. Co., 38 Iowa, 601.

6. Purcell v. Southern Express Co., 34 Ga. 315.

7. Union Express Co. v. Graham, 26 Ohio St. 595. See Van Horn v. Taylor, 2 La. Ann. 587, 46 Am. Dec. 558; Nelson v. Stephenson, 5 Duer (N. Y.) 538.

8. McCarthy v. Louisville, etc., R. Co., 102 Ala. 193, 48 Am. St. Rep. 29, 61 Am. & Eng. R. Cas. 178; Hig-

ginbotham v. Great Northern R. Co., 10 W. R. 358.

9. Congar v. Chicago, etc., R. Co., 24 Wis. 157, 1 Am. Rep. 164; Stimson v. Jackson, 58 N. H. 138; Lake Shore, etc., R. Co. v. Hodapp, 83 Pa. St. 22, 16 Am. Ry. Rep. 167; The Huntress, Davies (U. S.) 82; Southern Express Co. v. Kaufman, 12 Heisk. (Tenn.) 161; Finn v. Western R. Corp., 102 Mass. 283.

10. Erie R. Co. v. Wilcox, 84 Ill. 239, 16 Am. Ry. Rep. 457, 25 Am. Rep. 451.

responsibility for a safe and proper delivery.¹¹ And the carrier should re-mark the goods, if necessary to insure safe delivery, where it has knowledge of the correct address and gives a bill of lading and the goods are imperfectly marked, or it will be responsible for loss or misdelivery.¹² So where the defective marking is due to the carrier's fault, or if the marking becomes illegible through its fault.¹³ But, in such cases, in order to exonerate the carrier, it is necessary that the negligence of the shipper should contribute to the loss, and whether or not it does is a question of fact for the jury.¹⁴

§ 3. Goods improperly loaded.—The carrier is not responsible for loss of or injury to goods occasioned by their being improperly loaded on the cars by the shipper. Where the shipper loaded heavy machinery upon a platform car, and blocked its wheels with insufficient blocking insecurely nailed, by reason whereof the machinery, while being transported by the carrier, broke from its fastenings without fault of the carrier in the running of the train, or in the maintenance of the track, and was injured, the carrier was not liable therefor, although its yard master and forwarder of freight cars saw the fastenings, and noticed their insufficiency, before the injury was done.¹⁵ But an answer by a carrier sued by a consignee for a failure to deliver goods which it agreed to transport to him at a certain destination, setting up negligence on the part of the owner and consignor in the mode of loading the goods on the car, is bad where it does not allege that such fault of the owner was the sole cause of the loss of the goods; contributory negligence on the owner's part not being a valid defence.¹⁶

11. O'Rourke v. Chicago, etc., R. Co., 44 Iowa, 526; Gulf, etc., R. Co. v. Maetze, 2 Tex. App. Civ. Cas., § 631, 18 Am. & Eng. R. Cas. 613.

12. Guillaume v. General Transp. Co., 100 N. Y. 491; Kreuder v. Woolcott, 1 Hilt. (N. Y.) 223; Richmond, etc., R. Co. v. Benson, 86 Ga. 203, 22 Am. St. Rep. 446; Wright v. Northern Cent. R. Co., 8 Phila. (Pa.) 19; Mahon v. Blake, 125 Mass. 477.

13. Meyer v. Chicago, etc., R. Co., 24 Wis. 566, 1 Am. Rep. 207; Foard

v. Atlantic, etc., R. Co., 8 Jones L. (N. C.) 235, 78 Am. Dec. 277; Forsythe v. Walker, 9 Pa. St. 148.

14. Viner v. New York, etc., R. Co., 50 N. Y. 23; Hutchinson v. Chicago, etc., R. Co., 37 Minn. 524, 35 N. W. 433; Shriver v. Sioux City, etc., R. Co., 24 Minn. 506.

15. Ross v. Troy, etc., R. Co., 49 Vt. 364, 24 Am. Rep. 144. See also Van Horn v. Taylor, 2 La. Ann. 587, 46 Am. Dec. 558.

16. McCarthy v. Louisville, etc., R.

§ 4. Liability of shipper or consignee to carrier for negligence in unloading.—A railroad company may recover from a customer to whom it has delivered on a side track a car of lumber safely fastened, for negligence of the latter in leaving it partially unloaded and with the supports removed, in consequence of which the lumber falls or is blown upon the adjacent track, causing injury to an approaching train. The failure of the carrier to keep a watchman at the side track and the fact that the lumber was transported on a flat car and not on a lumber car did not constitute contributory negligence preventing a recovery. In such a case the carrier having no knowledge or notice of the danger, owed no duty whatever to act upon the assumption that the danger might exist, and thus take affirmative measures to protect itself against any wrong which the owner of the goods might inflict upon it.¹⁷

§ 5. Liability of shipper for injury caused by goods of dangerous character.—One who has in his possession a dangerous article, which he desires to send to another, may send it by a common carrier if it will accept and carry it; but it is his duty to give the carrier notice of its character, so that it may either refuse to take it, or be enabled, if it takes it, to make suitable provision against danger. The omission to give the carrier such notice is an act of negligence which will render the shipper liable for all damages arising from explosion of the articles shipped, and the carrier will not be presumed to have had knowledge of the nature of the contents of the package where there are no attendant circumstances to arouse its suspicions as to their true character.¹⁸ The duty does not arise from any contract, express or implied, but

Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29, 61 Am. & Eng. R. Cas. 178. See also Carriers of live stock, chap. 18. A witness who properly qualifies himself may give his opinion, in such action, that the cars were "well and carefully loaded." Id.

17. New York, etc., R. Co. v. Atlantic Refining Co., 129 N. Y. 597, 49 Am. & Eng. R. Cas. 131, revg. 13 N. Y. Supp. 466. See also Chapman v. Atlantic Refining Co., 108 N. Y. 638, 38 Hun (N. Y.) 637.

18. Barney v. Burnstenbinder, 64

Barb. (N. Y.) 212, 7 Lans. (N. Y.) 210; Nitro-glycerine Case, 15 Wall. (U. S.) 524; Boston, etc., R. Co. v. Shanly, 107 Mass. 568, 3 Am. Ry. Rep. 396, 12 Am. L. Reg. N. S. 500; Standard Oil Co. v. Tierney, 92 Ky. 367, 36 Am. St. Rep. 595, 49 Am. & Eng. R. Cas. 117; Herne v. Garton, 2 El. & El. 66, 105 E. C. L. 66, 5 Jur. N. S. 648; Brass v. Maitland, 6 El. & Bl. 471; 88 E. C. L. 471; Farrant v Barnes, 11 C. B. N. S. 557, 103 E. C. L. 557, 8 Jur. N. S. 868.

from the principle expressed in the maxim, *Sic utere tuo ut alienum non laedas.*¹⁹ The principal is liable if the article is shipped by his agent.²⁰ The shipper is not liable where the carrier had been informed of the nature of the package either directly or by the marking of the package, even though an employe of the carrier had no knowledge of its dangerous character, if the injury could have been avoided by the exercise of ordinary care and prudence.²¹ Where a contractor of blasting ordered a manufacturer to send him a quantity of dynamite, and another to send him certain exploders. Each manufacturer, without the other's knowledge, delivered the respective articles to a carrier, who was ignorant of the danger of combining the two substances, which, while being transported with due care, exploded, injuring the property of the carrier, and the goods of a third party. It was impossible to distinguish what proportion of the explosion was caused by either substance. It was held that the two manufacturers, but not the contractor, were jointly liable in tort, to the carrier and to the third party, and the fact that the omission of the shipper's agent to give notice of the dangerous character of the articles was a criminal or illegal act, did not affect the principal's liability for damages in a civil action.²² There is an implied contract on the part of the shipper that his goods are not of such a character as to cause injury, and the knowledge of the agent of the shipper is the knowledge of the principal, although such knowledge must be shown in order to fix liability upon the latter.²³ In a recent

19. Boston, etc., R. Co. v. Shanly, *supra*; Wellington v. Downer Kerosene Oil Co., 104 Mass. 64; Carter v. Towne, 98 Mass. 567, 96 Am. Dec. 682.

20. Barney v. Burnstenbinder, *supra*; Thomas v. Winchester, 6 N. Y. 397.

21. Standard Oil Co. v. Tierney, (Ky.) 27 S. W. 983, 16 Ky. L. Rep. 327, revg. 92 Ky. 367, 36 Am. St. Rep. 595, 49 Am. & Eng. R. Cas. 117, 17 S. W. 1025, 13 Ky. L. Rep. 626, 11 Ry. & Corp. L. J. 92.

A subsequent change in the manner of branding cannot be proved in an action for negligence in shipping

it improperly branded. *Id.*; Morse v. Minneapolis, etc., R. Co., 30 Minn. 465, 11 Am. & Eng. R. Cas. 168; Lang v. Sanger, 76 Wis. 71; Nalley v. Hartford Carpet Co., 51 Conn. 524, 50 Am. Rep. 47; Terre Haute, etc., R. Co. v. Clem, 123 Ind. 15, 18 Am. St. Rep. 303, 42 Am. & Eng. R. Cas. 229.

22. Boston, etc., R. Co. v. Shanly, *supra*. In the Nitro-Clycerine Case, the carrier was held not liable to third parties.

23. Barney v. Burnstenbinder, *supra*; Jeffrey v. Bigelow, 13 Wend. (N. Y.) 518.

case it has been held that illuminating gas, compressed into steel cylinders of insufficient strength to hold it, though liable to explode by its tendency to expand when heated, is not within the provisions of the United States statutes, forbidding the carriage on passenger vessels of camphene, nitro glycerine, benzine, benzole, coal oil, crude or refined petroleum, or "other like explosive burning fluids or like dangerous articles," as the danger lies not in the gas itself, but in the weakness of the vessel containing it.²⁴

24. Russell v. New Jersey Steam-boat Co., 10 Misc. Rep. (N. Y.) 593, 32 N. Y. Supp. 824.

CHAPTER XIV.

PRESUMPTIONS AND BURDEN OF PROOF.

- SECTION**
1. Presumptions and burden of proof generally.
 2. Presumption as to state of goods when received.
 3. Defense of loss by the act of God.
 4. Where goods lost consist of several kinds.
 5. Where liability is limited by special contract.
 6. Proof of loss by fire under contract limiting liability.
 7. Where carrier is merely a warehouseman.

§ 1. Presumptions and Burden of proof generally.—In an action against a carrier for loss of or injury to goods the burden rests upon the plaintiff to show by affirmative proof the delivery of the goods to the carrier, their nature and condition, and that they were in fact in good order when received by the carrier.¹ There is no presumption that the goods were in good order when received by the carrier.² The receipt of the carrier for the goods as being “in apparent good order” raises no presumption whatever against the carrier as to the actual condition of the goods when received, and does not relieve the plaintiff of the burden of showing such condition, and that the goods were in fact in good order when received by the carrier. Such words in a receipt by the carrier refer only to the outward appearance of the package.³

1. Smith v. New York Cent. R. Co., 43 Barb. (N. Y.) 225, affd. 41 N. Y. 620; Hoffberg v. Bumford, 88 N. Y. Supp. 940; Canfield v. Baltimore, etc., R. Co., 46 N. Y. Super. Ct. 238; Louisville, etc., R. Co. v. Echols, 97 Ala. 556; Reubens v. Ludgate Hill Steamship Co., 20 N. Y. Supp. 481; Wing v. New York, etc., R. Co., 1 Hilt. (N. Y.) 235; Peebles v. Boston, etc., R. Co., 112 Mass. 498; Missouri Pac. R. Co. v. Douglass, 2 Tex. App. Civ. Cas., § 28, 16 Am. & Eng. R. Cas. 98.

Delivery of the whole of a con-

signment may be presumed from the delivery of a part. Union Pacific R. Co. v. Hepner, 3 Colo. App. 313; Savannah, etc., R. Co. v. Steininger, 84 Ga. 579.

2. Brooks v. Dinsmore, 3 St. Rep. (N. Y.) 587; Lake Shore Nitro-glycerine Co. v. Illinois Cent. R. Co., 75 Ill. 394; Marquette, etc., R. Co. v. Kirkwood, 45 Mich. 51, 40 Am. Rep. 453. See Rice v. Indianapolis, etc., R. Co., 3 Mo. App. 27. Compare Breed v. Mitchell, 48 Ga. 533.

3. Thyll v. New York, etc., R. Co., 92 App. Div. (N. Y.) 513, 87 N. Y.

The burden of proof is also on the plaintiff to show by affirmative evidence non-delivery or a failure of the carrier to deliver them at their destination in good order.⁴ When there has been a loss or injury of goods in shipment by the carrier, such proof is sufficient to establish a *prima facie* case against the carrier, and, in the absence of a contract limiting its liability, the burden of proof is then upon the carrier to show affirmatively that the loss or injury resulted from a cause for which it was not responsible, such as the act of God or the public enemy;⁵ or that the shipment

Supp. 345, modg. 84 N. Y. Supp. 175; Miller v. Hannibal, etc., R. Co., 90 N. Y. 430, 43 Am. Rep. 179; Clark v. Barnell, 12 How. (U. S.) 272, 13 L. Ed. 985; Roth v. Hamburg-American Packet Co., 59 N. Y. Super. Ct. 49; St. Louis, etc., R. Co. v. Neel, 56 Ark. 279; Chicago, etc., R. Co. v. Benjamin, 63 Ill. 283; Burwell v. Raleigh, etc., R. Co., 94 N. C. 451; Gulf, etc., R. Co. v. Holder, 10 Tex. Civ. App. 223.

4. Blum v. Monahan, 36 Misc. Rep. (N. Y.) 179, 73 N. Y. Supp. 162; Roberts v. Chittenden, 88 N. Y. 33; Mouton v. Louisville, etc., R. Co., (Ala.) 29 So. 602; Chicago, etc., R. Co. v. Dickinson, 74 Ill. 249; Chicago, etc., R. Co. v. Provine, 61 Miss. 288; Day v. Ridley, 16 Vt. 48; Hot Springs R. Co. v. Hudgins, 42 Ark. 485, plaintiff is relieved from this necessity where the carrier pleads non-receipt of the goods; Ingledew v. Northern R. Co., 7 Gray (Mass.) 86; Armstrong v. Chicago, etc., R. Co., 62 Mo. App. 639; Galveston, etc., R. Co. v. Gildea, 2 Tex. App. Civ. Cas., § 271.

5. N. Y.—Park v. Preston, 108 N. Y. 434; Bowden v. Fargo, 2 Misc. Rep. (N. Y.) 551; Colt v. McMechen, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200; Campe v. Weir, 28 Misc. Rep. (N. Y.) 243, 58 N. Y. Supp. 1082; Reiser v. Metropolitan Express Co.,

91 N. Y. Supp. 170; Rind v. Stake, 28 Misc. Rep. (N. Y.) 177, 59 N. Y. Supp. 42; Lockwood v. Manhattan, etc., Warehouse Co., 28 App. Div. (N. Y.) 68, 50 N. Y. Supp. 974; Westcott v. Fargo, 63 Barb. (N. Y.) 349; Canfield v. Baltimore, etc., R. Co., 93 N. Y. 532, 45 Am. Rep. 268, 16 Am. & Eng. R. Cas. 162, holding “the law to have been settled beyond controversy that proof of the non-delivery of property by a bailee upon demand, unexplained, makes out a *prima facie* case of negligence against such bailee in the care and custody of the thing bailed, and, in the absence of any evidence on his part, excusing such non-delivery, presents a question of fact as to the negligence of the bailee for the consideration of the jury. Steers v. Liverpool, etc., Steamship Co., 57 N. Y. 6, 15 Am. Rep. 453; Magnin v. Dinsmore, 56 N. Y. 168; Burnell v. New York Cent. R. Co., 45 N. Y. 185, 6 Am. Rep. 61; Fairfax v. New York Cent., etc., R. Co., 67 N. Y. 11; Clafin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Schmidt v. Blood, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143; Moore v. Evans, 14 Barb. (N. Y.) 524. The principle upon which this rule is founded embraces as well the case of a partial as of a total failure to deliver the subject of a bailment.” See also Place v. Union Express Co., 2 Hilt. (N. Y.) 19, apply

was such that it was only liable for negligence, as that the goods

ing the rule in an action for delay in delivery.

U. S..—*Cumming v. Barracouta*, 40 Fed. 498; *Western Mfg. Co. v. The Guiding Star*, 37 Fed. 641; *Woodward v. Illinois Cent. R. Co.*, 1 Biss. (U. S.) 403; *The Samuel E. Spring*, 29 Fed. 397.

Ala..—*Mouton v. Louisville, etc., R. Co.*, (Ala.) 29 So. 602; *Richmond, etc., R. Co. v. Grousdale*, 99 Ala. 389; *Alabama G. S. R. Co. v. Little*, 71 Ala. 611; *South, etc., Alabama R. Co. v. Wood*, 66 Ala. 167.

Cal..—*Wilson v. California Cent. R. Co.*, 94 Cal. 166.

Conn..—*Mears v. New York, etc., R. Co.*, (Conn.) 52 Atl. 610, 56 L. R. A. 884; *Boies v. Hartford, etc., R. Co.*, 37 Conn. 272.

Fla..—*Savannah, etc., R. Co. v. Harris*, 26 Fla. 148.

Ga..—*Georgia R. etc., Co. v. Reener*, 93 Ga. 808; *Purcell v. Southern Express Co.*, 34 Ga. 315; *Central R. Co. v. Hasselkus*, 91 Ga. 382.

Ill..—*Chesapeake, etc., R. Co. v. Radbourne*, 52 Ill. App. 203.

Ind..—*Pennsylvania Co. v. Livright*, 14 Ind. App. 518.

Iowa.—*Winne v. Illinois Cent. R. Co.*, 31 Iowa, 583; *Angle v. Mississippi, etc., R. Co.*, 18 Iowa, 555; *St. Clair v. Chicago, etc., R. Co.*, 80 Iowa, 304, delay in delivery.

La..—*Chapman v. New Orleans, etc., R. Co.*, 21 La. Ann. 224; *Tardos v. Toulon*, 14 La. Ann. 429.

Me..—*Dow v. Portland Steam Pack-et Co.*, 84 Me. 490; *Bennett v. American Express Co.*, 83 Me. 236; *Little v. Boston, etc., R. Co.*, 66 Me. 239.

Mass..—*Alden v. Pearson*, 3 Gray (Mass.) 342.

Minn..—*Boehl v. Chicago, etc., R. Co.*, 44 Minn. 191; *Hull v. Chicago*,

etc., R. Co., 41 Minn. 510; *Smith v. St. Paul City R. Co.*, 32 Minn. 1.

Mo..—*George v. Chicago, etc., R. Co.*, 57 Mo. App. 358; *Heck v. Missouri Pac. R. Co.*, 51 Mo. App. 532; *Hance v. Pacific Express Co.*, 48 Mo. App. 179; *Davis v. Wabash, etc., R. Co.*, 89 Mo. 340; *Buddy v. Wabash, etc., R. Co.*, 20 Mo. App. 206; *Green v. Indianapolis, etc., R. Co.*, 56 Mo. 556; *Degge v. American Express Co.*, 2 Mo. App. Rep. 904.

N. H..—*Hall v. Cheney*, 36 N. H. 26.

N. J..—*Hunt v. Morris*, 12 N. J. L. 175.

Pa..—*Buck v. Pennsylvania R. Co.*, 150 Pa. St. 170; *Grogan v. Adams Express Co.*, 114 Pa. St. 523; *Adams Express Co. v. Holmes*, (Pa.) 9 Atl. 166; *New York Cent., etc., R. Co. v. Eby*, (Pa.) 12 Atl. 482; *Pennsylvania R. Co. v. Miller*, 87 Pa. St. 395; *Empire Transp. Co. v. Wamsutta Oil Refining, etc., Co.*, 63 Pa. St. 14; *Phoenix Clay Pot Works v. Pittsburgh, etc., R. Co.*, 139 Pa. St. 284; *American Express Co. v. Sands*, 55 Pa. St. 140; *Clark v. Spencer*, 10 Watts (Pa.) 335.

S. C..—*Johnstone v. Richmond, etc., R. Co.*, 39 S. C. 55; *Wardlaw v. South Carolina R. Co.*, 11 Rich. L. (S. C.) 337; *Ewart v. Street*, 2 Bailey L. (S. C.) 157.

Tenn..—*Nashville, etc., R. Co. v. Stone & Haslett*, (Tenn.) 79 S. W. 1031; *Louisville, etc., R. Co. v. Wynn*, 88 Tenn. 320; *Merchants Despatch Transp. Co. v. Bloch*, 86 Tenn. 392; *Turney v. Wilson*, 7 Yerg. (Tenn.) 340; *Deming v. Merchants Cotton Press, etc., Co.*, 90 Tenn. 306.

Tex..—*St. Louis, etc., R. Co. v. Martin*, (Tex. Civ. App.) 35 S. W. 28; *St. Louis, etc., R. Co. v. Par-*

were perishable or were live stock.⁶ There is no presumption of negligence arising from the mere fact of loss or injury, and when the carrier has made such proofs as to the cause of the loss or injury, the burden is on the plaintiff to show that the carrier's negligence was the proximate cause of the loss.⁷ But when property has been delivered in good condition to a carrier, and it has been damaged while in possession of the carrier, nothing else appearing, the presumption is that there has been negligence on the part of the carrier, and the burden is on the carrier to remove such presumption.⁸ Where, in an action against a railroad company to recover for a case of plate glass, broken while in its possession as a carrier, the evidence disclosed that the case, with several other like cases, was delivered to defendant for transportation, in good order, and that the other cases were delivered by the carrier in good order, as received, it will be presumed that it was negligently handled by defendant.⁹ Negligence on the part of a carrier undertaking to transport heavy castings is shown by the fact that they were shipped in good order and were found cracked upon delivery, and the carrier, to avoid liability, has the burden

mer, (Tex. Civ. App.) 30 S. W. 1109; Missouri Pac. R. Co. v. Scott, 4 Tex. Civ. App. 76; Texas, etc., R. Co. v. Morse, 1 Tex. App. Civ. Cas., § 411; Ryan v. Missouri, etc., R. Co., 65 Tex. 13; Missouri Pac. R. Co. v. China Mfg. Co., 79 Tex. 26.

Va.—Murphy v. Staton, 3 Munf. (Va.) 239.

Vt.—Mann v. Birchard, 40 Vt. 326, delay in delivery.

Wis.—Browning v. Goodrich Transp. Co., 78 Wis. 391; Black v. Goodrich Transp. Co., 55 Wis. 319; Kirst v. Milwaukee, etc., R. Co., 46 Wis. 489.

Eng.—Riley v. Horne, 5 Bing. 217, 15 E. C. L. 422.

Can.—Henry v. Canadian Pac. R. Co., 1 Manitoba 210.

6. See Carriers of Live Stock, chap. 18.

7. The Guiding Star, 53 Fed. 936; Pittsburgh, etc., R. Co. v. Hazen, 84

Ill. 36; Terre Haute, etc., R. Co. v. Sherwood, 132 Ind. 129; Pittsburgh, etc., R. Co. v. Hollowell, 65 Ind. 188; Jordan v. American Express Co., 86 Me. 225; E. O. Stannard Milling Co. v. White Line Cent. Transit Co., 122 Mo. 258; Cleveland, etc., R. Co. v. Crawford, 24 Ohio St. 631; Buck v. Pennsylvania R. Co., 150 Pa. St. 170; Pennsylvania R. Co. v. Raiordon, 119 Pa. St. 577; East Tennessee, etc., R. Co. v. Stewart, 13 Lea (Tenn.) 432.

8. Pennsylvania R. Co. v. Naive, (Tenn.) 79 S. W. 124.

9. Hutkoff v. Pennsylvania R. Co., 29 Misc. Rep. (N. Y.) 770, 61 N. Y. Supp. 254. Citing Campe v. Weir, 28 Misc. Rep. (N. Y.) 243, 58 N. Y. Supp. 1082; Roth v. Hamburg Amer. Packet Co., 12 N. Y. Supp. 462; Trimble v. New York Cent., etc., R. Co., 39 App. Div. (N. Y.) 403, 412, 57 N. Y. Supp. 437.

of showing cause for the fracture which will overcome the presumptive case raised against him.¹⁰ The destruction of goods while in the hands of an express company by the derailment and burning of the car on which they were shipped gives rise to a presumption of negligence.¹¹ But under a count asking recovery against a railroad company as a voluntary bailee of goods which were destroyed before delivery to the consignee, the burden of proof was on the plaintiff to show the negligence averred.¹² Where a carrier, instead of delivering a trunk at the port as required by its contract, without giving the owner an opportunity to examine or take charge of it for the purpose of entry, sent it to the custom house, and, after entry and release, forwarded it by an express company to the owner's address, it had the burden of showing that a loss therefrom did not occur while it was in its actual custody.¹³ It may be presumed in case of a decay in perishable goods in transit by reason of negligence on the part of the carrier, that such negligence occurred while the goods were in the custody of the last carrier.¹⁴ The burden of proof is on the carrier to show that a shipper assented to its billing goods to a place other than that specified in the shipping receipt.¹⁵ The burden of proof is on the plaintiff to show that defendant is a common carrier.¹⁶

10. Hudson River Lighterage Co. v. Wheeler Condenser & E. Co., 93 Fed. 374. Citing Phoenix Pot Works v. Pittsburgh, etc., R. Co., 139 Pa. St. 284; Ketchum v. American Merchants Union Exp. Co., 52 Mo. 390; Grieve v. Illinois C. R. Co., 104 Iowa, 659, 74 N. W. 192; Terre Haute, etc., R. Co. v. Sherwood, 132 Ind. 129, 17 L. R. A. 339; Hinton v. Eastern R. Co., (Minn.) 75 N. W. 373; Hull v. Chicago, etc., R. Co., 41 Minn. 510, 5 L. R. A. 587; Shriver v. Sioux City, etc., R. Co., 24 Minn. 506; Alabama, etc., R. Co. v. Little, 71 Ala. 611, 12 Am. & Eng. R. Cas. 37; Rintoul v. New York, etc., R. Co., 17 Fed. 905, 16 Am. & Eng. R. Cas. 144.

11. Powers Mercantile Co. v. Wells, Fargo & Co., (Minn.) 100 N. W. 735.

12. Frederick v. Louisville, etc., R. Co., 133 Ala. 486, 31 So. 968.

13. Fasy v. International Nav. Co., 177 N. Y. 591, 70 N. E. 1098, affg. 77 App. Div. (N. Y.) 469, 79 N. Y. Supp. 1103.

14. Densmore Commission Co. v. Duluth, etc., R. Co., 101 Wis. 563, 77 N. W. 904.

15. Cleveland, etc., R. Co. v. C. & A. Potts & Co., (Ind. App.) 71 N. E. 685.

16. Ringgold v. Haven, 1 Cal. 108; Morrison v. Davis, 20 Pa. St. 171; Doty v. Strong, 1 Pin. (Wis.) 313; Missouri Pac. R. Co. v. Douglass, 2 Tex. App. Civ. Cas., § 28. See Denver, etc., R. Co. v. Cahill, 8 Colo. App. 158, allegation and proof not necessary where railroads are made common carriers by statute.

Where plaintiff in an action against a railroad company to recover for a loss of goods in shipment, introduces evidence which tends strongly to show inferentially that defendant managed and controlled the line of road upon which the loss occurred, although it was owned by a separate corporation, such as that the managing officers of the two companies were the same, that defendant held itself out to the public as operating the line by advertising it as a part of its system, etc., and defendant, although having it within its power, fails to produce evidence to show the actual relation between the two companies, it is a reasonable presumption that such evidence would support plaintiff's contention, and the jury is justified in determining the issue in favor of the plaintiff.¹⁷

§ 2. Presumption as to state of goods when received.—If goods are delivered by a carrier in a damaged state, it will not be liable unless it is shown that they were in a different state when they were received by it. The presumption, if any, would be that the goods were received in the same condition as when they were delivered¹⁸ The burden of proof is, as we have seen, on the shipper to show a delivery to the carrier in good order.¹⁹ It has, however, been held that the burden is on the carrier to show as a defence that, when delivered to it, the goods were in a damaged condition, or that the injury occurred from a cause for which it was not liable.²⁰

§ 3. Defense of loss by act of God —The carrier is always liable for a loss or injury resulting from its own negligence; and when that intervenes, it cannot discharge itself by showing that it was occasioned by one of those occurrences which are termed the act of God. If by its negligence, property committed to it is brought under the operation of natural causes that work its destruction, or is exposed to such cause of loss, it is responsible. So also if but for its neglect the loss or injury would have been avoided. The rule is the same in reference to an act of the public enemy. The burden of proof is on the carrier, therefore, to show

17. *Pennsylvania R. Co. v. Anoka Nat. Bank*, 108 Fed. 482, 47 C. C. A. 454.

18. *Goodman v. Oregon R., etc., Co.*, 22 Or. 14, 49 Am. & Eng. R. Cas.

87; *Missouri Pac. R. Co. v. Breeding*, 4 Tex. App. Civ. Cas., § 154.

19. See § 1, *ante*.

20. *Montgomery, etc., R. Co., v. Moore*, 51 Ala. 394.

not only that an act of God or the public enemy was the immediate and proximate cause of the loss or injury, but also that it actually exercised the requisite care and diligence to protect the goods from the operation of such causes.²¹ But it has been held that where it is shown that a loss of goods in the possession of a carrier was due to an overpowering cause, the burden is on the opposite party to establish the negligence of the carrier.²²

§ 4. Where goods lost consist of several kinds.—Where a shipment consists of several kinds of goods of different values, a portion of which is lost, and the proof is not definite as to the proportion of each that was shipped, there is no legal presumption in such a case, but it is purely a question of fact, from the evidence, as to which kind of goods were destroyed, the burden of proof being on the plaintiff, and an instruction that the presumption is that all goods lost, the kind and value of which is not proven, must have been those of the least value, is erroneous.²³ The plaintiff has the burden of proof to establish the value of goods lost, and in the absence of such proof a judgment in his favor cannot stand.²⁴

§ 5. Where liability is limited by special contract.—Where goods are received for transportation by a common carrier, under a special contract by which its common law liability as insurer is limited, it is held by the weight of authority that, the carrier having proved the loss to have occurred by reason of the excepted cause, it then devolves upon the shipper to establish the negligence of the carrier, failing in which he cannot recover.²⁵ On the

21. Michaels v. New York Cent. R. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Montgomery, etc., R. Co. v. Moore, 51 Ala. 394; Agnew v. Steamer Contra Costa, 27 Cal. 425; Jackson v. Sacramento Val. R. Co., 23 Cal. 269; Central R. Co. v. Hasselkus, 91 Ga. 382; Richmond, etc., R. Co. v. White, 88 Ga. 805; Van Winkle v. South Carolina R. Co., 38 Ga. 32; Davis v. Wabash, etc., R. Co., 89 Mo. 340; Leonard v. Hendrickson, 18 Pa. St. 40; Bell v. Reed, 4 Binn. (Pa.) 127, 5 Am. Dec. 398.

22. Jones v. Minneapolis, etc., R.

Co., (Minn.) 97 N. W. 893.

23. Lake Shore Nitro-glycerine Co. v. Illinois Cent. R. Co., 75 Ill. 394.

24. Houston, etc., R. Co. v. McGlosson, 1 Tex. App. Civ. Cas., § 224.

25. N. Y.—Canfield v. Baltimore, etc., R. Co., 93 N. Y. 532, 45 Am. Rep. 268; Whitworth v. Erie R. Co., 87 N. Y. 413; Steers v. Liverpool, etc., Steamship Co., 57 N. Y. 1, 15 Am. Rep. 458; Cochran v. Dinsmore, 49 N. Y. 249; Lamb v. Camden, etc., Co., 46 N. Y. 271, 7 Am. Rep. 327; French v. Buffalo, etc. R. Co., 4

other hand, it is held in a number of jurisdictions that, under such contracts, the burden is upon the carrier to show not only that the loss was by the excepted cause, but also that it itself was free from fault.²⁶ The reason why the carrier should not be

Keyes (N. Y.) 108; *Sutro v. Fargo*, 41 N. Y. Super. Ct. 231.

U. S.—*The Jefferson*, 31 Fed. 489; *The New Orleans*, 26 Fed. 44; *Clark v. Barnwell*, 12 How. (U. S.) 272; *Western Transp. Co. v. Downer*, 11 Wall. (U. S.) 133; *Wertheimer v. Pennsylvania R. Co.*, 17 Blatchf. (U. S.) 421; *Van Schaack v. Northern Transp. Co.*, 3 Biss. (U. S.) 394; *Speyer v. The Mary Belle Roberts*, 2 *Sawy.* (U. S.) 1.

Ark.—*Little Rock, etc., R. Co. v. Harper*, 44 Ark. 208; *Little Rock, etc., R. Co. v. Corcoran*, 40 Ark. 375; *Little Rock, etc., R. Co. v. Talbot*, 39 Ark. 523.

Iowa.—*Mitchell v. United States Express Co.*, 46 Iowa, 214.

Ind.—*Indianapolis, etc., R. Co. v. Forsythe*, 4 Ind. App. 326.

Kan.—*Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 623; *Kallman v. United States Express Co.*, 3 Kan. 205.

La.—*New Orleans Mut. Int. Co. v. New Orleans, etc., R. Co.*, 20 La. Ann. 302; *Kelham v. Steamship Kensington*, 24 La. Ann. 100; *Kirk v. Folsom*, 23 La. Ann. 584; *Price v. The Uriel*, 10 La. Ann. 413.

Me.—*Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228.

Md.—*Bankard v. Baltimore, etc., R. Co.*, 34 Md. 197.

Mo.—*Otis Co. v. Missouri Pac. R. Co.*, 112 Mo. 622; *Read v. St. Louis, etc., R. Co.*, 60 Mo. 199; *Harvey v. Terre Haute, etc.*, 74 Mo. 538; *Hance v. Pacific Express Co.*, 48 Mo. App. 179; *Witting v. St. Louis, etc., R. Co.*, 28 Mo. App. 103; *Heil v. St. Louis, etc., R. Co.*, 16 Mo. App. 363.

N. C.—*Smith v. North Carolina R. Co.*, 64 N. C. 235.

Pa.—*Buck v. Pennsylvania R. Co.*, 150 Pa. St. 170; *Pennsylvania R. Co. v. Raiordon*, 119 Pa. St. 577; *Cotton v. Cleveland, etc., R. Co.*, 67 Pa. St. 211; *Patterson v. Clyde*, 67 Pa. St. 505; *Farnham v. Camden, etc., R. C.*, 55 Pa. St. 53.

Plaintiff in an action against a railroad company for injury to perishable property by heating has the burden of proving negligence, or circumstances from which negligence may be reasonably inferred, where the contract of shipment releases the liability from any causes incident to transportation, such as "heating," not directly traceable to the negligence of its servants. *Davenport v. Pennsylvania R. Co.*, 10 Pa. Super. Ct. 47.

Tenn.—*Louisville, etc., R. Co. v. Manchester Mills*, 88 Tenn. 656.

Eng.—*Harris v. Packwood, 3 Taunt.* 264.

26. Ala.—*McCarthy v. Louisville, etc., R. Co.*, 102 Ala. 193; *Louisville, etc., R. Co. v. Touart*, 97 Ala. 514; *East Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596; *Alabama G. S. R. Co. v. Little*, 71 Ala. 611; *Grey v. Mobile Co.*, 55 Ala. 387; *Steele v. Townsend*, 37 Ala. 247.

Conn.—*Harper v. Railroad Co.*, 37 Conn. 272.

Ga.—*Richmond, etc., R. Co. v. White*, 88 Ga. 805; *Columbus, etc., R. Co. v. Kennedy*, 78 Ga. 646; *Berry v. Cooper*, 28 Ga. 543.

Ill.—*Dunspeth v. Wade*, 3 Ill. 285.

Minn.—*Shea v. Minneapolis, etc., R.*

required to prove the absence of negligence on its part was in some cases stated to be that the special agreement relieves the carrier from all liability, except that of a bailee for hire,²⁷ but that ground has been held untenable by subsequent cases.²⁸ It is now generally put upon the ground that to require it would limit the restriction and destroy its chief purpose and, in effect, amount to holding that the carrier might not limit its liability, by practically casting upon it the burden of proof in every case.²⁹ On the other hand it is claimed that the duty of the carrier to prove the absence of negligence on its part arises from the terms of the contract, from the character of its occupation, and from the rule of evidence requiring the facts, even of a negative averment, to be proved by the party within whose knowledge they peculiarly lie.³⁰ The burden of proof is on the carrier to show the special contract and that the loss was one within the exemptions of its provisions.³¹

Co., 63 Minn. 228; *Hull v. Chicago, etc.*, R. Co., 41 Minn. 510; *Shriver v. Sioux City, etc.*, R. Co., 24 Minn. 506.

Miss.—*Southern Express Co. v. Seide*, 67 Miss. 613; *Chicago, etc., R. Co. v. Moss*, 60 Miss. 1003.

Ohio.—*Pennsylvania Co. v. Yoder*, 25 Ohio Cir. Ct. R. 32; *United States Express Co. v. Blackman*, 28 Ohio St. 144; *Erie R. Co. v. Lockwood*, 28 Ohio St. 358; *Gaines v. Union Transp., etc.*, Co., 28 Ohio St. 418; *Union Express Co. v. Graham*, 26 Ohio St. 595; *Graham v. Davis*, 4 Ohio St. 362; *Fatman v. Cincinnati, etc.*, R. Co., 2 Disney (Ohio), 248; *Union Mut. Ins. Co. v. Indianapolis, etc.*, R. Co., 1 Disney (Ohio) 480.

S. C..—*Johnstone v. Richmond, etc.*, R. Co., 39 S. C. 55; *Wallingford v. Columbia, etc.*, R. Co., 26 S. C. 258; *Baker v. Brinson*, 9 Rich. L. (S. C.) 201; *Swindler v. Hilliard*, 2 Rich. L. (S. C.) 286.

Tex.—*Missouri Pac. R. Co. v. China Mfg. Co.*, 79 Tex. 26; *Ryan v. Mis-*

souri, etc., R. Co., 65 Tex. 13; *St. Louis, etc., R. Co. v. Martin*, (Tex. Civ. App.) 35 S. W. 28.

W. Va.—*Brown v. Adams Express Co.*, 15 W. Va. 812.

27. Lamb v. Camdén, etc., Co., 46 N. Y. 271; *York Co. v. Central Railroad*, 3 Wall. (U. S.) 107.

28. Erie R. Co. v. Lockwood, 28 Ohio St. 358.

29. Patterson v. Clyde, 67 Pa. St. 505; *Phoenix Clay Pot Works v. Pittsburg, etc.*, R. Co., 139 Pa. St. 284; *New Jersey Steam Nav. Co. v. Merchants Bank*, 6 How. (U. S.) 384.

30. Chicago, etc., R. Co. v. Moss, 60 Miss. 1003; *Richmond, etc., R. Co. v. White*, 88 Ga. 805; 1 *Greenleaf on Ev.* (14th Ed.), § 79.

31. U. S.—*Hooper v. Rathbone*, Taney's Dec. (U. S.) 519; *Western R. Co. v. Harwell*, 91 Ala. 340; *Western Transp. Co. v. Newhall*, 24 Ill. 466; *Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129; *Fillebrown v. Grand Trunk R. Co.*, 55 Mo. 462; *Baltimore, etc., R. Co. v. Brady*, 32

§ 6. Proof of loss by fire under contract limiting liability.—A shipper or consignee of goods under a contract relieving the carrier from liability for loss or damage by fire from any cause to the property in transit, or in deposit or places of trans-shipment, or at depots or landings at point of delivery, has the burden of proving that the loss or damage by fire was the result of the carrier's negligence and of showing facts taking the case out of the operation of the exemption clause. The occurrence of a fire while the goods were in the possession of the carrier does not alone justify the inference of negligence. In the absence of all explanation of the origin of the fire, or of evidence tending to show that it was in the power of the carrier to have made such explanation, or that, by the exercise of reasonable care, the fire would not have occurred, no presumption of negligence is raised so as to justify the submission of the question to the jury.³² In some

Md. 333; McMillan v. Michigan Southern, etc., R. Co., 16 Mich. 79; Lindsley v. Chicago, etc., R. Co., 36 Minn. 539; Johnson v. Alabama, etc., R. Co., 69 Miss. 191; Wolf v. American Express Co., 43 Mo. 421; United States Express Co. v. Backman, 28 Ohio St. 144; Schaeffer v. Philadelphia, etc., R. Co., 168 Pa. St. 209; Slater v. South Carolina R. Co., 29 S. C. 96; Falvey v. Northern Transp. Co., 15 Wis. 129.

32. Draper v. Delaware, etc., Canal Co., 118 N. Y. 123; Van Akin v. Erie R. Co., 92 App. Div. (N. Y.) 23, 87 N. Y. Supp. 871; Platt v. Richmond, etc., R. Co., 108 N. Y. 358, 32 Am. & Eng. R. Cas. 517; Whitworth v. Erie R. Co., 87 N. Y. 413, 6 Am. & Eng. R. Cas. 352; Caldwell v. New Jersey Steamboat Co., 57 N. Y. 282; Germania Fire Ins. Co. v. Memphis, etc., R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Lamb v. Camden, etc., R. Co., 46 N. Y. 271, 7 Am. Rep. 327; Cochran v. Dinsmore, 49 N. Y. 249; Sutro v. Fargo, 41 N. Y. Super. Ct. 241; Insurance Co. of N. A. v. Lake Erie, etc., R. Co., 152

Ind. 333, 4 Chic. L. J. Wkly. 201, 1 Repr. 819, 53 N. E. 382; Clark v. Barnwell, 12 How. (U. S.) 272, 13 L. Ed. 985; Western Transp. Co. v. Downer, 11 Wall. (U. S.) 129, 20 L. Ed. 160; Farnham v. Camden, etc., R. Co., 55 Pa. St. 53; Colton v. Cleveland, etc., R. Co., 67 Pa. St. 211; Patterson v. Clyde, 67 Pa. St. 500; Pennsylvania R. Co. v. Raordon, 119 Pa. St. 577; Buck v. Pennsylvania R. Co., 150 Pa. St. 170, 24 Atl. 678; Smith v. American Express Co., 108 Mich. 572, 66 N. W. 479; Read v. St. Louis, etc., R. Co., 60 Mo. 199; Kallman v. United States Express Co., 3 Kan. 205; New Orleans Mut. Ins. Co. v. New Orleans, etc., R. Co., 20 La. Ann. 302; Wilson v. Southern Pac. R. Co., 62 Cal. 164, 7 Am. & Eng. R. Cas. 400; Louisville, etc., R. Co. v. Manchester Mills, 88 Penn. 653, 14 S. W. 314; Sager v. Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659; Mitchell v. United States Express Co., 46 Iowa 214; Kansas Pac. R. Co. v. Reynolds, 8 Kan. 623; Smith v. North Carolina R. Co., 64 N. C. 235; Little Rock,

jurisdictions the contrary doctrine is held that the burden is on the carrier to show absence of negligence in case of loss or injury from a cause within the contract provision for exemption.³³

§ 7. When carrier is merely a warehouseman.—Where the carrier's responsibility is that of a warehouseman merely, it is liable only for losses caused by its negligence, and mere proof of loss or injury is not sufficient to render it liable. For example, if the plaintiff in an action against a railroad company to recover the value of goods deposited in its depot, and alleged to have been lost through its neglect, proves simply that the goods were stolen from the depot, and fails to offer any evidence of a want of ordinary care on the part of the company, the court may properly rule that the evidence is insufficient to maintain the action.³⁴ A *prima facie* case of negligence is made out against a warehouseman who refuses to deliver property stored with him, upon proof of demand and refusal. Upon such proof alone, the burden is on him to account for the property, otherwise he shall be deemed to

etc., R. Co. v. Talbot, 39 Ark. 523; Harris v. Packwood, 3 Taunt. 264; Muddle v. Stride, 9 Car. & P. 380.

33. Hinton v. Eastern R. Co., 72 Minn. 339, 75 N. W. 373, 11 Am. & Eng. R. Cas. N. S. 125; Shea v. Minneapolis, etc., R. Co., 63 Minn. 228, 65 N. W. 458; Southard v. Minneapolis, etc., R. Co., 60 Minn. 392, 62 N. W. 442, 619; Hull v. Chicago, etc., R. Co., 41 Minn. 510, 5 L. R. A. 587, 43 N. W. 391; Newport News, etc., R. Co. v. Holmes, 14 Ky. L. Rep. 853; Newberger Cotton Co. v. Illinois Cent. R. Co., 75 Miss. 303, 23 So. 186; Mitchell v. Carolina C. R. Co., 124 N. C. 236, 44 L. R. A. 515, 32 S. E. 671; Graham v. Davis, 4 Ohio St. 362, 62 Am. Dec. 285; Union Express Co. v. Graham, 26 Ohio St. 595; United States Express Co. v. Bachman, 28 Ohio St. 144; Erie R. Co. v. Lockwood, 28 Ohio St. 358; Gaines v. Union Transp. & Ins. Co., 28 Ohio St. 418;

Wallingford v. Columbia, etc., R. Co., 26 S. C. 258, 2 S. E. 19; Texas, etc., R. Co. v. Payne, 15 Tex. Civ. App. 58, 38 S. W. 366; Galveston, etc., R. Co. v. Efron, (Tex. Civ. App.) 38 S. W. 639; Ryan v. Missouri, etc., R. Co., 65 Tex. 13, 57 Am. Rep. 589; Missouri Pac. R. Co. v. China Mfg. Co., 79 Tex. 26, 14 S. W. 785; Gult, etc., R. Co. v. Zimmerman, 81 Tex. 605; Wardlaw v. South Carolina R. Co., 11 Rich. L. (S. C.) 337; The Isaac Reed, 82 Fed. 566; The Kensington, 88 Fed. 331; Mackenzie v. Cox, 9 C. & P. 632, 38 E. C. L. 263; Louisville, etc., R. Co. v. Cowherd, 120 Ala. 51, 23 So. 793; Houston, etc., R. Co. v. Bath, 17 Tex. Civ. App. 697, 44 S. W. 595; Selma, etc., R. Co. v. United States, 139 U. S. 560, 35 L. Ed. 266; Chicago, etc., R. Co. v. Moss, 60 Minn. 1003, 45 Am. Rep. 428.

34. Lamb v. Western R. Corp., 7 Allen (Mass.) 98.

have converted it to his own use.³⁵ But if it appears that the property, when demanded, had been consumed by fire, the burden of proof is then on the bailor to show that the fire was the result of the negligence of the warehouseman.³⁶

35. Wilson v. Southern Pac. R. Co.,
62 Cal. 164, 7 Am. & Eng. R. Cas.
400, 9 Am. & Eng. R. Cas. 161;
Boies v. Hartford, etc., R. Co., 37
Conn. 273, 9 Am. Rep. 347.

36. Wilson v. Southern Pac. R. Co.,
supra; Browne v. Johnson, 29 Tex.
43; Harris v. Packwood, 3 Taunt.

CHAPTER XV.

DAMAGES.

SECTION 1. Measure of damages in case of loss of goods.

2. Interest as part of damages.
3. Freight charges, advances, and attorney's fees.
4. Damages where goods are only injured.
5. Measure of damages in case of delay.
6. Damages for refusal or failure to carry.
7. Damages for refusal to deliver.
8. Damages for misdelivery.
9. Damages where goods have no market value.
10. Damages for mental suffering.
11. Remote and speculative damages.
12. Contract of sale as measure of damages.
13. Damages for loss or delay in delivery of goods intended for a specific purpose.
14. Prospective, contingent, or possible consequences.

§ 1. Measure of damages in case of loss of goods.—In case of a loss of goods by reason of the failure of a common carrier to transport and deliver them in accordance with his contract, the general rule is that the measure of damages is the market value of the goods at the place of destination, at the time and in the condition they should have been delivered, with interest from the time they should have been delivered, less the amount of freight charges due for their transportation.¹ The market value is the

1. N. Y.—Harris v. Delaware, etc., R. Co., 61 N. Y. 656; Sturgess v. Bissell, 46 N. Y. 462; Rice v. Ontario Steamboat Co., 56 Barb. (N. Y.) 384; Sherman v. Wells, 28 Barb. (N. Y.) 403; Harris v. Panama R. Co., 5 Bosw. (N. Y.) 312; Davis v. New York, etc., R. Co., 1 Hilt. (N. Y.) 543; Amory v. McGregor, 15 Johns. (N. Y.) 24; Watkinson v. Laughton, 8 Johns. (N. Y.) 213.

U. S.—New York, etc., R. Co. v. Estill, 147 U. S. 591, 54 Am. & Eng. R. Cas. 487, 41 Fed. 853; Mobile, etc., R. Co. v. Jurey, 111 U. S. 584; Ormsby v. Union Pac. R. Co., 4 Fed. 706, 2 McCrary (U. S.) 48; Woodward v. Illinois Cent. R. Co., 1 Bisa. (U. S.) 403.

Ala.—Echols v. Louisville, etc., R. Co., 90 Ala. 366; Louisville, etc., R. Co. v. Kelsey, 89 Ala. 287, 42 Am. & Eng. R. Cas. 584; Louisville, etc., R.

price at which the goods can be replaced for money in the market;

Co. v. Gilmer, 89 Ala. 534, 42 Am. & Eng. R. Cas. 450; *East Tennessee*, etc., R. Co. v. *Johnson*, 75 Ala. 596, 22 Am. & Eng. R. Cas. 437, 51 Am. Rep. 489; *South*, etc., *Alabama R. Co. v. Wood*, 72 Ala. 451, 18 Am. & Eng. R. Cas. 634.

Cal.—*Ringgold v. Haven*, 1 Cal. 108.

Ill.—*Chicago*, etc., R. Co. v. *Dickinson*, 74 Ill. 249, and such value is purely a question of fact for the jury; *Northern Transp. Co. v. McClary*, 66 Ill. 233.

Iowa.—*Robinson v. Merchant Dispatch Transp. Co.*, 44 Iowa, 470; *Cobb v. Illinois Cent. R. Co.*, 38 Iowa 601.

Ky.—*Cincinnati*, etc., R. Co. v. *Spratt*, 2 Duv. (Ky.) 4.

La.—*Price v. The Uriel*, 10 La. Ann. 413; *Rathbone v. Neal*, 4 La. Ann. 563, 50 Am. Dec. 579.

Me.—*Little v. Boston*, etc., R. Co., 66 Me. 239; *Perkins v. Portland*, etc., R. Co., 47 Me. 573, 74 Am. Dec. 507.

Md.—*Baltimore*, etc., R. Co. v. *Pumphrey*, 59 Md. 390, 9 Am. & Eng. R. Cas. 331.

Minn.—*Jellett v. St. Paul*, etc., R. Co., 30 Minn. 265, 16 Am. & Eng. R. Cas. 246.

Miss.—*Vicksburg*, etc., R. Co. v. *Ragsdale*, 46 Miss. 458.

Mo.—*Davis v. Wabash*, etc., R. Co., 89 Mo. 340, 13 Mo. App. 449; *Sturgeon v. St. Louis*, etc., R. Co., 65 Mo. 569; *Union R.*, etc., Co. v. *Traube*, 59 Mo. 355, 8 Am. Ry. Rep. 441; *Rice v. Indianapolis*, etc., R. Co., 3 Mo. App. 27.

Neb.—*Atchison*, etc., R. Co. v. *Lawler*, 40 Neb. 356, 61 Am. & Eng. R. Cas. 255.

N. H.—*Hackett v. Boston*, etc., R. Co., 35 N. H. 390.

Ohio.—*Erie R. Co. v. Lockwood*, 28 Ohio St. 358, 14 Am. Ry. Rep. 143; *McGregor v. Kilgore*, 6 Ohio 358, 27 Am. Dec. 260.

Or.—*Prettyman v. Oregon R.*, etc., Co., 13 Or. 341, 25 Am. & Eng. R. Cas. 413.

Pa.—*Ruppel v. Allegheny Valley R. Co.*, 167 Pa. St. 166, 46 Am. St. Rep. 666, 36 W. N. C. (Pa.) 210; *Gillingham v. Dempsey*, 12 S. & R. (Pa.) 183; *Hand v. Baynes*, 4 Whart. (Pa.) 204, 33 Am. Dec. 54; *Lucesco Oil Co. v. Pennsylvania R. Co.*, 2 Pittsb. (Pa.) 477.

S. C.—*Wallingford v. Columbia*, etc., R. Co., 26 S. C. 258, 30 Am. & Eng. R. Cas. 40; *Kyle v. Laurens R. Co.*, 10 Rich. L. (S. C.) 382, 70 Am. Dec. 231, factor's commission not to be deducted; *Shaw v. South Carolina R. Co.*, 5 Rich. L. (S. C.) 462, 57 Am. Dec. 768.

Tenn.—*East Tennessee*, etc., R. Co. v. *Kelly*, 91 Tenn. 699; *Louisville*, etc., R. Co. v. *Mason*, 11 Lea (Tenn.) 116, 16 Am. & Eng. R. Cas. 241; *Dean v. Vaccaro*, 2 Head (Tenn.) 488, 75 Am. Dec. 744. *Compare Edminson v. Baxter*, 4 Hayw. (Tenn.) 112, 9 Am. Dec. 751.

Tex.—*Gulf*, etc., R. Co. v. *Roberts*, (Tex. Civ. App.) 85 S. W. 479; *Southern Pac. R. Co. v. D'Arcalis*, (Tex. Civ. App.) 64 S. W. 813; *Texas*, etc., R. Co. v. *Tankersley*, 63 Tex. 57; *Tex. Pac. R. Co. v. Nicholson*, 61 Tex. 491; *Missouri Pac. R. Co. v. Barnes*, 2 Tex. App. Civ. Cas. § 575; *Gulf*, etc., R. Co. v. *Clark*, 2 Tex. App. Civ. Cas., § 512, 18 Am. & Eng. R. Cas. 628; *Fowler v. Davenport*, 21 Tex. 626. The price at

not the price for which they are sold at retail.² The market value may be ascertained from the market reports as published in the newspapers, or from market quotations,³ or the price paid for an article may be given in evidence to prove its market value;⁴ and when that is the only evidence the jury will be confined to this in determining the market value.⁵ The market value at the time the goods should have arrived at the place of destination should

which cotton had been contracted to be sold at the place of its delivery is not evidence of its market value at that point as a measure of damages for failure to deliver. Galveston, etc., R. Co. v. Efron, (Tex. Civ. App.) 38 S. W. 639.

Vt.—Laurent v. Vaughn, 30 Vt. 90.

W. Va.—Quarrier v. Baltimore, etc., R. Co., 20 W. Va. 424, 18 Am. & Eng. R. Cas. 535.

Wis.—Dean v. Chicago, etc., R. Co., 43 Wis. 305; Whitney v. Chicago, etc., R. Co., 27 Wis. 327, 5 Am. Ry. Rep. 291; Chapman v. Chicago, etc., R. Co., 26 Wis. 295, 7 Am. Rep. 81.

Eng.—O'Hanlan v. Great Western R. Co., 6 B. & S. 484, 118 E. C. L. 484; Brandt v. Bowlby, 2 B. & Ad. 932, 22 E. C. L. 214; Anderson v. North Eastern R. Co., 9 W. R. 519; Waller v. Midland Great Western R. Co., L. R. 4 Ir. 376.

Can.—Worden v. Canadian Pac. R. Co., 13 Ont. Rep. 652, 30 Am. & Eng. R. Cas. 127; Leader v. Northern R. Co., 3 Ont. Rep. 92, 16 Am. & Eng. R. Cas. 287.

The end of the carrier's route is, in the absence of other stipulation, the place of destination, within the meaning of the rule stated in the text. Marshall v. New York Cent. R. Co., 45 Barb. (N. Y.) 520, 5 Alb. L. J. 74, affd. 48 N. Y. 660.

Loss of gold coin.—Where a carrier failed to deliver a canvas bag containing ninety double eagles of the coinage of the United States,

which the carrier received from the plaintiff's agent in Mexico, the plaintiff was held entitled to recover in treasury notes the value of the coin, together with the premium on gold at the time it should have been delivered, with interest on the amount from the date of the demand. Cushing v. Wells, 98 Mass. 550.

Animals escaping en route.—The market value of the horses at the place of destination was held to be the measure of damages where some of the horses were killed and others escaped. Texas, etc., R. Co. v. Sims (Tex. Civ. App.), 26 S. W. 634. But where the animals escaping were recovered the measure of damages was held to be the expense of searching for and recovering them. North Missouri R. Co. v. Akers, 4 Kan. 453, 96 Am. Dec. 183.

2. Wehle v. Haviland, 69 N. Y. 448; Starkey v. Kelly, 50 N. Y. 676.

3. Sisson v. Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252; Central R., etc., Co. v. Skellie, 86 Ga. 686.

4. Smith v. Griffith, 3 Hill (N. Y.), 333, 38 Am. Dee. 639, and the defendant will not be allowed to show that the market price was wholly fictitious, and that the goods were actually of little or no value; Richmond v. Bronson, 5 Den. (N. Y.) 55.

5. Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 350.

be taken.⁶ But where the place of shipment and the place of destination are only a short distance apart, the market value at the first place may be shown in evidence in proof of the value at the latter place.⁷ And where the contract so provides,⁸ or where special circumstances so require,⁹ the market value at the place of shipment may be taken instead of that at the place of destination. The market value at the nearest market, less the cost of transportation thereto, is to be taken as the measure of damages, where there is no market at the place of destination.¹⁰ The shipper of goods, though plaintiff, may testify as to the character, quantity and market value of the property lost.¹¹ The market value may also be proven by market quotations and the testimony of market experts.¹² Witnesses must testify from their own knowledge as to character, quantity and value of goods and not from the state-

6. Illinois Cent. R. Co. v. Hall, 58 Ill. 409, 11 Am. Ry. Rep. 95.

7. Echols v. Louisville, etc., R. Co., 90 Ala. 366, 42 Am. & Eng. R. Cas. 454; South, etc., Alabama R. Co. v. Wood, 72 Ala. 451, 18 Am. & Eng. R. Cas. 634.

8. Chicago, etc., R. Co. v. Katzenbach, 118 Ind. 174, 38 Am. & Eng. R. Cas. 375; Caples v. Louisville, etc., R. Co., 17 Mo. App. 14; Illinois Cent. R. Co. v. Langdon, 71 Miss. 146.

9. Lakeman v. Grinnell, 5 Bosw. (N. Y.) 625, where goods were destroyed by fire before the vessel left port; Wheelwright v. Beers, 2 Hall (N. Y.), 391, where a voyage was broken up at an intermediate port, the measure of damages is the difference between the prime cost of the cargo, and what it was sold for, after the voyage was broken up. See also Dusar v. Murgatroyd, 1 Wash. (U. S.) 13; Rome R. Co. v. Sloane, 39 Ga. 636; Evansville, etc., R. Co. v. Montgomery, 85 Ind. 494, 9 Am. & Eng. R. Cas. 195.

10. Leonard v. Fitchburg, etc., R.

Co., 143 Mass. 307, 28 Am. & Eng. R. Cas. 105; Indianapolis, etc., R. Co. v. Strain, 81 Ill. 504; Wabash, etc., R. Co. v. Lynch, 12 Ill. App. 365; Union Pac. R. Co. v. Williams, 3 Colo. App. 526; East Tennessee, etc., R. Co. v. Hale, 85 Tenn. 69, 27 Am. & Eng. R. Cas. 36; Louisville, etc., R. Co. v. Mason, 11 Lea (Tenn.) 116, 16 Am. & Eng. R. Cas. 241; Houston, etc., R. Co. v. Williams (Tex. Civ. App.), 31 S. W. 556; Gulf, etc., R. Co. v. Dunman, 4 Tex. App. Civ. Cas. § 99.

11. Marsh v. Union Pac. R. Co., 3 McCrary (U. S.), 236, 6 Am. & Eng. R. Cas. 360; South, etc., Alabama R. Co. v. Wood, 66 Ala. 167, 9 Am. & Eng. R. Cas. 419, 41 Am. Rep. 749; St. Louis South-Western R. Co. v. Williams (Tex. Civ. App.), 32 S. W. 225; Gulf, etc., R. Co. v. Clark, 2 Tex. App. Civ. Cas. § 512; Missouri Pac. R. Co. v. German, 84 Tex. 141.

12. Alabama, etc., R. Co. v. Searles, 71 Miss. 744; Brackett v. Edgerton, 14 Minn. 174, 100 Am. Dec. 211; Sisson v. Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252.

ments on other persons,¹³ although information derived from newspaper reports of the market have been held admissible.¹⁴ The opinion of witnesses as to the extent of the injury, as, for example, the loss of weight in cattle or the effect upon them of the accident or delay, is admissible;¹⁵ but not as to the amount of the loss or damage, that being a question for the jury.¹⁶ Direct testimony as to value is not indispensable, if there is proof of the character, quality and quantity of goods and the nature and extent of the injury, from which the jury may properly estimate the loss or damage.¹⁷ But there must be some proof from which the jury may properly fix the amount of damages.¹⁸ The amount of damages is a question for the jury, and where everything is conceded except the amount recoverable the consideration of the jury may be limited to this question.¹⁹ Damages for the non-delivery of goods in a foreign country are to be computed in our currency, without any allowance for depreciation.²⁰ Evidence of the valuation of the goods named by the shipper at the time of shipment is admissible to show the actual loss sustained;²¹ and if the special contract fixes the limit of recovery and is valid, the measure of damages cannot exceed the amount so fixed.²² In an action against

13. Voorhees v. Chicago, etc., R. Co., 71 Iowa, 735, 60 Am. Rep. 823, 29 Am. & Eng. R. Cas. 322; Southern Pac. R. Co. v. Maddox, 75 Tex. 300, 42 Am. & Eng. R. Cas. 528; Missouri Pac. R. Co. v. Sherwood, 84 Tex. 125.

14. Cleveland, etc., R. Co. v. Perkins, 17 Mich. 296.

15. Illinois Cent. R. Co. v. Waters, 41 Ill. 73; Fort Worth, etc., R. Co., v. Greathouse, 82 Tex. 104, 49 Am. & Eng. R. Cas. 157.

16. Birney v. Wabash, etc., R. Co., 20 Mo. App. 470; Gulf, etc., R. Co. v. Wright, 1 Tex. Civ. App. 402.

17. Muller v. Eno, 14 N. Y. 597; Richmond v. Bronson, 5 Den. (N. Y.) 55; Merdock v. Dumner, 22 Pick. (Mass.) 156; Louisville, etc., R. Co. v. Mason, 11 Lea (Tenn.), 116, 16 Am. & Eng. R. Cas. 241; O'Hanlan v. Great Western R. Co., 6 B. & S. 484, 118 E. C. L. 484, 13 W. R. 741.

18. Central R. Co. v. Rogers, 66 Ga. 251; Montgomery, etc., R. Co. v. Edmonds, 41 Ala. 667; Toledo, etc., R. Co. v. Kickler, 51 Ill. 157; Huston v. Peters, 1 Metc. (Ky.) 558; Browning v. Goodrich Transp. Co., 78 Wis. 391, 23 Am. St. Rep. 44.

19. Bush v. Northern Pac. R. Co., 3 Dak. 444, 18 Am. & Eng. R. Cas. 559; Erie, etc., Dispatch v. Stanley, 22 Ill. App. 459; Robson v. Buffalo, etc., R. Co., 10 U. C. C. P. 279.

20. Rice v. Ontario Steamboat Co., 56 Barb. (N. Y.) 384.

21. Savannah, etc., R. Co. v. Collins, 77 Ga. 376, 4 Am. St. Rep. 87.

22. Atchison, etc., R. Co. v. Miller, 16 Neb. 661, 18 Am. & Eng. R. Cas. 545.

A package was consigned to an express company for transportation, without disclosure being made that it contained gold. It was stipulated

a carrier to recover the value of a race horse, killed during his transportation, evidence of his pedigree and that some of his blood relations have a record for speed is competent as affecting his value.²³ Evidence as to the pedigree of a horse, as shown by the American Stud books, is admissible on the question of value.²⁴ Where goods are received in a damaged condition proof of subsequent facts showing the extent of the damage is admissible.²⁵ But written statements or accounts of sales rendered by the shipper's commission merchant are hearsay and inadmissible for such purpose.²⁶

§ 2. Interest as part of damages.—The right to interest, as a part of the damages, in actions against carriers was held in some of the earlier cases in New York to be within the discretion of the

that the company should not be liable for more than \$50 on any shipment unless its true value was stated. The package was destroyed en route by fire. It was shown that, had disclosure been made, a greater charge would have been imposed for transportation, and that the package would have been put in a safe, under the care of special messengers. Held that, in the absence of proof of some affirmative act of wrongdoing, the company was entitled to an instruction that the recovery could not exceed \$50. *Rowan v. Wells, Fargo & Co.*, 80 App. Div. (N. Y.) 31, 80 N. Y. Supp. 226.

23. Baltimore & O. R. Co. v. Hubbard, 25 Ohio C. C. 477; **Pittsburgh, etc., R. Co. v. Sheppard**, 55 Ohio St. 68, 46 N. E. 61, 37 Ohio L. J. 177, 6 Am. & Eng. R. Cas. N. S. 528, 60 Am. St. Rep. 732.

24. Louisville & N. R. Co. v. Kice, 22 Ky. L. Rep. 1462, 60 S. W. 705.

In an action against a carrier for the loss of a stallion, through defendant's negligence in shipping the same in a car in which fresh lime

had recently been carried, evidence that a horse traded by the plaintiff for the stallion was worthless, and that an action was pending against plaintiff for breach of warranty, together with the petition in such action, was properly rejected, since the value of an article traded for another cannot be shown in reduction of the value of the latter. *Galliers v. Chicago, etc., R. Co.*, 116 Iowa, 319, 89 N. W. 1109. In such case, evidence of the value of the stallion when sold to another, long before he was obtained by plaintiff, was incompetent. *Id.* Evidence of the number and character of a mare's foals was competent to prove such value. *Campbell v. Iowa Cent. Ry. Co. (Iowa)*, 99 N. W. 1061.

25. New York, etc., R. Co. v. Estill, 147 U. S. 591; **Magdeburg General Ins. Co. v. Paulson**, 29 Fed. 530; **Winne v. Illinois Cent. R. Co.**, 31 Iowa, 583.

26. Hess v. Missouri Pac. R. Co., 40 Mo. App. 202; **Texas, etc., R. Co. v. Scrivener**, 2 Tex. App. Civ. Cas. § 328.

jury where the actions were *ex delicto*.²⁷ And this rule is followed in certain other jurisdictions.²⁸ In other cases interest was held to be allowable in case of gross negligence.²⁹ The later cases in New York seem to have adopted the rule that, in actions against a carrier for non-delivery or loss of goods, the plaintiff is entitled to recover interest on the value of such goods from the time they should have been delivered, and in actions for delay in delivery, is entitled to recover interest on the difference between their value in the condition in which they should have arrived and their value as they actually arrived, and that interest is allowable in such cases, as a part of the damages, as a legal right and not in the discretion of the jury, where the action is *ex delicto*.³⁰ And this

27. Richmond v. Bronson, 5 Den. (N. Y.) 55; Black v. Camden, etc., R. Co., 45 Barb. (N. Y.) 40; Wehle v. Haviland, 42 How. Pr. (N. Y.) 399, 4 Daly (N. Y.), 550.

28. Chicago, etc., R. Co. v. Ames, 40 Ill. 249; Kyle v. Laurens R. Co., 10 Rich. L. (S. C.) 382, 70 Am. Dec. 231; Fowler v. Davenport, 21 Tex. 635; Texas, etc., R. Co., v. Ferguson, 1 Tex. App. Civ. Cas. § 1253, 9 Am. & Eng. R. Cas. 395.

29. Amory v. McGregor, 15 Johns. (N. Y.) 24, 8 Am. Dec. 205; Watkinson v. Laughton, 8 Johns. (N. Y.) 213; Lakeman v. Grinnell, 5 Bosw. (N. Y.) 625; Texas, etc., R. Co. v. Davis, 2 Tex. App. Civ. Cas. § 191; Texas, etc., R. Co. v. Martin, 2 Tex. App. Civ. Cas. § 342; Texas, etc., R. Co. v. Wright, 2 Tex. App. Civ. Cas. § 339.

30. Sherman v. Wells, 28 Barb. (N. Y.) 403.

In actions upon contract, as for the non-delivery of goods by a vendor, the rule seems to be well settled that the allowance of interest is a question of law and does not at all rest in the discretion of the jury, and is not dependent upon such considerations as to whether the party has failed to perform, either wilfully or

by mere accident and without any moral misconduct. Dana v. Fiedler, 12 N. Y. 40, 62 Am. Dec. 130. But the rule does not apply as to unliquidated demands. White v. Miller, 78 N. Y. 393, 34 Am. Rep. 543.

In an action against a warehouse for non-delivery of goods, interest on the value of the goods from the time of the demand and refusal to deliver was allowed as a proper item of damages. Schwerin v. McKie, 51 N. Y. 180, 10 Am. Rep. 581.

In an action against a railroad company for the conversion of baggage, although it was held that under the circumstances of the case the company was not liable as a common carrier, interest was held recoverable as a matter of right. McCormick v. Pennsylvania Cent. R. Co., 49 N. Y. 303.

And the rule is well settled in this State that in actions of trover, trespass, replevin, etc., the law gives interest on the loss as part of the damages, while in other cases of negligence it has been held that it cannot be recovered as a matter of right, but may be allowed in the discretion of the jury. Wilson v. City of Troy, 135 N. Y. 96, 31 Am. St. Rep. 817.

is the rule generally maintained elsewhere, whether the form of the action is *ex delicto* or *ex contractu*.³¹ The reason for the rule is that interest is as necessary a part of a complete indemnity to the owner of the property as the value itself in order to place him as near as may be in the same position he would have occupied had the carrier complied with its contract.³² In Missouri the rule now seems to be that where an action *ex delicto* is based upon the simple negligence of the carrier, interest is not allowable, for the reason that no benefit has been derived by the carrier by reason of the injury or wrong.³³ In Illinois the right to a recovery of

31. U. S.—Missouri, etc., R. Co. v. Truskett, 186 U. S. 479, 22 S. Ct. 943, 46 L. Ed. 1259; New York, etc., R. Co. v. Estill, 147 U. S. 591, 41 Fed. 853, 54 Am. & Eng. R. Cas. 506; Mobile, etc., R. Co. v. Jurey, 147 U. S. 591, 16 Am. & Eng. R. Cas. 132; Western Mfg. Co. v. The Guiding Star, 37 Fed. 641; The Nith, 36 Fed. 86; Woodward v. Illinois Cent. R. Co., 1 Biss. (U. S.) 403; Bazin v. Steamship Co., 3 Wall. Jr. (C. C.) 229; King v. Shepherd, 3 Story (U. S.), 349; The Gold Hunter, 1 B. & H. Adm. 300.

Ark.—St. Louis, etc., R. Co. v. Phelps, 46 Ark. 485; St. Louis, etc., R. Co. v. Mudford, 44 Ark. 439.

Ga.—East Tennessee, etc., R. Co. v. Johnson, 85 Ga. 497.

Iowa.—Robinson v. Merchants' Dispatch Transp. Co., 45 Iowa, 470.

La.—Murrell v. Dixey, 14 La. Ann. 298.

Mass.—Cushing v. Wells, 98 Mass. 550; Spring v. Haskell, 4 Allen (Mass.), 112.

Minn.—Cowley v. Davidson, 13 Minn. 92.

Ohio.—Erie R. Co. v. Lockwood, 28 Ohio St. 358.

Tex.—St. Louis Southwestern R. Co. v. Dolan (Tex. Civ. App.), 84 S. W. 393; Texas & P. R. Co. v. Smis-
sen (Tex. Civ. App.), 73 S. W. 42;

Gulf, etc., R. Co. v. McCarty, 82 Tex. 608; Fort Worth, etc., R. Co. v. Greathouse, 82 Tex. 104; Houston, etc., R. Co. v. Jackson, 62 Tex. 209, 21 Am. & Eng. R. Cas. 126; Gulf, etc., R. Co. v. Batte (Tex. Civ. App.), 81 S. W. 813; Texas, etc., R. Co. v. Murtishaw (Tex. Civ. App.), 78 S. W. 953; Southern Pac. Co. v. Anderson (Tex. Civ. App.), 63 S. W. 1023.

Vt.—Newell v. Smith, 49 Vt. 255; Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 350.

Wis.—Thomas, etc., Mfg. Co. v. Wabash, etc., R. Co., 62 Wis. 642, 51 Am. Rep. 725; Chapman v. Chicago, etc., R. Co., 26 Wis. 295, 7 Am. Rep. 81.

Eng.—British Columbia, etc., Co. v. Nettleship, L. R. 3 C. P. 499.

32. See cases cited in notes 30 and 31, *ante*.

33. New York, etc., R. Co. v. Estill, 147 U. S. 591; Kimes v. St. Louis, etc., R. Co., 85 Mo. 611; Wade v. Missouri Pac. R. Co., 78 Mo. 362; De Steiger v. Hannibal, etc., R. Co., 73 Mo. 33; State v. Harrington, 44 Mo. App. 297. But see Padley v. Catterlin, 64 Mo. App. 648; Dunn v. Hannibal, etc., R. Co., 68 Mo. 268; Gray v. Missouri River Packet Co., 64 Mo. 47, where interest was held to be allowable.

In Mississippi interest has been

interest has been held by the courts to be based entirely upon statute, which allows it only in cases of trespass, trover, or fraud, and does not apply to an action against a carrier for damages for unreasonable delay in the transportation of goods or failure to deliver, except where there has been a wrongful conversion.³⁴ The rule as to allowance of interest where goods have been negligently injured by the carrier while in course of transportation, has been held to be the same as in the case of a delay in delivery.³⁵ And the proper rate of interest has been held to be the legal rate at the place of destination of the goods.³⁶ An excessive verdict cannot be supported on the ground that it may include interest, where no claim was set up in the complaint for interest, and no testimony or instructions concerning it given on the trial.³⁷

§ 3. Freight charges, advances, and attorney's fees.—As has been stated, the general rule is that the freight charges are to be deducted from the market value of the goods at the time and place of delivery.³⁸ But the proofs must show the amount of the freight charges and that they are due and unpaid.³⁹ Where it has been stipulated that the market value at the place of shipment shall be the measure of damages, it has been held that plaintiff is entitled to recover the market value and freight charges which have been prepaid.⁴⁰ And where cattle were lost at sea the plain-

held recoverable from the date of the injury or breach of contract. Illinois Cent. R. Co. v. Haynes, 64 Miss. 604.

34. Illinois Cent. R. Co. v. Cobb, 72 Ill. 148; Chicago, etc., R. Co. v. Ames, 40 Ill. 249.

35. Dunn v. Hannibal, etc., R. Co., 68 Mo. 268; Galveston, etc., R. Co. v. Johnson (Tex.), 19 S. W. 867; Fort Worth, etc., R. Co. v. Greathouse, 82 Tex. 104.

36. South, etc., Alabama R. Co. v. Jones, 56 Ala. 507; New York, etc., R. Co. v. Estill, 147 U. S. 591; Mobile, etc., R. Co. v. Jurey, 111 U. S. 584.

37. Miami Powder Co. v. Port

Royal, etc., R. Co., 38 S. C. 78, 16 S. E. 339.

38. See § 1, *ante*.

39. Capehart v. Granite Mills, 97 Ala. 353; Louisville, etc., R. Co. v. Craycraft, 12 Ind. App. 203; Michigan Southern, etc., R. Co. v. Caster, 13 Ind. 164; Massachusetts L. & T. Co. v. Fitchburg R. Co., 143 Mass. 318; Forbes v. Boston, etc., R. Co., 133 Mass. 154; Gray v. Missouri River Packet Co., 64 Mo. 47; Galveston, etc., R. Co. v. Ball, 80 Tex. 602; Galveston, etc., R. Co. v. Kelley (Tex. Civ. App.), 26 S. W. 470; Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, 13 Am. St. Rep. 776.

40. Missouri Pac. R. Co. v. Barnes, 2 Tex. App. Civ. Cas. § 575.

tiff was held entitled to recover their value and the amount of freight charges prepaid.⁴¹ But it has been held otherwise in an action to recover damages for cattle killed in transit.⁴² It has also been held that deduction of freight charges is not to be made unless it has been pleaded by way of set off or counterclaim.⁴³ Trover against a carrier for goods damaged during transportation will lie without payment of the freight, if at all, only where the damages equal or exceed the amount of the freight.⁴⁴ Where, in an action for the loss of corn by the sinking of a barge, the proof showed that the corn was worth 42 to 43 cents per bushel at destination, and at the price of 42 cents, after deducting the value of the corn saved and the freight, there was left an amount due to plaintiff exceeding the amount of the verdict, an objection that the cost of transportation should have been deducted from the judgment was not sustainable.⁴⁵ In an action by a consignee who has advanced money on goods against common carriers, for injury to such goods *in transitu* the measure of damages is the amount of the advances made with interest, to the extent of the value of the goods if delivered in a sound state, less the amount the goods sold for as damaged goods.⁴⁶ The rule as to the measure of damages for a loss, delay or injury is the same regardless of the purpose of shipment, as for example, whether cattle were shipped for purposes of sale, or to be pastured, or for trading purpose.⁴⁷ It has been held, however, that where cattle are not to be sold but to be kept by the owner, the measure of damages in case of injury is the actual damage to the stock, together with any expense properly incurred in caring for them until recovery.⁴⁸ Where the carrier undertakes to act as factor and sell the goods, the damages for delay in transportation and in making sale, has been held to be

41. The Hugo, 61 Fed. 860.

42. Gulf, etc., R. Co. v. Kemp (Tex. Civ. App.), 30 S. W. 714.

43. Bamberg v. South Carolina R. Co., 9 S. C. 61, 30 Am. Rep. 13.

44. Miami Powder Co. v. Port Royal, etc., R. Co., 38 S. C. 78, 55 Am. & Eng. R. Cas. 688, 16 S. E. 339, 20 L. R. A. 123.

45. Marsden Co. v. Bullitt, 24 Ky. L. Rep. 1697, 72 S. W. 32.

46. Burritt v. Rench, 4 McLean (U. S.), 325, he must look to the con-

signee for any excess in advances; Ober v. Indianapolis, etc., R. Co., 13 Mo. App. 81.

47. Estill v. New York, etc., R. Co., 147 U. S. 591, 41 Fed. 849; Gulf, etc., R. Co. v. Stanley (Tex. Civ. App.), 29 S. W. 806, 33 S. W. 109. See also Smith v. Griffith, 3 Hill (N. Y.), 333, 38 Am. Dec. 639.

48. Gulf, etc., R. Co. v. Godair, 3 Tex. Civ. App. 514; St. Louis, etc., R. Co. v. Hindsman, 1 Tex. App. Civ. Cas. § 204.

damages actually sustained by reason of the carrier's negligence.⁴⁹ Attorney's fees cannot be recovered by the shipper or consignee in an action for failure or delay in delivery, except where permitted by statute.⁵⁰

§ 4. Damages where goods are only injured.—Where goods are injured during transportation and are delivered in a damaged condition, the measure of damages is their difference in market value, when placed in the carrier's charge and when delivered at the point of destination, so far as caused by injuries on the way, with interest, less the freight charges.⁵¹ The measure of recovery

49. *Calvin v. Jones*, 3 Dana (Ky.), 376.

50. *Richmond, etc., R. Co. v. Benson*, 86 Ga. 203, 22 Am. St. Rep. 446; *New Orleans, etc., R. Co. v. Moore*, 40 Miss. 39; *Paddock v. Missouri Pac. R. Co.*, 1 Mo. App. Rep. 87.

51. *N. Y.—Robertson v. National Steamship Co.*, 42 St. Rep. (N. Y.) 649, 17 N. Y. Supp. 459; *Black v. Camden, etc., R. Co.*, 45 Barb. (N. Y.) 40.

U. S.—New York, etc., R. Co. v. Estill, 147 U. S. 591; *Western Mfg. Co. v. The Guiding Star*, 37 Fed. 641; *The Mangalore*, 9 Sawy. (U. S.) 71, 23 Fed. 463.

La.—Corso v. New Orleans, etc., R. Co., 48 La. Ann. 1286; *Henderson v. Maid of Orleans*, 12 La. Ann. 352.

Mass.—Smith v. New Haven, etc., R. Co., 12 Allen (Mass.), 531, 90 Am. Dec. 166.

Mich.—Marquette, etc., R. Co. v. Langton, 32 Mich. 251.

Mo.—Heil v. St. Louis, etc., R. Co., 16 Mo. App. 362; *Harvey v. Terre Haute, etc., R. Co.*, 6 Mo. App. 585, 74 Mo. 538.

N. H.—Hackett v. Boston, etc., R. Co., 35 N. H. 390.

Tenn.—Louisville, etc., R. Co. v. Trent, 16 Lea (Tenn.), 420.

Tex.—Texas, etc., R. Co. v. Dish-

man & Tribble (Tex. Civ. App.), 85 S. W. 319; *Houston, etc., R. Co. v. Williams* (Tex. Civ. App.), 31 S. W. 556; *Texas, etc., R. Co. v. Klepper* (Tex. Civ. App.), 24 S. W. 567.

Household goods.—Where household goods in use are injured while being transported by a carrier, the measure of damages is the difference in their actual value just prior to and just subsequent to the injury, and not the difference in the market value of similar goods at the nearest second-hand stores. In ascertaining the value, the original cost of the property, the manner in which it has been used, its general condition and quality, the percentage of its depreciation from use, damage, age, decay, or otherwise, are all proper to be submitted to the jury. *Wells, Fargo Exp. Co. v. Williams* (Tex. Civ. App.), 71 S. W. 314.

Must be evidence of damage.—In an action against a carrier for damages to goods the only evidence of their value was given by plaintiff and his employes who had similar actions against the carrier. The goods had been used for several years, but no allowance was made for the depreciation in value. There was no evidence of the value of some of the articles specified in the bill of par-

for injury to stock in transit is the difference in the market value of the stock in the condition in which they should have arrived if they had been properly carried, and their market value as they actually arrived.⁵² The shipper or consignee may recover the entire value of the goods if the damages are such as to be beyond repair except at an expense exceeding its value or such as to constitute practically a total loss.⁵³ And where the consignee protects

ticulars, and it was admitted that the valuations placed on other articles were wrong. Held insufficient to warrant the court in directing a verdict for plaintiff for the damages alleged in the complaint. *Litt v. Wabash R. Co.*, 50 App. Div. (N. Y.) 550, 64 N. Y. Supp. 108.

Injury to valuable trotting mare.—It is competent for the plaintiff to prove by the opinion of witnesses the value of the mare both before and after the injury, and also prove her speed, and her value assuming that she possessed the speed proved. *Reed v. Rome, etc., R. Co.*, 48 Hun (N. Y.), 231, 16 St. Rep. (N. Y.) 58.

52. *Texas, etc., R. Co. v. Birchfield* (Tex. Civ. App.), 33 S.W. 1022; *Missouri, etc., R. Co. v. Cobb* (Tex. Civ. App.), 36 S. W. 500; *Texas, etc., R. Co. v. Avery* (Tex. Civ. App.), 33 S. W. 704; *Gulf, etc., R. Co. v. Simmons* (Tex. Civ. App.), 28 S. W. 825; *Galveston, etc., R. Co. v. Herring* (Tex. Civ. App.), 28 S. W. 580, the rule applies although the cattle were injured while being loaded on the cars; *Galveston, etc., R. Co. v. Johnson* (Tex.), 19 S. W. 867, 29 S. W. 428, plaintiff cannot recover for damages naturally incident to the trip; *Galveston, etc., R. Co. v. Silegman* (Tex. Civ. App.), 23 S. W. 298, the plaintiff must show what the property would have been worth at the place of destination had it been safely carried there.

Evidence of market value.—

The price that a shipper paid for his cattle at the place at which he purchased them, or the market value thereof at a point other than the destination, is immaterial upon the question of the measure of damages for injuries to the cattle during transportation, as the value at the point of destination is the standard by which the damages is to be measured. *Hendrick v. Boston, etc., R. Co.*, 170 Mass. 44, 48 N. E. 835. Evidence of a general decline in the market value of cattle after the making of a shipment is admissible in an action for injuries to such cattle in shipment. *Gulf, etc., R. Co. v. Forst* (Tex. Civ. App.), 34 S. W. 167. Evidence of the market value of hogs in different places is properly excluded in an action for damages to hogs in shipment, where the market value at the place of shipment, at which place they were sold, is shown. *Terry v. Gulf, etc., R. Co.*, 14 Tex. Civ. App. 451, 37 S. W. 234.

Presumption as to loss.—Where sugar in bags were received by the carrier in good order and on delivery some of the bags were empty, the presumption, in the absence of proof, is that the bags were full when shipped, and that their average weight was that of the lightest bags shipped. *The Euripides*, 63 Fed. 140.

53. *Thomas, etc., Mfg. Co. v. Wabash, etc., R. Co.*, 62 Wis. 642, 51 Am. Rep. 725; *Texas, etc., R. Co. v. Logan*, 3 Tex. App. Civ. Cas. § 186.

himself from loss resulting from the goods being damaged, by an actual sale of the goods and receipt of the price, he can only recover nominal damages.⁵⁴ So, where the damage results from the shipper's negligence in packing.⁵⁵ Where the goods delivered were different from those shipped, in weight and value, the recovery should be the difference in value between those shipped and those delivered.⁵⁶ Reasonable costs and expenses incurred in repairing damage and compensation for the loss of the use of the goods during such time,⁵⁷ the reasonable cost of re-packing damaged goods,⁵⁸ the reasonable expense of keeping live stock until salable,⁵⁹ and reasonable expenses incurred in seeking for goods,⁶⁰ have been held to be recoverable, in addition to the actual loss, where the injury to the goods was lessened by the action of the plaintiff. The law, for wise reasons, imposes upon a party subject to injury from a breach of contract the active duty of making reasonable exertions to render the injury as light as possible. Public interest and sound morality accord with the law in demanding this; and, if the injured party, through negligence or wilfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls on him.⁶¹

§ 5. Measure of damages in case of delay.—In an action against a carrier of goods for failure to deliver the same within a reasonable time, the measure of damages is the difference in value of the merchandise at the time and place it ought to have

54. Henry v. Central R., etc., Co., 89 Ga. 815.

55. Baldwin v. London, etc., R. Co., 9 Q. B. Div. 582, 9 Am. & Eng. R. Cas. 175.

56. Memphis, etc., Packet Co. v. Abell (Ky.), 30 S. W. 658.

57. Robertson v. National Steamship Co., 42 St. Rep. (N. Y.) 694, 17 N. Y. Supp. 459, 60 N. Y. Super. Ct. 132; Savannah, etc., R. Co. v. Pritchard, 77 Ga. 412, 4 Am. St. Rep. 92; Winne v. Illinois Cent. R. Co., 31 Iowa, 583, 1 Am. Ry. Rep. 460; Washash, etc., R. Co. v. Lynch, 12 Ill. App. 365.

58. Texas, etc., R. Co. v. Levi, 59 Tex. 674, 13 Am. & Eng. R. Cas. 464.

59. Galveston, etc., R. Co. v. Tuckett (Tex. Civ. App.), 35 S. W. 150.

60. North Missouri R. Co. v. Akers, 4 Kan. 453, 96 Am. Dec. 183; Savannah, etc., R. Co. v. Pritchard, 77 Ga. 412. *Compare* Western Mfg. Co. v. The Guiding Star, 37 Fed. 641.

61. Hamilton v. McPherson, 28 N. Y. 72, 84 Am. Dec. 330; Grindle v. Eastern Express Co., 67 Me. 317, 21 Am. Rep. 31; Hackett v. Boston, etc., R. Co., 35 N. H. 390; Tardos v. Chicago, etc., R. Co., 35 La. Ann. 15; Missouri Pac. R. Co. v. Rushing, 3 Tex. App. Civ. Cas. § 317; Houston, etc., R. Co. v. Williams (Tex. Civ. App.), 31 S. W. 556.

been delivered in the usual course of transportation, and at the time of its actual delivery or tender, whether the difference in value was occasioned by injury to the goods or was due to a decline in the market value, with interest added, and freight charges, if unpaid, deducted.⁶² The rule is the same where there is a special

62. N. Y.—G. S. Roth Clothing Co. v. Maine S. S. Co., 44 Misc. Rep. (N. Y.) 237, 88 N. Y. Supp. 987, 42 Misc. Rep. (N. Y.) 550, 86 N. Y. Supp. 25; Sherman v. Hudson River R. Co., 64 N. Y. 254; Holden v. New York Cent. R. Co., 54 N. Y. 662; Ward v. New York Cent. R. Co., 47 N. Y. 29, 7 Am. Rep. 405, 1 Am. Ry. Rep. 452; Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Livingston v. New York Cent., etc., R. Co., 5 Hun (N. Y.), 562; Medbury v. New York, etc., R. Co., 26 Barb. (N. Y.) 564; Lakeman v. Grinnell, 5 Bosw. (N. Y.) 625; Kent v. Hudson River R. Co., 22 Barb. (N. Y.) 278; Robertson v. National Steamship Co., 60 N. Y. Super. Ct. 132. A different rule was maintained in Jones v. New York, etc., R. Co., 29 Barb. (N. Y.) 633; Wibert v. New York, etc., R. Co., 19 Barb. (N. Y.) 36; Conger v. Hudson River R. Co., 6 Duer (N. Y.), 375; Kirkland v. Leary, 2 Sweeny (N. Y.), 677.

U. S.—The Vaughan, 14 Wall. (U. S.) 258.

Ark.—Murrell v. Pacific Express Co., 54 Ark. 22, 26 Am. St. Rep. 17; St. Louis, etc., R. Co. v. Phelps, 46 Ark. 485.

Cal.—Ringgold v. Haven, 1 Cal. 108; Hart v. Spalding, 1 Cal. 213.

Del.—McHenry v. Philadelphia, etc., R. Co., 4 Harr. (Del.) 448.

Ga.—East Tennessee, etc., R. Co. v. Johnson, 85 Ga. 497, 45 Am. & Eng. R. Cas. 340; Atlanta, etc., R. Co., v. Texas Grate Co., 81 Ga. 602, 40 Am. & Eng. R. Cas. 130.

Ill.—Louisville, etc., R. Co. v. Heilprin, 95 Ill. App. 402; Chicago, etc., R. Co. v. Stanbro, 87 Ill. 195; Chicago, etc., R. Co. v. Dickinson, 74 Ill. 249; Illinois Cent. R. Co. v. McClellan, 54 Ill. 58, 5 Am. Rep. 83; Sangamon, etc., R. Co. v. Henry, 14 Ill. 156; Illinois Cent. R. Co. v. Cobb, 72 Ill. 148.

Ind.—Michigan Southern, etc., R. Co. v. Caster, 13 Ind. 164.

Iowa.—Hudson v. Northern Pac. R. Co., 92 Iowa, 231; Bridgman v. The Steamboat Emily, 18 Iowa, 509.

Kan.—Missouri Pac. R. Co. v. McGrath, 3 Kan. App. 220; Kansas Pac. R. Co. v. Reynolds, 9 Kan. 623, 5 Am. Ry. Rep. 260.

Me.—Dunham v. Boston, etc., R. Co., 70 Me. 164, 35 Am. Rep. 314; Weston v. Grand Trunk R. Co., 54 Me. 376 92 Am. Dec. 552.

Mass.—Fox v. Boston, etc., R. Co., 148 Mass. 220, 37 Am. & Eng. R. Cas. 632; Scott v. Boston, etc., Steamship Co., 106 Mass. 468; Cutting v. Grand Trunk R. Co., 13 Allen (Mass.), 381; Smith v. New Haven, etc., R. Co., 12 Allen (Mass.), 531, 90 Am. Dec. 166; Spring v. Haskell, 4 Allen (Mass.), 112; Ingledew v. Northern R. Co., 7 Gray (Mass.), 86.

Mich.—Houseman v. Merchants' Dispatch Transp. Co., 104 Mich. 300; Ward's Cent., etc., Lake Co. v. Elkins, 34 Mich. 439, 22 Am. Rep. 544; Sisson v. Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252.

Minn.—Whalon v. Aldrich, 8 Minn. 346.

Miss.—New Orleans, etc., R. Co. v.

engagement to deliver at a certain time.⁶³ In an action for negligent delay in delivery of a machine it has been held that it is

Tyson, 46 Miss. 729; Vicksburg, etc., R. Co. v. Ragsdale, 46 Miss. 458.

Mo.—D. Klass Commission Co. v. Wabash R. Co., 80 Mo. App. 164, 2 Mo. App. Rep. 545; Wilson v. Missouri Pac. R. Co., 2 Mo. App. Rep. 1366; Galvin v. Kansas City, etc., R. Co., 21 Mo. App. 273; Armstrong v. Missouri Pac. R. Co., 17 Mo. App. 403; Lesinsky v. Great Western Dispatch, 13 Mo. App. 575; Sturgeon v. St. Louis, etc., R. Co., 65 Mo. 569; Rankin v. Pacific R. Co., 55 Mo. 167; Faulkner v. South Pac. R. Co., 51 Mo. 311, 3 Am. Ry. Rep. 293.

N. H.—Bailey v. Shaw, 24 N. H. 297, 55 Am. Dec. 241.

N. C.—Lindley v. Richmond, etc., R. Co., 88 N. C. 547, 9 Am. & Eng. R. Cas. 31.

Ohio.—Devereux v. Buckley, 34 Ohio St. 16, 32 Am. Rep. 342, 21 Am. Ry. Rep. 72.

Pa.—Tanner v. Oil Creek R. Co., 53 Pa. St. 411; Hand v. Baynes, 4 Whart. (Pa.) 204, 33 Am. Dec. 54.

S. C.—Nettles v. South Carolina R. Co., 7 Rich. L. (S. C.) 190, 62 Am. Dec. 409.

Tenn.—East Tennessee, etc., R. Co. v. Hale, 85 Tenn. 69, 27 Am. & Eng. R. Cas. 36; Louisville, etc., R. Co. v. Mason, 11 Lea (Tenn.), 116, 16 Am. & Eng. R. Cas. 241.

Tex.—San Antonio, etc., R. Co. v. Josey (Tex. Civ. App.), 71 S. W. 606; San Antonio, etc., R. Co. v. Pratt (Tex.), 34 S. W. 445; Missouri, etc., R. Co. v. Darlington (Tex. Civ. App.), 30 S. W. 251; Gulf, etc., R. Co. v. McAuley (Tex. Civ. App.), 26 S. W. 475; Missouri Pac. R. Co. v. Russell (Tex.), 18 S. W. 594; International, etc., R. Co. v. Anderson, 3 Tex. Civ. App. 8; Inter-

national, etc., R. Co. v. Philips, 63 Tex. 590.

Vt.—Newell v. Smith, 49 Vt. 255, 17 Am. Ry. Rep. 100; Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 350; King v. Woodbridge, 34 Vt. 565.

Wis.—Peet v. Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446.

Eng.—Collard v. South Eastern R. Co., 7 H. & N. 79; Wilson v. Lancashire, etc., R. Co., 9 C. B. N. S. 632, 99 E. C. L. 632; Wilson v. New Castle, etc., R. Co., 18 E. B. & E. 557; British Columbia, etc., Co. v. Nettleship, L. R. 3 C. P. 499; Rice v. Baxendale, 7 H. & N. 96.

Penalty contracts. — Where plaintiff, in shipping pews to a certain church, informed the carrier that its contract with the church was a penalty contract, and directed immediate shipment, plaintiff's measure of damages in an action against the carrier for delay in delivery was the amount of forfeiture paid by it under the terms of the contract. Illinois Cent. R. Co. v. Southern Seating, etc., Co., 104 Tenn. 568, 58 S. W. 303. A contract of shipment providing that the carrier will remit five cents per 100 lbs. from the freight charges for every day's delay thereafter, if the goods are not delivered in ten days, limits the penalty to the amount of the freight charges and applies to a temporary delay and not where there is an entire failure of delivery. Nudd v. Wells, 11 Wis. 407.

Delay causing loss of engagement. — Where an express company undertook to carry the trunk of an actress without knowledge that she had engagements which she could not fill without the contents of the

the duty of a consignee to use ordinary care to ascertain and remove the cause of the delay, and in obtaining another machine,

trunk, the measure of damages for its refusal for several days to deliver the trunk, unless an excessive charge were paid, does not include what she would have received from such engagements during the wrongful detention. *Brown v. Weir*, 95 App. Div. (N. Y.) 78, 88 N. Y. Supp. 479.

A special contract with a third person, of which the carrier knew nothing, will not entitle plaintiff to any additional damages. *Columbus, etc., R. Co. v. Flournoy*, 75 Ga. 745.

Interest on the value of the goods for the length of time they are delayed is recoverable as damages. *East Tennessee, etc., R. Co. v. Johnson*, 85 Ga. 497; *Woodward v. Illinois Cent. R. Co.*, 1 Biss. (U. S.) 447; *Murrell v. Dixey*, 14 La. Ann. 298; *Smith v. Whitman*, 13 Mo. 352; *Laurent v. Vaughn*, 30 Vt. 90. Interest on the amount found as damages is not recoverable. *Illinois Cent. R. Co. v. Southern Seating etc., Co.*, 104 Tenn. 568, 58 S. W. 303.

A mere delay in delivery is not a conversion, and the owners can only recover damages resulting from carrier's negligence. *Briggs v. New York Cent. R. Co.*, 28 Barb. (N. Y.) 515; *St. Louis, etc., R. Co. v. Mudford*, 44 Ark. 439, 21 Am. & Eng. R. Cas. 139.

Delay in delivering corpse.—A verdict for \$1,640 for a delay of a few hours in the shipment of the corpse of the plaintiff's wife, resulting in a delay in the interment only from one afternoon to the next morning, was held to be excessive; plaintiff being treated with proper courtesy, and there being no intima-

tion that the condition of the corpse rendered a speedy interment necessary. *Louisville, etc., R. Co. v. Hull*, 24 Ky. Law Rep. 375, 57 L. R. A. 771, 68 S. W. 433. But a verdict of \$2,000 was sustained for delay in delivering a corpse, the body of the plaintiff's son, whereby funeral services could not be held at the church, but the burial had to be done at night. *Wells, etc., Express Co. v. Fuller* (Tex. Civ. App.), 35 S. W. 824.

Evidence of market value.—Market values at place of destination and not elsewhere are to be considered. *Missouri, etc., R. Co. v. Quinn* (Tex. Civ. App.), 29 S. W. 404; *San Antonio, etc., R. Co. v. Thompson* (Tex. Civ. App.), 66 S. W. 792. Fluctuations in market value of the goods during the period of the delay may be shown. *The Caledonia*, 157 U. S. 124; *Chicago, etc., R. Co. v. Wolcott*, 141 Ind. 267, 61 Am. & Eng. R. Cas. 135. A decline in the market between the time when the goods should have been delivered and when they were actually delivered may be shown, but not a decline between the time when the goods were delivered and when they were sold. *Glascock v. Chicago, etc., R. Co.*, 69 Mo. 589.

Where delay causes a total loss.—Where a carrier of summer goods delivered to it on July 10th failed to deliver them in New York until August 8th, the season for a sale of which was then over, and the consignee refused to accept them, he may recover the whole value of the goods; they having become worthless from negligent exposure to moisture. *Baumann v. New York, etc.*,

and that the measure of damages was the natural and proximate result of the carrier's delay after receiving payment for the shipment, and for such time only as intervened between the date the

R. Co., 35 Misc. Rep. (N. Y.) 223, 71 N. Y. Supp. 632; Schulze v. Great Eastern R. Co., 19 Q. B. Div. 30, 30 Am. & Eng. R. Cas. 134.

Household necessities. — The measure of damages for delay in the delivery of goods consisting of household necessities is the reasonable value of the use of the property to the owner during the time of the delay. Missouri, etc., R. Co. v. Clifton (Tex. Civ. App.), 80 S. W. 386.

Evidence of market price. — Evidence as to what the consignee agreed to pay for the goods f. o. b. at the point of shipment was admissible on the issue of their market value at the point of destination at the date they should have arrived there, where the consignee testified that he based the contract price on such market value; on the issue of such market value, the price at which the goods were actually sold was admissible. Garlington v. Ft. Worth, etc., R. Co. (Tex. Civ. App.) 78 S. W. 368.

Improper handling of shipment of fruit or vegetables. — The measure of damages is the difference in the market value of the fruit, had it arrived in proper condition, and its market value in the condition in which it did arrive. St. Louis, etc., R. Co. v. Henry (Tex. Civ. App.), 71 S. W. 334. Or the difference in the market value in the condition in which it would have arrived but for the delay, and that in which it did arrive. Garlington v. Fort Worth, etc., R. Co. (Tex. Civ. App.), 78 S. W. 368; San Antonio, etc., R. Co. v. Thompson (Tex. Civ. App.), 66 S. W. 792. See also South-

ern Ry. Co. v. Deakins, 107 Tenn. 522, 64 S. W. 477.

Delay in shipment of medicine.

—Plaintiff sued to recover damages for pain and retarded recovery by reason of failure of defendant express company to promptly deliver medicine purchased by her. The medicine was ordered by a relative of plaintiff, for whom she had worked, which facts were known to defendant's agent at the shipping point. The package was directed to such relative, and, though defendant's agent was informed that it contained medicine, he was not informed that it was for plaintiff. Held, that the evidence was insufficient to show notice to defendants of plaintiff's connection with and interest in the shipment, so as to warrant a finding of special damages in her favor; that though defendants subsequent to the date of shipment, were notified of plaintiff's interest therein and the probable consequences of their failure to deliver, they were not responsible for special damages to plaintiff for their failure to thereafter promptly deliver the medicine; that, plaintiff being the principal for whom the medicine was purchased, it was not error to refuse to direct a verdict for defendants, since she was entitled to recover such damages as her agent could have recovered in a suit in her own name. Pacific Express Co. v. Redman (Tex. Civ. App.), 60 S. W. 677.

63. Columbus, etc., R. Co. v. Flournoy, 75 Ga. 745; Chicago, etc., R. Co. v. Thrapp, 5 Ill. App. 502; Cutting v. Grand Trunk R. Co., 13 Allen (Mass.) 381.

machine should have been delivered and such time as by the use of ordinary care the consignee could have removed the cause of delay or obtained another machine, including the increased cost of labor to the consignee in the absence of the machine and the loss of time or profits on the contracts made by the consignee.⁶⁴ The necessary expenses incurred by the shipper or consignee in obtaining the goods, or in consequence of the delay, have been held proper items to be included in a recovery.⁶⁵ For example, the

Delay in transporting horses.

—At the time of an agreement to transport certain horses to Alaska, and to deliver them not later than a day named, defendant was informed that the purpose in shipping the horses was to use them in freighting goods over the Chilcoot Pass; that there was a great demand at that point for horses of the kind to be shipped, and that plaintiff could make from \$450 to \$500 per day from such use of them. Plaintiff had not, however, entered into any contracts for freighting with said horses, but was depending upon the condition of business for securing such contracts when the horses were delivered. The horses were not delivered until 27 days after the time agreed to, and there was evidence that during the interval between the time when said horses were to arrive under the contract and the date of their arrival a two-horse team could earn from \$50 to \$75 a day in freighting, and that single horses could have been rented for that purpose at \$20 a day. Held that, in estimating plaintiff's damages the jury might consider what might have been earned by the horses during the time of delay. *Port Blakely Mill Co. v. Sharkey*, 102 Fed. 259, 42 C. C. A. 329.

64. *Louisville, etc., Packet Co. v. Bottorff*, 25 Ky. L. Rep. 1324, 77 S. W. 920. Claim was made for a

carrier's delay in shipping to M. a new invention for renovating feathers, which had no established rental value. Evidence showed that the machine was moved from town to town as the supply of feathers to be cleaned became exhausted, and that at M. the supply of feathers and the profits were greater than at other places, due to the working up of such supply during the delay. There was testimony as to the rental value of the machine, together with horses and wagons. Held, that the measure of damages was the fair rental value of the machine, to be determined from its character, capacity, and running expenses, and, in the absence of specific instructions how to arrive at such value, it was error to refuse charges that no recovery could be had for any special benefit from use of the machine at M. and to find the rental value of the machine alone, without teams, wagons, and hands to operate it. *Texas & P. R. Co. v. Hassell* (Tex. Civ. App.), 58 S. W. 54. See *Lucas v. Railway Co.*, 122 Ala. 529; *Thompson v. Railroad Co.*, 122 Ala. 378.

65. *Briggs v. New York Cent. R. Co.*, 28 Barb. (N. Y.) 515; *Sangamon, etc., R. Co. v. Henry*, 14 Ill. 156; *Rankin v. Pacific R. Co.*, 55 Mo. 167; *Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489; *Nettles v. South Carolina R. Co.*, 7 Rich. L (S. C.) 190, 62 Am. Dec. 409.

expense incurred in a necessary search for goods delayed;⁶⁶ but not where the expense was shown to be the unnecessary;⁶⁷ the expense of teams sent for freight, where freight is wrongfully withheld;⁶⁸ but not for expense of agent and team sent to receive goods, without showing notice to defendant of an intention to do so;⁶⁹ the cost of keeping live stock, caused by a delay, until the next market day;⁷⁰ the freight charges from a wrong destination, to which the goods had been sent, to the proper one.⁷¹ But recovery cannot be had for the consignee's loss of time while waiting for the goods to arrive, in the absence of special circumstances shown to have been known to the carrier.⁷² The carrier is not entitled to deduct expenses of litigation incurred by it in recovering the shipper's goods from a wrongdoer who undertook to appropriate them.⁷³ Recovery can be had only for such damages as are the direct or proximate consequences of the delay, and the burden of proof is upon the plaintiff to show that the damages were due to the delay.⁷⁴ Only nominal damages are recoverable for negligent delay when no actual damages have been shown to have been sustained because of the delay, although injuries may have resulted from other causes.⁷⁵ The shrinkage in weight of live stock due to the delay in delivery is a proper element of damage, in addition to the difference in market value of the stock when they were delivered and when they should have been delivered;⁷⁶ but deterioration

66. *Savannah, etc., R. Co. v. Pritchard*, 77 Ga. 412. But see *Hales v. London, etc., R. Co.*, 4 B. & S. 66, 116 E. C. L. 66; *Woodger v. Great Western R. Co.*, L. R. 2 C. P. 318.

67. *St. Louis, etc., R. Co. v. Muford*, 48 Ark. 502; *Louisville, etc., R. Co. v. Trent*, 16 Lea (Tenn.) 419, where owner delayed acceptance of stock.

68. *Gulf, etc., R. Co. v. Loonie*, 84 Tex. 259.

69. *Briggs v. New York Cent. R. Co.*, 28 Barb. (N. Y.) 515.

70. *Ayres v. Chicago, etc., R. Co.*, 75 Wis. 215, 40 Am. & Eng. R. Cas. 108; *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211. See also *Armstrong v. Missouri Pac. R. Co.*, 17 Mo. App. 403.

71. *Montieth v. Merchants' Dispatch, etc., Co.*, 1 Ont. Rep. 47; *Galena, etc., R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574.

72. *Denver, etc., R. Co. v. De Witt*, 1 Colo. App. 419; *Ingledeew v. Northern R. Co.*, 7 Gray (Mass.) 86.

73. *Hardman v. Brett*, 37 Fed. 803.

74. *Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 695; *Detroit, etc., R. Co. v. McKenzie*, 43 Mich. 609, 9 Am. & Eng. R. Cas. 15.

75. *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621; *Henry v. Central R., etc., Co.*, 89 Ga. 815; *Baldwin v. London, etc., R. Co.*, 9 Q. B. Div. 582.

76. *Sturgeon v. St. Louis, etc., R. Co.*, 65 Mo. 569; *Douglass v. Hannibal, etc., R. Co.*, 53 Mo. App. 473;

caused by the negligence of the shipper must be borne by the shipper.⁷⁷

§ 6. Damages for refusal or failure to carry.—In an early case in New York it was held, in an action for the breach of a contract to transport goods, where by the refusal and neglect of the carrier to take the goods at the time agreed the opportunity to transport the same was wholly lost, that the true measure of damages was the difference between the value of the goods to be carried, at the place of their intended embarkation, and the value at their place of intended delivery, less the carriage and necessary expenses.⁷⁸ In a later case it was held, in an action for breach of contract to carry freight, that the measure of damages was the difference between the price agreed upon for transportation and that which the carriage by others would have cost at the time when the defendant agreed to receive the shipment.⁷⁹ The general rule in other States, where the carrier refuses to receive or carry goods tendered for transportation, is that the measure of damages recoverable by the shipper is the difference between the value of the goods at the time they were to have been delivered at the point of destination, and the value of goods of the same quality at the same time at the place of shipment, together with the interest from that time, less the cost of transportation.⁸⁰

Illinois Cent. R. Co. v. Simmons, 49 Ill. App. 433; *Gulf, etc., R. Co. v. Hume*, 6 Tex. Civ. App. 653; *Ayres v. Chicago, etc., R. Co.*, 75 Wis. 215, 40 Am. & Eng. R. Cas. 108; *Illinois Cent. R. Co. v. Waters*, 41 Ill. 73, delay in transporting animals after loading; *Lake Erie, etc., R. Co. v. Rosenberg*, 31 Ill. App. 47, delay in unloading animals after arrival at destination.

77. Boaz v. Central R. Co., 87 Ga. 463.

78. Bracket v. McNair, 14 Johns. (N. Y.) 170. The same rule was applied later in the case of *People v. New York, etc., R. Co.*, 22 Hun (N. Y.), 533, for a wrongful refusal to receive and transport.

79. Ogden v. Marshall, 8 N. Y. 340, 59 Am. Dec. 497.

80. Ark.—St. Louis, etc., R. Co. v. Neel, 56 Ark. 279.

Ga.—Central R. Co. v. Logan, 77 Ga. 804, 30 Am. & Eng. R. Cas. 63.

Ill.—Galena, etc., R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574; *Toledo, etc., R. Co. v. Roberts*, 71 Ill. 540, damages compensatory only where the refusal is not willful or malicious.

Ky.—Newport News, etc., R. Co. v. Mercer, 96 Ky. 475.

La.—Armistead v. Shreveport, etc., R. Co., 108 La. 171, 32 So. 456.

Mass.—Harvey v. Connecticut, etc., Rivers R. Co., 124 Mass. 421, 26 Am. Rep. 673.

On the failure of a carrier to transport goods, according to his contract, the owner must send them by another conveyance, if able to do so; and in such case, the measure of damages is the difference between the price at which the defendants undertook to carry the property, and that which the plaintiff was compelled to pay.⁸¹ It is the duty of the shipper to protect his property while the shipment is being delayed by the carrier's refusal or failure to carry it, and the carrier is liable for the reasonable expense thereof, but is not liable for injuries due to the failure of the shipper to properly protect the goods.⁸² Where the carrier fails to provide proper cars of the character it contracted to, the measure of damages is the actual loss sustained from deterioration of the goods by shipment by other means, and the increased cost of transportation;⁸³ and for a failure to provide cars at the time agreed upon the measure of damages is the loss of profits occasioned by the delay or the increased expenses of securing other transportation.⁸⁴ Where a carrier, by failure to exercise due diligence, is able to transport the goods only a part of the way, the shipper's measure of damages is the difference between the contract price of transportation and the increased cost necessary to secure the delivery of the property at its destination, without any pro rata allowance to the carrier for the partial carriage.⁸⁵

Minn.—Cowley v. Davidson, 13 Minn. 92.

Miss.—Anderson v. Louisville, etc., R. Co. (Miss.) 15 So. 795.

S. C.—Avenger v. South Carolina R. Co., 29 S. C. 265, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 519.

Tex.—International, etc., R. Co. v. Startz (Tex. Civ. App.), 33 S. W. 575; Houston, etc., R. Co. v. Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421.

81. Grund v. Pendergast, 58 Barb. (N. Y.) 216. But the carrier is not liable for loss of perishable goods through failure of the shipper to forward the goods at once by other means, or for unnecessary expense incurred in forwarding them.

Ward's Cent., etc., Lake Co. v. Elkins, 34 Mich. 439, 22 Am. Rep. 544.

82. Houston, etc., R. Co. v. Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421; St. Louis, etc., R. Co. v. Neel, 56 Ark. 279, 19 S. W. 963, 12 Ry. & Corp. L. J. 110.

83. Waller v. Midland Great Western R. Co., L. R. 4 Ir. 376; Irvine v. Midland Great Western R. Co., L. R. 6 Ir. 55.

84. Gulf, etc., R. Co. v. Martin (Tex. Civ. App.), 28 S. W. 576; Gulf, etc., R. Co. v. Hodge, 10 Tex. Civ. App. 543.

85. Spann v. Erie Boatman's Transp. Co., 11 Misc. Rep. (N. Y.) 680, 33 N. Y. Supp. 566.

§ 7. Damages for refusal to deliver.—Where the carrier wrongfully refuses to deliver the goods it is liable as for a conversion, and the measure of damages is the same as in any other case of conversion, namely, the value of the goods in the condition they were in at the time of the conversion, together with damages for the wrongful conversion by way of compensation for the loss of the use of the goods,⁸⁶ or legal interest from the date of the conversion less the freight charges.⁸⁷ The jury may award exemplary damages, if the conversion is under circumstances which show a wilful disregard of the shipper's rights,⁸⁸ but no recovery can be had because of mere brusqueness on the part of the carrier's agent.⁸⁹

§ 8. Damages for misdelivery.—Where goods are delivered by a carrier to the wrong person, thereby causing a total loss to the owner, the measure of damages is the same as in the case of a loss in any other way.⁹⁰ But if the owner receives his goods immediately from the person to whom they were wrongfully delivered, he can recover only nominal damages.⁹¹ Where the carrier delivers at the wrong destination, the measure of damages is the difference between the value of the goods where they are delivered and the value at the point where they should have been delivered.⁹² A carrier delivering goods to the consignee without requiring him to present the bill of lading and pay a draft upon him, in

86. Baltimore, etc., R. Co. v. O'Donnell, 49 Ohio St. 489, 55 Am. & Eng. R. Cas. 665; Savannah, etc., R. Co. v. Sloat, 93 Ga. 808, 61 Am. & Eng. R. Cas. 207; Loeffler v. Keokuk Northern Line Packet Co., 7 Mo. App. 185; Rice v. Indianapolis, etc., R. Co., 3 Mo. App. 27. See also Davis v. North Western R. Co., 4 Jur. N. S. 1303. See § 1, chap. 6. Missouri, etc., R. Co. v. C. H. Rines & Co. (Tex. Civ. App.), 84 S. W. 1092.

Where there was a delivery after a wrongful refusal the plaintiff was allowed to recover as damages the expenses of his servant while delivery was refused. Wait v. Gilbert, 10 Cush. (Mass.) 177.

87. Texas, etc., R. Co. v. Payne, 15 Tex. Civ. App. 58, 38 S. W. 366, and evidence as to what might be realized from a sale of the goods at retail, or the profit to be derived from such sale, is inadmissible.

88. Milwaukee, etc., R. Co. v. Arms, 91 U. S. 489-493; 2 Greenleaf, § 266 and cases cited.

89. Illinois Cent. R. Co. v. Brookhaven Mach. Co., 71 Miss. 663.

90. See § 1, *ante*.

91. Rosenfield v. Express Co., 1 Wood (U. S.) 131.

92. Galena, etc., R. Co. v. Rae, 18 Ill. 488; Teague v. Southern R. Co., 45 S. C. 27.

accordance with instructions of the shipper, is liable only for the value of the goods, not exceeding the amount of the draft.⁹³ Where an article was delivered to a common carrier, to be delivered to a factor at a certain market, who had been instructed not to sell until ordered, and such carrier delivered it to a factor at a different market, who had no instructions concerning it, and sold it immediately, upon proving a rise in the price of the goods, from that day until the suit was brought, the owner was held entitled to recover the highest price attained by the article within that period, suit having been brought within a reasonable time.⁹⁴ When there is a failure to deliver at a special point at the place of destination, as, for example, to deliver grain at a particular elevator, it has been held that, in the absence of statute, the measure of damages was the necessary cost of moving the goods to the place required; while, if the action were brought under the statute, depreciation in the price of the goods might be an element of damage.⁹⁵

§ 9. Damages where goods have no market value.—Where goods lost or damaged by a carrier in transit have no market value, the measure of damages is the cost of reproducing or replacing the same, if they can be reproduced or replaced, but, if they cannot be, then the value of the property to the owner. Not any fanciful price that he might, for special reasons, place upon them, nor the amount for which he could sell them to others, but the actual loss in money he would sustain by being deprived of articles so especially adapted to his use.⁹⁶ The measure of dam-

93. Louisville, etc., R. Co. v. Hartwell, 18 Ky. L. Rep. 745, 99 Ky. 436, 36 S. W. 183, 38 S. W. 104, 4 Am. & Eng. R. Cas. N. S. 550.

94. Arrington v. Wilmington, etc., R. Co., 6 Jones L. (N. C.) 68, 72 Am. Dec. 559. See also Wells v. Oregon R., etc., Co., 12 Sawy. (U. S.) 519, 32 Fed. 51, where action was brought under the California statute fixing the measure of damages at the highest market value.

95. Chicago, etc., R. Co. v. Stanbro, 87 Ill. 195, 18 Am. Ry. Rep. 180.

96. Houston, etc., R. Co. v. Ney (Tex. Civ. App.), 58 S. W. 43, and the jury may consider evidence as to the original cost of the articles; International, etc., R. Co. v. Nicholson, 61 Tex. 550, 21 Am. & Eng. R. Cas. 122; Gulf, etc., R. Co. v. Clark, 2 Tex. App. Civ. Cas., § 512, 18 Am. & Eng. R. Cas. 628; Denver, etc., R. Co. v. Frame, 6 Colo. 382, 18 Am. & Eng. R. Cas. 637; Missouri Pac. R. Co. v. Hewett, 2 Tex. App. Civ. Cas., § 273, rental value of a sewing machine not recoverable.

ages for delay in the delivery of a business man's order books,⁹⁷ or a drummer's samples,⁹⁸ has been held to be the value to them of the articles at the time when they should have been delivered, but they are not entitled to recover loss of profits which they would have derived from the sale of goods, unless the carrier was notified of the object for which the goods were intended and the consequences likely to follow a delay. The measure of damages for delay in delivering a collection of birds in time for an advertised exhibition has been held to be the net profits of the proposed exhibition,⁹⁹ and the same rule was applied for failure to transport an opera troupe and its effects in time to give performances as advertised.¹ For the loss of a family or other portrait, the actual value to the owner is the measure of damages, in estimating which the jury may consider the original cost, the probable cost of reproducing them,² the fact that the owner had no other portrait of that member of his family,³ or that the portrait was that of a distinguished person and copies were in demand.⁴ For delay in the transportation of household goods, the measure of damages has been held to be the rental value of the goods during the delay, with interest, but, if they have no rental value, the actual loss in money sustained in consequence of the delay to be determined from the facts in evidence.⁵

§ 10. Damages for mental suffering.—In an action against a carrier to recover damages for delay in the shipment of a corpse, there may be a recovery for the mental suffering or distress occasioned to a husband, wife, or other relative by reason of the negligent delay.⁶ But damages cannot be recovered for any mental an-

97. Wells v. Battle, 5 Tex. Civ. App. 532.

98. Schultze v. Great Eastern R. Co., 19 Q. B. Div. 30, 30 Am. & Eng. R. Cas. 134; Great Western R. Co. v. Redmayne, L. R. 1 C. P. 329, 14 W. R. 206.

99. Yoakum v. Dunn, 1 Tex. Civ. App. 532.

1. Foster v. Cleveland, etc., R. Co., 56 Fed. 434.

2. Houston, etc., R. Co. v. Burke, 55 Tex. 323, 40 Am. Rep. 808, 9 Am. & Eng. R. Cas. 59.

3. Green v. Boston, etc., R. Co., 128 Mass. 221, 35 Am. Rep. 370, 10 Cent. L. J. 208.

4. Bennett v. Drew, 3 Bosw. (N. Y.) 355.

5. Brown v. Adams, 3 Tex. App. Civ. Cas., § 390.

6. Louisville & N. R. Co. v. Hull, 24 Ky. L. Rep. 375, 68 S. W. 433, 57 L. R. A. 771; Hale v. Bonner, 82 Tex. 33, 27 Am. St. Rep. 850, 49 Am. & Eng. R. Cas. 135; Wells, etc., Express Co. v. Fuller (Tex. Civ. App.), 35 S. W. 824.

guish suffered by a plaintiff because of negligent delay in the transportation of a choice lot of birds used for exhibition purposes.⁷

§ 11. Remote and speculative damages.—Damages for breach of contract are only those which are incidental to and directly caused by the breach, the natural and proximate consequence of the act complained of, and such as may reasonably be presumed to have entered into the contemplation of the parties at the time they made the contract as the probable result of the breach of it. The plaintiff cannot recover speculative profits, or accidental or consequential losses, or damages arising from circumstances peculiar to the special case and which fairly may be supposed not to have been the necessary and natural sequence of the breach, unless by the terms of the agreement, or by direct notice, they are brought within the expectation of the parties and made known to the party who broke the contract.⁸ The measure of damages in

7. Yoakum v. Dunn, 1 Tex. Civ. App. 524.

8. N. Y.—Hamilton v. McPherson, 28 N. Y. 72; Medbury v. New York, etc., R. Co., 26 Barb. (N. Y.) 564; Brauer v. Oceanic Steam Nav. Co., 34 Misc. Rep. (N. Y.) 127, 69 N. Y. Supp. 465. This doctrine of the Civil law was early adopted in this state and subsequently in England.

Ill.—Wabash, etc., R. Co. v. Lynch, 12 Ill. App. 365.

Iowa.—Cobb v. Illinois Cent. R. Co., 38 Iowa 601.

Kan.—Atchison, etc., R. Co. v. Thomas, (Kan.) 78 Pac. 861; Missouri Pac. R. Co. v. Nevin, 31 Kan. 385, 16 Am. & Eng. R. Cas. 252.

Md.—Baltimore, etc., R. Co. v. Pumphrey, 59 Md. 390, 9 Am. & Eng. R. Cas. 332.

Miss.—Vicksburg, etc., R. Co. v. Ragsdale, 46 Miss. 458.

Mo.—Gray v. St. Louis, etc., R. Co., 54 Mo. App. 666; Rogan v. Wabash R. Co., 51 Mo. App. 665; Armstrong v. Missouri Pac. R. Co., 17 Mo. App. 403; McAlister v. Chicago, etc., R.

Co., 74 Mo. 351, 7 Am. & Eng. R. Cas. 373.

Neb.—Mackay v. Western Union Tel. Co., 1 Am. Electl Cas. 362, 16 Nev. 226; Sycamore Marsh, etc., Mfg. Co. v. Sturm, 13 Neb. 211.

N. C.—Hamilton v. Western North Carolina R. Co., 96 N. C. 398, 30 Am. & Eng. R. Cas. 1.

Tex.—Pacific Express Co. v. Darnell, 63 Tex. 639; Gulf, etc., R. Co. v. Gilbert, 4 Tex. Civ. App. 366; Wells, etc., Express Co. v. Fuller, (Tex. Civ. App.) 35 S. W. 824; Missouri, etc., R. Co. v. Belcher, 88 Tex. 549.

Wis.—Bradley v. Chicago, etc., R. Co., (Wis.) 68 N. W. 410.

U. S.—Central Trust Co. v. Savannah, etc., R. Co., 69 Fed. 683.

Eng.—Hadley v. Baxendale, 9 Exch. 341, 18 Jur. 358, 23 L. J. Exch. 179, 2 C. L. R. 517; Prior v. Wilson, 8 W. R. 260, 2 L. T. N. S. 549; Smeed v. Ford, 1 El. & Bl. 602, 102 E. C. L. 602, 7 W. R. 266; Irvine v. Midland Great Western R. Co., L. R. 6 Ir. 55.

actions against carriers is the same whether the action is *ex delicto*, upon the violation of the public duty of the carrier, or *ex contractu*, upon the non-performance of its agreement.⁹ Actual notice to the carrier of special circumstances affecting the damages which might result from loss or delay need not be shown; it is sufficient to charge it with notice, if it be shown from the nature of the goods shipped, or from other circumstances, that the carrier ought to have known the consequences which would follow from such loss or delay.¹⁰ It has been well said, in speaking of the application of the maxim, *causa proxima non remota spectatur*, to particular cases, that if the best possible expression of the rule could be deduced from the authorities, "it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations."¹¹

§ 12. Contract of sale as measure of damages.—Where goods are forwarded by a carrier, in pursuance of a contract of sale between the consignor and the consignee, of which the carrier has actual or constructive notice, the contract price is the measure of damages for their loss by the carrier.¹² Where the goods are sent to a consignee with an option to take them at the price stated or to return them, the measure of damages for their loss by the carrier is the price fixed, with interest from the day the goods would in the ordinary course of transportation have reached the consignee.¹³ In case of a delay in transportation the measure of damages in such a case is the difference between what is received on a sale of the goods and the price for which they were contracted to be sold.¹⁴ Where in consequence of such delay the consignee refuses to accept the goods, and they are, therefore, sold, the measure of

9. St. Louis, etc., R. Co. v. Heath, 41 Ark. 476, 18 Am. & Eng. R. Cas. 557; Baltimore, etc., R. Co. v. Pumphrey, 59 Md. 390. Compare Dresser v. West Virginia Transp. Co., 8 W. Va. 553.

10. Toledo, etc., R. Co. v. Lockhart, 71 Ill. 627; Illinois Cent. R. Co. v. Cobb, 64 Ill. 128; Vicksburg, etc., R. Co. v. Ragsdale, 46 Miss. 458; King v. Woodbridge, 34 Vt. 565.

11. Mutual Ins. Co. v. Tweed, 7 Wall. (U. S.) 44.

12. Medbury v. New York, etc., R. Co., 26 Barb. (N. Y.) 564; Illinois Cent. R. Co. v. McClellan, 54 Ill. 58, 5 Am. Rep. 83; Cobb v. Illinois Cent. R. Co., 38 Iowa, 601. See also Central R., etc., Co. v. Skellie, 86 Ga. 686.

13. Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442, revg. 38 N. Y. Super. Ct. 248.

14. Illinois Cent. R. Co. v. Cobb, 64 Ill. 143.

damages is the difference between the contract price and the market value of the goods on the day when they are actually delivered.¹⁵ Where the carrier had no notice of the goods being shipped under contract of sale, or the notice given was not such as to inform the carrier that the damages claimed would probably result from a failure to promptly deliver, the measure of damages is the difference between their market value at the time and place they should have been delivered, and such value when they were actually delivered.¹⁶ Interest may be added from the former date and freight deducted, but recovery cannot be had for loss of profits on contracts of sale, made or contemplated, in the absence of notice to the carrier at the time of shipment.¹⁷

§ 13. Damages for loss or delay in delivery of goods intended for a specific purpose.—In the absence of any evidence that the carrier knew or should have known that goods shipped were intended for a specific purpose and the consequences likely to follow a loss of the goods or a delay in delivery, the damages are limited

15. St. Louis, etc., R. Co. v. Mufford, 48 Ark. 502, 32 Am. & Eng. R. Cas. 539; Deming v. Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267; Gulf, etc., R. Co. v. Martin (Tex. Civ. App.), 28 S. W. 576; Fort Worth, etc., R. Co. v. Greathouse, 82 Tex. 104, 49 Am. & Eng. R. Cas. 157; Texas, etc., R. Co. v. Talley, 2 Tex. App. Civ. Cas., § 765. See also Collard v. South Eastern R. Co., 7 H. & N. 79, 9 W. R. 697, 4 L. T. N. S. 410.

But such recovery cannot be had where no claim was made for special damages and the carrier did not have notice of the contract. Wabash, etc., R. Co. v. Lynch, 12 Ill. App. 365; Gulf, etc., R. Co. v. Pettit, 3 Tex. Civ. App. 588. The rule applies where the shipper declines to ship on account of delay in furnishing cars. International, etc., R. Co. v. Startz (Tex. Civ. App.), 33 S. W. 575.

16. Murrell v. Pacific Express Co.,

54 Ark. 22, 26 Am. St. Rep. 17, and also extra expense incurred in writing or telegraphing for the goods; Columbus, etc., R. Co. v. Flournoy, 75 Ga. 745; Gelvin v. Kansas City, etc., R. Co., 21 Mo. App. 273; Lindley v. Richmond, etc., R. Co., 88 N. C. 547, 9 Am. & Eng. R. Cas. 31, if the goods were in equally good condition, and if they were not, the damages should be increased to the extent of the deterioration resulting from the delay; Philadelphia, etc., R. Co. v. Lehman, 56 Md. 209, 40 Am. Rep. 415, 6 Am. & Eng. R. Cas. 14; Harvey v. Connecticut, etc., R. Co., 124 Mass. 421, 26 Am. Rep. 673, 18 Am. Ry. Rep. 9; Horne v. Midland R. Co., L. R. 8 C. P. 131, 42 L. J. C. P. 59.

17. East Tennessee, etc., R. Co. v. Johnson, 85 Ga. 497; Bowden v. San Antonio, etc., R. Co. (Tex. Civ. App.), 25 S. W. 987; Wilson v. Lancashire, etc., R. Co., 9 C. B. N. S. 632, 99 E. C. L. 632, 9 W. R. 635.

in the former case to the value of the goods at destination at the time they should arrive, and in the latter case to the difference in market value.¹⁸ The measure of damages is generally held to depend upon the extent of the notice given to the carrier.¹⁹ If the delay is in the transportation of machinery to be applied to a special use, and that is known to the carrier, he is responsible for such damages as are fairly attributable to the delay. The natural consequences of delay and stoppage of work, the payment for wages and expenses during the delay, the loss from not having work finished at the time it otherwise would have been, and the

18. Lewark v. Norfolk, etc., R. Co. (N. C.), 49 S. E. 882, recovery denied for the loss of fish, for the packing of which a shipment of ice was intended to be used.

Wages paid to employes.—The amount of wages paid to employes of a cotton mill while the mill was idle and the profits the mill would have made were held not recoverable because of a delay in the shipment of cotton needed to operate the mill, the defendant having no notice. Gee v. Lancashire, etc., R. Co., 6 H. & N. 211, 9 W. R. 103, 3 L. T. N. S. 328. Proof of wages paid employes and loss of promised custom was not allowed as items of damage caused by delay in the delivery of machinery, in the absence of notice. Priestly v. Northern Indiana R. Co., 26 Ill. 205, 79 Am. Dec. 369. Recovery of wages paid laborers and loss of profits from business was denied for negligent delay in transporting part of the machinery of a saw mill, where no notice to defendant of the consequences was shown. Vicksburg, etc., R. Co. v. Ragsdale, 46 Miss. 480, 1 Am. Ry. Rep. 407. So held also in the case of delay in shipment of other machinery. Davis v. Cincinnati, etc., R. Co., 1 Disney (Ohio), 23; Gulf, etc., R. Co. v. Pettit, 3 Tex. Civ. App. 588; Gulf, etc., R. Co. v. Loonie, 84 Tex. 259.

Recovery of wages of workmen kept idle by reason of carrier's delay in shipping building materials to a contractor were not allowed where notice was not given at time of shipment, although it was given four days afterwards. Ligon v. Missouri Pac. R. Co., 3 Tex. App. Civ. Cas., § 1. See also Missouri Pac. R. Co. v. Breeding, 4 Tex. App. Civ. Cas., § 154.

Increased expense of laying a plank road was not allowed as an item of damage for delay in shipment of the plank. Pennsylvania R. Co. v. Titusville, etc., Plank Road Co., 71 Pa. St. 350.

19. Rogan v. Wabash R. Co., 51 Mo. App. 665; Thomas, etc., Mfg. Co. v. Wabash, etc., R. Co., 62 Wis. 642, 51 Am. Rep. 725; Hadley v. Baxendale, 9 Exch. 341, 2 C. L. R. 517; Ruthvan Woolen Mfg. Co. v. Great Western R. Co., 18 U. C. C. P. 316; Grindle v. Eastern Express Co., 67 Me. 317, 24 Am. Rep. 31, the damages for delay in delivering money sent to pay insurance premiums was held to be the net value of the policies on the day they lapsed in consequence of non-payment, the carrier having had notice of the purpose for which the money was sent. See Savannah, etc., R. Co. v. Pritchard, 77 Ga. 412, as to damage for delay in delivery of a stillworm.

fair value of the use of the machinery during the delay, and not what might have been made by the mill or plant during the time of its enforced idleness, is the measure of damages.²⁰ If the contract of carriage is made with reference to the shipper or consignee embarking in a new business, the speculative profits which might be supposed to arise, but which were defeated because of a breach of contract which delayed the business, cannot be looked to as an element of damage. Such profits would not be an immediate and proximate effect of the delay but would be dependent largely upon other contingencies, skill, industry, energy, the market supply of material, keeping machinery in order, loss of time by weather or breakage of machinery, and would be too indefinite and remote to constitute a basis of recovery.²¹

§ 14. Prospective, contingent, or possible consequences.— Speculative, remote, or contingent damages cannot form the basis of a recovery for breach of contract.²² Only actual damages, established by proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable.²³ Where a cattle shipper sued for breach of contract to lease him cattle space on defendant's line of ocean steamers for one year, damages for loss of profits based on an arrangement that, if he could procure two lines of steamers, one running to Liverpool and the other to London, certain parties would take his contract off his hands, and would pay him a commission for buying and selling the cattle, are too remote, speculative and conjectural to be recovered.²⁴ Damages cannot be recovered for loss of profits which the shipper or consignee might have secured which depend upon further con-

20. Vicksburg, etc., R. Co. v., Ragsdale, 46 Miss. 480; Cincinnati Chronicle Co. v. White Line Cent. Trans. Co., 1 Cinc. Super. Ct. Rep. 300; Foard v. Atlantic, etc., R. Co. 8 Jones L. (N. C.) 235, 87 Am. Dec. 277; Pacific Express Co. v. Darnell (Tex.), 32 Am. & Eng. R. Cas. 543; Gulf, etc., R. Co. v. Gilbert, 4 Tex. Civ. App. 366.

21. Vicksburg, etc., R. Co. v. Ragsdale, 46 Miss. 484; Cooper v. Young, 22 Ga. 269; Gulf, etc., R. Co. v.

Maetze, 2 Tex. App. Civ. Cas., § 631, 18 Am. & Eng. R. Cas. 614; St. Louis, etc., R. Co. v. Hindsman, 1 Tex. App. Civ. Cas., § 204.

22. Atchison, etc., R. Co. v. Thomas (Kan.), 78 Pac. 861.

23. Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 49 C. C. A. 244.

24. Brauer v. Oceanic Steam Nav. Co., 34 Misc. Rep. (N. Y.) 127, 69 N. Y. Supp. 465, 73 N. Y. Supp 291.

tingencies,²⁵ such as the result of ulterior speculation,²⁶ the probable profits to be realized from animals used for breeding purposes,²⁷ or the possible amount of prizes that might be won by goods at an exhibition,²⁸ or the moneys that might have been made from race horses on the race track.²⁹ Compensation for the actual loss sustained is the fundamental principle upon which our law bases the allowance of damages. It will not make this allowance, however, upon a calculation of speculative or conjectural profits, for this would be proceeding upon contingencies, and would involve the subject in too much uncertainty. It would be too difficult for practical application. The data of estimation must be so definite and certain that the loss or damage can be ascertained reasonably by calculation, and the loss or damage must be the natural or proximate consequence of the act.³⁰

25. Little Rock, etc., R. Co. v. Conatser, 61 Ark. 560; Illinois Cent. R. Co. v. Cobb, 64 Ill. 128; Frazier v. Smith, 60 Ill. 145.

26. Harrison v. Stewart, Taney's Dec. (U. S.) 485.

27. New York, etc., R. Co. v. Estill, 147 U. S. 591; Chicago, etc., R. Co. v. Hale, 2 Ill. App. 150, 83 Ill. 360, 25 Am Rep. 403; Love v. Ross, 89 Iowa 400; Illinois Cent. R. Co. v. Haynes, 64 Miss. 604; Connoble v. Clark, 38 Mo. App. 476; Missouri

Pac. R. Co. v. Fagan, 72 Tex. 127, 13 Am. St. Rep. 776, 35 Am. & Eng. R. Cas. 666.

28. Western Union Tel. Co. v. Crall, 39 Kan. 580; Watson v. Ambergate, etc., R. Co., 15 Jur. 448; Simpson v. London, etc., R. Co., 1 Q. B. Div. 274, 24 W. R. 294.

29. Armsby v. Union Pac. R. Co., 4 Fed. 706, 2 McCrary (U. S.), 48.

30. Medbury v. New York, etc., R. Co., 26 Barb. (N. Y.) 546.

CHAPTER XVI.

CARRIER'S LIEN.

SECTION 1. Carrier's lien for charges.

2. Carrier's lien for general balance due.
3. What carriers are entitled to lien.
4. What property lien applies to.
5. When lien attaches.
6. Delivery of goods and payment of freight.
7. Lien of carrier where consignee fails or refuses to receive.
8. Lien of the last of connecting carriers.
9. Priority over other liens.
10. How lien is lost, satisfied, or discharged.
11. Lien waived by express agreement or stipulation inconsistent with it.
12. How lien is enforced.

§ 1. **Carrier's lien for charges.**—A common carrier has a specific lien upon the goods transported by it and still in its possession as security for all compensation and charges due for their transportation, and for all proper storage and warehouse charges. The carrier by virtue of such lien has the right to retain the possession of the goods until the charges are paid, and so long as the possession is retained by the carrier, the consignee or owner cannot deprive him of it.¹ The right to the lien extends to and in-

1. *N. Y.*—Lake St. El. R. Co. v. Ill. 513; Galena, etc., R. Co., v. Rae, Long Island R. Co., 32 Misc. Rep. (N. Y.) 669, 66 N. Y. Supp. 455; Barker v. Havens, 17 Johns. (N. Y.) 234, 3 Am. Dec. 393; Compton v. Shaw, 1 Hun (N. Y.), 441; Clarkson v. Edes, 4 Cow. (N. Y.) 470.
- U. S.*—Gracie v. Palmer, 8 Wheat. (U. S.) 635.
- Ala.*—Long v. Mobile, etc., R. Co., 51 Ala. 512.
- Conn.*—Pinney v. Wells, 10 Conn. 115.
- Ga.*—Brown v. Clayton, 12 Ga. 564.
- Ill.*—Ohio, etc., R. Co. v. Noe, 77
- 18 Ill. 488, 68 Am. Dec. 574.
- Iowa.*—Alden v. Carver, 13 Iowa, 253, 81 Am. Dec. 430.
- Ky.*—Thomas v. Frankfort & C. R. Co., 25 Ky. L. Rep. 1051, 76 S. W. 1093.
- La.*—Mississippi Val. Transp. Co. v. Fosdick, Mann. Unrep. Cas. (La.) 3.
- N. H.*—Hall v. Dimond, 63 N. H. 465.
- S. C.*—Ewart v. Kerr, Rice L. (S. C.) 203.
- Tenn.*—Rankin v. Memphis, etc.

cludes salvage charges,² and charges for customs duties advanced on goods imported by either the initial or terminal carrier.³ In some cases it has been held that the injury, inconvenience, and expense which a carrier may suffer by reason of the consignee not unloading goods from cars within a reasonable time, constitute a claim in the nature of demurrage, but do not give the carrier a lien upon the goods such as he has for freight charges.⁴ But many other cases hold that a carrier may have a lien for demurrage charges, even without express stipulation therefor in the contract of shipment.⁵ A common carrier's lien for charges of transportation includes charges which it may have advanced to a preceding carrier.⁶ A carrier may pay to a connecting carrier charges the

Packet Co., 9 Heisk. (Tenn.) 567, 24 Am. Rep. 339.

Vt.—Dyer v. Grand Trunk R. Co., 42 Vt. 441, 1 Am. Rep. 350.

Eng.—Gisbourn v. Hurst, 1 Salk. 249; Higgins v. Bretherton, 5 C. & P. 2, 24 E. C. L. 188; Skinner v. Uphaw, 2 Ld. Raym. 752.

2. Chicago, etc., R. Co. v. Northwestern Union Packet Co., 38 Iowa 377, 9 Am. & Eng. R. Cas. 46, note.

3. Wabash R. Co. v. Pearce, 192 U. S. 179, 24 S. Ct. 231, 48 L. Ed., revg. 82 Mo App. 437; Guesnard v. Louisville, etc., R. Co., 76 Ala. 453, 23 Am. & Eng. R. Cas. 691.

4. Crommelin v. New York, etc., R. Co., 4 Keyes (N. Y.) 90, 1 Abb. App. Dec. (N. Y.) 472, 10 Bosw. (N. Y.) 47; East Tennessee, etc., R. Co. v. Hunt, 15 Lea. (Tenn.) 261. As to collector holding goods for freight charges under U. S. Statutes, see Wyman v. Lancaster, 32 Fed. 720; Cleveland, etc., R. Co. v. McClurg, 119 U. S. 454, 28 Am. & Eng. R. Cas. 70.

5. Huntley v. Dows, 55 Barb. (N. Y.) 310; Darlington v. Missouri Pac. R. Co., (Mo. App.) 72 S. W. 122; Haygood v. 1310 Tons of Coal, 21 Fed. 681; Miller v. Mansfield, 112 Mass. 260; Miller v. Railroad Co., 88

Ga. 563, 15 S. E. 316, 18 L. R. A. 323, 30 Am. St. Rep. 170; Kentucky Wagon Mfg. Co. v. Ohio & M. R. Co., 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850, 56 Am. St. Rep. 326; Owen v. Railway Co., 83 Mo. 464; McGee v. Railway Co., 71 Mo. App. 314; Railroad Co. v. Adams (Va.), 18 S. E. 675, 22 L. R. A. 530, 44 Am. St. Rep. 916.

Statutes.—N. J. statutes give carriers a lien for demurrage charges. The Mississippi Code giving a lien for freight and storage applies to demurrage charges for delay in unloading. New Orleans, etc., R. Co. v. A. H. George & Co., 82 Miss. 710, 35 So. 193. A railroad company, in view of the duties required by law to provide proper service to shippers, having a right to demand a reasonable fee for car service or storage charges on the car load of freight after allowing the consignee a reasonable time to unload it, is entitled to a lien on the freight for such damages. Chicago, etc., Ry. Co. v. Dorsey Fuel Co., 112 Ill. App. 382; Schumacher v. Chicago, etc., R. Co., 207 Ill. 199, 69 N. E. 825.

6. Thomas v. Frankfort & C. R. Co., 25 Ky. L. Rep. 1051, 76 S. W. 1093. Where the contracting car-

latter has paid, and retain possession of the goods for its reimbursement, when the advance charges were such as were incident to the transportation of the goods, and were necessary to be paid in order to continue them in transit.⁷ Ordinarily the carrier's lien is limited to a proper compensation for the services rendered, which is the charges fixed or quoted to the shipper at the time of shipment.⁸ But a quotation of charges is not conclusive on the carrier where it is shown to have been the result of accident or mistake.⁹ Where the carrier discovers that misrepresentations have been made as to the value of the goods, it may rescind the contract of shipment; but if it goes on and performs, it can demand no more than the contract price.¹⁰ The lien of a vessel on cargo covers the damages accruing from the failure of the shipper to furnish the amount of property for transportation required by the contract and demurrage, as well as the freight due on the goods actually transported.¹¹ But the right of demurrage does not attach to carriers by rail, and no presumption will be indulged against a shipper that he consented to a charge of demurrage, because at the time of shipment he understood that the published rules of the company provided for the demurrage.¹² Railroad companies cannot create in their favor a demurrage lien on their freight not removed from a car within a certain time, by simply publishing to the public their intention of so doing.¹³

rier is not the agent of the connecting carrier, the latter has a lien for its charges; and its refusal to deliver the goods until the charges are provided for, will not amount to conversion. *Shewalter v. Missouri Pac. Ry. Co.*, 84 Mo. App. 589.

7. *Pearce v. Wabash R. Co.*, 89 Mo. App. 437. But where goods are shipped in bond from a foreign port, and a customs clearance shows the entrance was to be made at the port of St. Louis, they are entitled to direct importation to such port, and on being diverted from their course and entered at the port of St. Paul a carrier paying the customs duties assessed at St. Paul, has no lien on the goods for reimbursement. *Id.*

8. *Louisville, etc., R. Co. v. Wilson*, 119 Ind. 352.

9. *Rowland v. New York, etc., R. Co.*, 61 Conn. 103, 29 Am. St. Rep. 175, 49 Am. & Eng. R. Cas. 61; *Savannah, etc., R. Co. v. Bundick*, 94 Ga. 775.

10. *Saratoga, etc., R. Co. v. Row*, 24 Wend (N. Y.), 74, 35 Am. Dec. 598. See also *United States Express Co. v. Koerner* (Minn.), 68 N. W. 181; *Missouri, etc., R. Co. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 553.

11. *Warehouse & B. Supply Co. v. Galvin* (Wis.), 71 N. W. 804.

12. *Cleveland, etc., R. Co. v. Holden*, 73 Ill. App. 582.

13. *Cleveland, etc., R. Co. v. Lamm*, 73 Ill. App. 592.

§ 2. Carrier's lien for general balance due.—The carrier's lien exists only in favor of charges due for transportation of the particular property and does not apply to charges disconnected with the cost of transportation. A general lien, or lien for a general balance due to the carrier by the owner of the goods, can only exist by special contract;¹⁴ and a special contract, or stipulations creating a general lien, will be strictly construed, and the lien cannot be claimed unless the case comes clearly within the terms of the stipulation.¹⁵ General liens in behalf of carriers are regarded as encroachments upon the common law and are not favored by the courts.¹⁶ The specific lien is implied, but while the carrier may by express agreement or by long established and well known usage of trade in particular localities, or as to particular classes of carriers, become entitled to a lien for general balances,¹⁷ it cannot by

14. Hartshorne v. Johnson, 7 N. J. L. 108; Pharr v. Collins, 35 La. Ann. 939, 48 Am. Rep. 251; Steamboat Virginia v. Kraft, 25 Mo. 76; Rushforth v. Hadfield, 6 East. 519, 7 East. 224; Sornes v. British Empire Shipping Co., 8 H. L. Cas. 338; Phillips v. Rodie, 15 East. 547; Bairley v. Gladstone, 3 M. & S. 205.

15. Bacharach v. Chester Freight Line, 133 Pa. St. 414, 42 Am. & Eng. R. Cas. 362; Pennsylvania R. Co. v. American Oil Works, 126 Pa. St. 485, 12 Am. St. Rep. 885, 42 Am. & Eng. R. Cas. 357.

Under the terms of a bill of lading giving a lien on the goods for all unpaid freights, the carrier was entitled to a lien on the cargo in question only for the freight due on that cargo, and not for a general balance on previous cargoes. *Atlas S. S. Co. v. Columbus Land Co.*, 102 Fed. 358, 42 C. C. A. 398.

16. Rushforth v. Hadfield, 6 East. 519, 7 East. 224, 2 Smith 624; McFarland v. Wheeler, 26 Wend. (N. Y.) 467.

17. Whitehead v. Vaughan, 6 East. 523; Holderness v. Collinson, 7 B. &

C. 212, 14 E. C. L. 30, 1 M. & R. 55; *Butler v. Woolcott*, 2 B. & P. N. R. 64; and cases cited in last preceding note.

No lien exists, in favor of the forwarding agent upon goods forwarded by him, for special services rendered by request of the owner in a reappraisal hearing before the custom house authorities, in the absence of an express contract between the parties that such lien should exist, or a contract fairly to be implied from the existence of a general custom recognizing such lien. *Topliff v. Lake Shore, etc., R. Co.*, 7 Ohio N. P. 297, 2 Ohio S. & C. P. Dec. 352.

But a carrier can have no lien as against the real owner for a general balance due from the consignee. *Wright v. Snell*, 5 B. & Old. 350, 7 E. C. L. 127, 42 Am. & Eng. R. Cas. 365; *Kirkman v. Shawcross*, 6 T. R. 14; *McFarland v. Wheeler*, 26 Wend. (N. Y.) 467. As to construction of contracts providing for general lien, see *Westfield v. Great Western R. Co.*, 52 L. J. Q. B. Div. 276, 4 Ry. & C. T. Cas. 16; *Wiltshire Iron Co. v. Great Western R. Co.*, L. R. 6 Q. B.

general notice acquire such right,¹⁸ except where the shipper's assent was expressly secured.¹⁹ And where expressly assented to, it is inferior to the vendor's right of stoppage *in transitu*.²⁰

§ 3. What carriers are entitled to lien.—A person engaged in the business of carrying freight by wagons from depots to other places, and of delivering packages for all persons who choose to employ him, has a lien, as a common carrier, upon the goods for charges for hauling, and also for freight charges advanced to a railroad company for the consignee.²¹ Where goods come by the hand of successive carriers to the depot of the last one in the place where the consignee lives, the carriage ends. If another carrier without special authority from the consignee, or authority warranted from usage known to and acquiesced in by the consignee, takes the goods from the depot to the consignee's warehouse, the consignee incurs no obligation to it, and it has no lien for its charges on the goods so hauled.²² Where a city ordinance gave a cartman a lien for charges of goods transported, provided he should convey the property to the property clerk of the police department, or to a convenient storage warehouse, to be stored, subject to all charges incurred, and give a notice, with a statement of particulars, at once, to the bureau of licenses, a cartman was not entitled to a lien where he retained the property in his own possession and sent no notice as required.²³ Where barges are detained by low water, and their cargoes have to be cared for, the owner of the

101; *Ex parte* Great Western R. Co., 22 Ch. Div. 470, 52 L. J. Ch. 734.

18. Wright v. Snell, *supra*; Kirkman v. Shawcross, *supra*; Oppenheim v. Russell, 3 B. & P. 42.

19. Westfield v. Great Western R. Co., *supra*; Fitzpatrick v. Cusack, 12 L. C. R. 306.

20. See Priority Over Other Liens, § 9, *post*.

21. Cayo v. Pool's Assignee (Ky.), 55 S. W. 887, 49 L. R. A. 251.

22. Kansas City Transfer Co. v. Neiswanger, 18 Mo. App. 103.

23. Taylor v. Smith, 87 App. Div. (N. Y.) 78, 84 N. Y. Supp. 13;

Browning v. Belford, 83 App. Div. (N. Y.) 144, 82 N. Y. Supp. 489, 13 N. Y. Ann. Cas. 154.

Where a public cartman, who was engaged in loading cars with goods for plaintiff, agreed to load a trap which had been driven to the car by plaintiff, he could have no lien on the trap because of the lack of any service rendered as a carrier with respect thereto. And he was not entitled to a lien for his transportation charges, given by an ordinance, where the goods were injured in transit to an amount in excess of the charges. *Id.*

bargees has a lien for his charges, whether he is regarded as a carrier or as a warehouseman.²⁴

§ 4. What property lien applies to.—The carrier can have no lien excepting for services rendered as a carrier, and in that case it can have a lien only upon the articles with respect to which such services were rendered.²⁵ Its lien can apply only to property in its possession as a carrier, or in a capacity accessory thereto, and not to property delivered to it in an independent capacity, as, for example, the engine of a customer sent to its workshop for repairs.²⁶ Government property is not exempt from a common carrier's lien for freight; and in a replevin suit instituted by the United States, judgment may be rendered for the defendant on the ground of such lien.²⁷ Although a lien upon property belonging to the United States cannot be enforced by the courts by means of a suit against the government, nor by a proceeding *in rem* when possession of the property can only be obtained by taking it out of the actual possession of officers or agents of the government; yet it may exist, and may be enforced whenever enforcement does not disturb the possession of the government.²⁸ To justify a lien upon goods for their freight, the relation of debtor and creditor must exist between the owner of goods and the carrier, so that an action at law might be maintained for the payment of the debt sought to be enforced by the lien.²⁹ A common carrier, who innocently receives goods from a wrongdoer, without the consent of the owner express or implied, has no lien upon them for their carriage, against such owner, but must on demand surrender them to

24. Nicolette Lumber Co. v. People's Coal Co., 26 Pa. Super. Ct. 575, and in the absence of a stipulation, a carrier is entitled to be paid what the particular services are worth, to secure which he has a lien on the property bailed while in his possession.

25. Taylor v. Smith, 87 App. Div. (N. Y.) 78, 84 N. Y. Supp. 13; Booker v. Reilly, 82 N. Y. Supp. 1008.

26. Kinnear v. Midland R. Co., 19 L. T. N. S 387. See also Harrison

v. Midland R. Co., 68 L. T. 268, 62 L. J. Q. B. 225.

27. Union Pac. R. Co. v. United States, 2 Wy. 170.

28. The Davis, 10 Wall. (U. S.) 15; The Siren, 7 Wall. (U. S.) 152; United States v. Wilder, 3 Sumn. (U. S.) 308. But see Dufoit v. Gorman, 1 Minn. 301, 66 Am. Dec. 543, holding that a carrier can have no lien on property of the United States.

29. Fitch v. Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 33.

the owner.³⁰ But when the owner has, by his own voluntary acts, clothed the sender of the goods with apparent authority to act for him or with apparent authority over the goods, and thus enabled him to defraud the carrier, then the carrier has a right to look to the owner for its reasonable charges and to hold a lien on the goods for the charges.³¹ Where plaintiff claimed that he surrendered a bill of lading of certain goods to an alleged purchaser for the purpose of allowing them to be unloaded to prevent demurrage charges, and the goods were shipped by such purchaser over the line of the defendant company, which paid freight charges on connecting lines, and performed the service of hauling them, without knowledge of any fraud in the purchaser's possession, the contention that the defendant was not entitled to a lien for such freight charges on account of the alleged fraud was without merit.³²

30. *Van Buskirk v. Purinton*, 2 Hall (N. Y.) 561; *Collman v. Collins*, 2 Hall (N. Y.) 568; *Pingree v. Detroit*, etc., R. Co., 66 Mich. 143, 11 Am. St. Rep. 479; *Gilson v. Gwinn*, 107 Mass. 126, 9 Am. Rep. 13; *Robinson v. Baker*, 5 Cushing (Mass.) 137, 51 Am. Dec. 54; *Stevens v. Boston*, etc., R. Corp., 8 Gray (Mass.) 262, and has no lien even for freight charges which it has paid to a previous carrier, by whom the owner had directed them to be carried; *Vaughn v. Providence*, etc., R. Co., 13 R. I. 578, 9 Am. & Eng. R. Cas. 41; *Clark v. Lowell*, etc., R. Co., 9 Gray (Mass.) 231, goods received from wharfinger who had no authority to forward them; *Hayes v. Campbell*, 63 Cal. 143, goods received from agent who had no authority to ship them; *Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 272; *Pearsons v. Tincker*, 36 Me. 384. In the case of *Saltus v. Everett*, 20 Wend. (N. Y.) 275, it is said: "The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his consent, and consequently that

even the honest purchaser under a defective title cannot hold against the true proprietor. There is no cause to be found, or any reason or analogy anywhere suggested in the books, which would go to show that the real owner was concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently. If the owner loses his property, or is robbed of it, or it is sold or pledged without his consent, by one who has only a temporary right to its use, by hiring or otherwise, or a qualified possession of it for a specific purpose, as for transportation or work to be done upon it, the owner can follow and reclaim it in the possession of any person, however innocent."

31. *Vaughn v. Providence*, etc., R. Co., 13 R. I. 578, citing *Mallory v. Burrett*, 1 E. D. Sm. (N. Y.) 234; *York Co. v. Illinois Cent. R. Co.*, 3 Wall. (U. S.) 107; *Yorke v. Gre-naugh*, 2 Ld. Raym. 867.

32. *Hoffman v. Lake Shore*, etc., Ry. Co. (Mich.), 7 Det. Leg. N. 503, 84 N. W. 55.

§ 5. When lien attaches.—In reference to carriers by water the rule in New York and in England is that the lien of the carrier attaches as soon as the goods are placed on board the ship. The freighter who removes goods once shipped with a bill of lading delivered can only reclaim them upon payment of freight, necessary expense of unloading, and indemnifying the party for any difference between the value of the goods at the port of lading and what the master or ship owner may be obliged to pay at the port of destination under such bill of lading.³³ A person who has shipped goods on a general ship is not entitled to demand them back without payment of the freight, and this is the rule, although the freight is not yet earned or due.³⁴ Some cases hold that the lien does not attach until the voyage commences, which is upon breaking ground for the voyage, and the freight is due.³⁵ The rule maintained in other cases is that the lien does not attach until the goods have been delivered at the owner's or a public wharf.³⁶

§ 6. Delivery of goods and payment of freight.—Freight for the carriage of goods by water, unless there is a different stipulation between the parties, is only demandable where the goods are ready for delivery to the proper person, and when the consignee has had an opportunity to examine the goods, to see if the obligations of the bill of lading have been fulfilled by the shipowners. If the shipment is large, or, from the master's storage of it, it cannot be landed in a day, if he lands a part of it, his lien upon the whole gives him a right to ask security for the entire freight; but he cannot demand payment of the entire freight before the consignee has had an opportunity to examine the goods. The ship is not bound to land an entire shipment in a day; and if landed on different days, and the shipper, being notified thereof, does not receive the goods, and has made no arrangements to secure payment of the freight, they may be stored for safe keeping at the consignee's expense and risk, in the shipowner's name, to preserve his lien on the freight.³⁷ The master has a lien on all the

33. Bartlett v. Carnley, 6 Duer (N. Y.) 194.

34. Tindall v. Taylor, 4 El. & Bl. 219, 82 E. C. L. 219.

35. Baily v. Damon, 3 Gray (Mass.) 92.

36. The Eddy, 5 Wall. (U. S.) 481; McCullough v. Hellweg, 66 Md.

269; Johnston v. Davis, 60 Mich. 56.

37. Brittan v. Barnaby, 21 How. (U. S.) 527.

goods in the same bill of lading for the entire freight, and by part delivery he does not waive his lien on the remainder of the goods for the unpaid balance of freight, and an offer to give security does not effect the lien.³⁸

§ 7. Lien of carrier where consignee fails or refuses to receive.—Where the owner or consignee of the goods is in default in not receiving or refusing to receive the goods at their destination, the carrier may store them in its own warehouse and have an additional lien for its storage charges, or store them in a warehouse belonging to another, subject to its lien for freight. The possession essential to the lien of the carrier for its freight charges need not always be direct and actual possession of the carrier; that of its agent or servant, or the keeper of a warehouse acting under its authority, is also its own, for this purpose.³⁹ It is not material that a railroad allows goods to remain stored in cars, instead of putting them in a storehouse. The responsibility of the company for their custody is the same as if they had been stored, and they have the right to retain them until their charges are paid.⁴⁰ Where a carrier has a lawful lien on goods for storage, though it may have delivered part of them without insisting on the lien, nevertheless it has a right to retain the residue for the amount due on the whole, and the same will not be defeated by the fact that the amount claimed may be too large, unless the owner or party desiring the possession of the goods makes a tender of the amount due.⁴¹ So, where goods to be shipped are in loaded cars, which are delivered at the carrier's depot, and, on the shipper's refusal on demand to pay the proper freight charges, the goods are left in the custody of the carrier, it has a lien on the goods for proper

38. Frothingham v. Jenkins, 1 Cal. 42.

R. Co., 108 Ill. App. 520, 207 Ill. 199, 69 N. E. 825. Where a consignee of car loads of coke was notified on their arrival that a charge for rental would be made if they were not unloaded within 48 hours, the railroad company was also entitled to a lien on the freight for such rental charges on failure to unload within a reasonable time. Id.

39. Western Transp. Co. v. Barber, 56 N. Y. 544; Fisk v. Newton, 1 Den. (N. Y.) 47, 43 Am. Dec. 649; Brittan v. Barnaby, 21 How. (U. S.) 527; The Eddy, 5 Wall. (U. S.) 481; Alden v. Carver, 13 Iowa, 253, 81 Am. Dec. 430; Rankin v. Memphis, etc., Packet Co., 9 Heisk. (Tenn.) 569, 24 Am. Rep. 339.

41. See note 40.

40. Schumacher v. Chicago, etc.,

storage charges, whether they are left in the cars or removed to the warehouse.⁴²

§ 8. Lien of the last of connecting carriers.—Where there is a continuous shipment by several connecting carriers, the last of the carriers has a lien on the goods for all freight and other charges paid by it to each successive previous carrier in pursuance of the regular course of business between connecting carriers.⁴³ The last connecting carrier also has a lien for advances made for charges of a previous carrier under an independent contract, although its bill of lading is for carriage and delivery upon payment of freight and charges and it has failed to perform its own

42. Dixon v. Central of Ga. R. Co., 110 Ga. 173, 35 S. E. 369. Where several loaded cars are delivered to a carrier, on which the shipper refuses to pay the proper freight charges on demand, such carrier may retain possession of the goods in all of them until its charges are paid. Id.

43. Ark.—Loewenberg v. Arkansas, etc., R. Co., 56 Ark. 439.

Colo.—Prince v. Denver, etc., R. Co., 12 Colo. 402, 37 Am. & Eng. R. Cas. 626.

Ga.—Georgia R., etc., Co. v. Murr rah, 85 Ga. 343, 45 Am. & Eng. R. Cas. 334.

Ind.—Evansville, etc., R. Co. v. Marsh, 57 Ind. 505, 18 Am. Ry. Rep. 482.

Mass.—Crossan v. New York, etc., R. Co., 149 Mass. 196, 14 Am. St. Rep. 408, 40 Am. & Eng. R. Cas. 136; Potts v. New York, etc., R. Co., 131 Mass. 455, 3 Am. & Eng. R. Cas. 424, 41 Am. Rep. 247; Briggs v. Boston, etc., R. Co., 6 Allen (Mass.), 246, 83 Am. Dec. 626; Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137, but there is no lien where payment was made in bad faith.

Mo.—Evans v. Chicago & A. R. Co., 76 Mo. App. 472, 1 Mo. App. Repr.

551; Armstrong v. Chicago, etc., R. Co., 62 Mo. App. 639; Moore v. Henry, 18 Mo. App. 35; Wells v. Thomas, 27 Mo. 17, 72 Am. Dec. 228; Steamboat Virginia v. Kraft, 25 Mo. 76.

Ohio.—Bowman v. Hilton, 11 Ohio, 303.

Pa.—Union Express Co. v. Shoop, 85 Pa. St. 325, and it has a right to retain the goods in its possession a reasonable time to ascertain whether the freight of previous carriers has been paid.

R. I.—Vaughan v. Providence, etc., R. Co., 13 R. I. 578, 9 Am. & Eng. R. Cas. 41.

Tenn.—White v. Vann, 6 Humph. (Tenn.) 70, 41 Am. Dec. 294.

Wis.—Schneider v. Evans, 25 Wis. 241, 3 Am. Rep. 56, 9 Am. L. Reg. N. S. 536.

Can.—Hayward v. Grand Trunk R. Co., 32 U. C. Q. B. 392; Trottier v. Red River Transp. Co., T. Wood (Manitoba), 255.

Where the initial carrier received from a wrongful holder the goods transported, the last carrier has no better standing than the first carrier and has no lien. Stevens v. Boston, etc., R. Corp., 8 Gray (Mass.), 262.

contract. Having advanced these charges it becomes subrogated to the rights of the antecedent carrier.⁴⁴ The fact that the goods were damaged before reaching the line of the last carrier will not affect its right to such lien, nor can the lien be defeated by the consignee setting up a counterclaim for such damages against the charges demanded.⁴⁵ The lien of the last carrier is not affected by the fact that it received and transported the goods through a mistake, or some error or wrongdoing on the part of one of the previous carriers, where it has itself been free from wrong and acted in good faith. For example, where the goods are sent to a wrong destination by error of a previous carrier,⁴⁶ where the initial carrier secured the contract for shipment by fraudulent representations;⁴⁷ or where the initial carrier by mistake ships the goods over a different line than was designated by the shipper.⁴⁸ But if the carrier wrongly receiving the goods knew of the directions as to their shipment by a different line when it wrongfully received them,⁴⁹ or it was a party to an improper agreement with the connecting line by which the shipper's routing directions were violated,⁵⁰ it would have no right to charge freight and would have no lien for such charges, as its transportation of the

44. Western Transp. Co. v. Hoyt, 69 N. Y. 230, 25 Am. Rep. 175. See also Nordemeyer v. Loescher, 1 Hilt. (N. Y.) 499.

45. Thomas v. Frankfort, etc., R. Co., 25 Ky. L. Rep. 1051, 76 S. W. 1093; Guesnard v. Louisville, etc., R. Co., 76 Ala. 453; St. Louis, etc., R. Co. v. Lear, 54 Ark. 399, 55 Am. & Eng. R. Cas. 414; Bissell v. Price, 16 Ill. 408; Bowman v. Hilton, 11 Ohio 303.

46. Vaughan v. Providence, etc., R. Co., 13 R. I. 578, 9 Am. & Eng. R. Cas. 41; Briggs v. Boston, etc., R. Co., 6 Allen (Mass.) 245, 83 Am. Dec. 626; Whitney v. Beckford, 105 Mass. 267; Knight v. Providence, etc., R. Co., 13 R. I., 572, 43 Am. Rep. 46, 9 Am. & Eng. R. Cas. 90.

47. Walker v. Cassaway 4 La. Ann. 19, 50 Am. Dec. 551.

48. Price v. Denver, etc., R. Co.,

12 Colo. 402, 37 Am. & Eng. R. Cas. 626; Bird v. Georgia R. Co., 72 Ga. 655, 27 Am. & Eng. R. Cas. 39; Fordyce v. Johnson, 56 Ark. 430; Patten v. Union Pac. R. Co., 29 Fed. 590; Snow v. Indiana, etc., R. Co., 109 Ind. 422, 23 Am. & Eng. R. Cas. 77; Hand v. Baynes, 4 Whart. (Pa.) 204, 33 Am. Dec. 54; Sager v. Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659; Johnson v. New York Cent. R. Co., 33 N. Y. 610, 88 Am. Dec. 416; Ingalls v. Brooks, 1 Edm. Sel. Cas. (N. Y.) 104.

49. See cases cited note 48.

50. Denver, etc., R. Co. v. Hill, 13 Colo. 35, 40 Am. & Eng. R. Cas. 145; Andrews v. Dieterich, 14 Wend. (N. Y.) 31; The Schooner Anne, 1 Mason (U. S.) 512; Fitch v. Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 33; Bird v. Georgia R. Co., 72 Ga. 655, 27 Am. & Eng. R. Cas. 39.

goods would be voluntary. A carrier receiving goods from another carrier with notice that the freight charges have been paid in advance for through shipment by the shipper can have no lien on the goods for its share of freight charges.⁵¹ But it is entitled to a lien for unpaid freight charges although the agent of the other carrier had given the shipper a receipt erroneously endorsed "Freight charges paid through."⁵² And where the carrier receives notice that the shipper has attempted to prepay the freight for the entire transportation, but has not paid it in full at the regular rates,⁵³ or, the bill of lading contains a stipulation that the total cost of transportation shall not exceed a certain sum, and it has no knowledge of such an agreement,⁵⁴ the carrier has a lien for the balance of the freight. It is held in some cases that the second carrier is not bound by the unauthorized acts of the initial carrier; that the initial carrier acts, in ordinary cases, as the agent of the shipper for forwarding the goods beyond its line, and not as agent of the subsequent carriers.⁵⁵ Other authorities, however, hold that the initial line is the agent of the subsequent carriers and not of the shipper, and that its acts bind the subsequent carriers, whether actually authorized by them or not.⁵⁶

§ 9. Priority over other liens.—The carrier's lien for freight charges is superior to and has priority over the claims of general creditors, where the goods transported were received by it from the rightful owner, and neither creditors nor the sheriff can acquire, through attachment or other process, any better right to

51. *Marsh v. Union Pac. R. Co.*, 3 *McCrory* (U. S.) 236, 9 Fed. 873, 6 Am. & Eng. R. Cas. 359; *American Nat. Bank v. Georgia R. Co.*, 96 Ga. 665.

52. *Wolf v. Hough*, 22 Kan. 659, 40 Am. & Eng. R. Cas. 139.

53. *Crossan v. New York, etc., R. Co.*, 149 Mass. 196, 14 Am. St. Rep. 408, 21 N. E. 367, 6 R. R. & Corp. L. J. 27.

54. *Moses v. Fort Townsend S. R. Co.*, 5 Wash. 595, 55 Am. & Eng. R. Cas. 418. See also *Fordyce v. Johnson*, 56 Ark. 430.

55. *Mallory v. Burrett*, 1 E. D. Sm. (N. Y.) 234; *Moses v. Fort Townsend S. R. Co.*, *supra*; *Briggs v. Boston, etc., R. Co.*, *supra*; *Bird v. Georgia R. Co.*, *supra*; *Wells v. Thomas*, 27 Mo. 17, 72 Am. Dec. 228; *Sumner v. Southern R. Assoc.*, 7 *Baxt.* ((Tenn.) 346, 32 Am. Rep. 565, 9 Am. & Eng. R. Cas. 18.

56. *Jones v. Boston, etc., R. Co.*, 63 Me. 188; *Schneider v. Evans*, 25 Wis. 241, 9 Am. L. Reg. N. S. 541, note.

the property than the shipper or consignee has. The common carrier has a special interest in and lien on property attached, for freight due for its transportation, to its full value, and neither the shipper, consignee, or sheriff has any right to seize the goods without furnishing indemnity. If the property is seized without furnishing indemnity, the carrier may recover the full value of the goods in an action for unlawful taking.⁵⁷ The lien of the carrier for charges for carriage of the specific articles is prior to the rights of the vendor, and the carrier may insist upon retaining possession until those charges are paid. And an officer holding process against the vendee may lawfully advance these charges to the carrier, on taking possession of the goods, and having so advanced them is substituted to all the carrier's rights of possession as security therefor.⁵⁸ The lien of a carrier and warehouseman for the keeping of property after a completion of the transportation thereof is superior to that of a pledgee who procured the property to be transported and stored it.⁵⁹ But the lien of the carrier is inferior to that of a warehouseman to whom the carrier has delivered the goods for storage after the transportation has ended.⁶⁰ The carrier's lien for freight charges on goods being transported, between the consignment and the stoppage, is superior to and may be asserted as against the consignor's right of stoppage *in transitu*.⁶¹ But the right of stoppage *in transitu* is not affected by a clause in the bill of lading which provides that the carrier may retain the goods for any charges due from the consignee for other goods. The right of the carrier to extend its lien by contract to the general balance due from the owner of the goods consigned to him, if conceded, cannot apply to goods which do not become his because retaken by the consignor under the right of stoppage *in transitu*, and a lien under such a stipulation is subordinate to the

57. Campbell v. Conner, 70 N. Y. 424; Newhall v. Vargas, 15 Me. 314, 33 Am. Dec. 617; Santa Fe Pac. R. Co. v. Bossut (N. M.), 62 Pac. 977.

58. Rucker v. Donovan, 13 Kan. 251, 19 Am. Rep. 84.

59. Cooley v. Minnesota Transfer Co., 53 Minn. 327, 39 Am. St. Rep. 609, 55 Am. & Eng. R. Cas. 616.

60. Powers v. Sixty Tons of Marble, 21 La. Ann. 402.

61. Potts v. New York, etc., R. Co., 131 Mass. 455, 3 Am. & Eng. R. Cas. 424, 41 Am. Rep. 247; Hays v. Monille, 14 Pa. St. 48; Pennsylvania Steel Co. v. Georgia R., etc., Co., 94 Ga. 636; Rucker v. Donovan, 13 Kan. 251, 19 Am. Rep. 84; Crass v. Memphis, etc., R. Co., 96 Ala. 447, 55 Am. & Eng. R. Cas. 659.

right of stoppage *in transitu*.⁶² In ordinary cases of the hypothecation of a cargo, the lien for freight takes precedence.⁶³

§ 10. How lien is lost, satisfied, or discharged.—The lien of a carrier, whether by land or water, is lost by an unqualified or unconditional delivery of the goods to the owner or consignee or to any other person not the agent or servant of the carrier or under its control, without regard to the question of intent, where there is no fraud. Where the carrier voluntarily parts with the possession it loses its lien.⁶⁴ As to what amounts to a delivery sufficient to constitute a waiver of lien under certain circumstances, it has been held that the delivery must be made with such intent, or it must be made under such circumstances that the law will presume the intent to have existed; and nothing must remain to be done by the carrier in order to fully perform its contract.⁶⁵ Delivery of a portion of

62. Pennsylvania R. Co. v. American Oil Works, 126 Pa. St. 485, 24 W. N. C. 88, 17 Atl. 671, 12 Am. St. Rep. 885, 42 Am. & Eng. R. Cas. 357; Farrell v. Richmond, etc., R. Co., 102 N. C. 390, 37 Am. & Eng. R. Cas. 704; Oppenheim v. Russell, 3 B. & P. 42; Jackson v. Nicol, 7 Scott 577; Morley v. Hay, 3 M. & R. 696; Leuckhart v. Cooper, 3 Bing. N. Cas. 99, 32 E. C. L. 55.

63. Gracie v. Palmer, 8 Wheat. (U. S.) 605. See also Faith v. East India Co., 4 B. & Ald. 630, 6 E. C. L. 630; Howard v. Macondray, 7 Gray (Mass.) 516.

64. N. Y.—Geneva, etc., R. Co. v. Sage, 35 Hun (N. Y.), 95; Bigelow v. Heaton, 4 Den. (N. Y.) 496; McFarland v. Wheeler, 26 Wend. (N. Y.) 467; Van Bokkelin v. Ingwersoll, 5 Wend. (N. Y.) 315.

U. S.—Egan v. A Cargo of Spruce Lath, 43 Fed. 480; The Eddy, 5 Wall. (U. S.) 481; Four Thousand, etc., Bags of Linseed, 1 Black. (U. S.), 108, the lien depends upon the possession of the goods and arises from the right to retain them until

the amount of the lien is paid; DuPont de Nemours v. Vance, 19 How. (U. S.) 171; Cutler v. Rae, 7 How. (U. S.) 729.

Cal.—Wingard v. Banning, 39 Cal. 543; Frothingham v. Jenkins, 1 Cal. 42, 52 Am. Dec. 286.

Iowa.—Reineman v. Covington, etc., R. Co., 51 Iowa, 338.

Minn.—Shea v. Minneapolis, etc., R. Co., 63 Minn. 228.

N. C.—Norfolk Southern R. Co. v. Barnes, 104 N. C. 25, the carrier's losing possession of the goods through its own negligence is equivalent to a voluntary delivery by it, so far as the rights of innocent third parties are concerned.

Vt.—Bailey v. Quint, 22 Vt. 474.

Eng.—Forth v. Simpson, 13 Q. B. 680, 66 E. C. L. 680; Lambert v. Robinson, 1 Esp. N. P. 119; Skinner v. Upshaw, 2 1d Raym. 752.

65. New York Cent., etc., R. Co. v. Davis, 86 Hun (N. Y.), 86, 34 N. Y. Supp. 206. Where it appeared that carloads of coal on which the lien was claimed were, on reaching their destination, placed on spur tracks

the goods on which the carrier has a lien for freight does not discharge the lien for the entire freight charges on the portion not delivered. It does not discharge the lien *pro tanto*.⁶⁶ The lien is not discharged where delivery of the goods is secured by fraud

which were on the consignee's premises and for which he had furnished the ties, while the railroad company built the tracks and furnished the iron. The spur tracks were operated exclusively by the railroad company, and part of its charge was for placing the coal on the spur track. Before the consignee could handle the coal, it was necessary to remove the cars from the spur track, and move them along the main track, thence along a branch track on the consignee's premises to his docks, and this was done by an engine and crew of the railroad company, which its superintendent furnished on request. It was held that placing the cars on the spur tracks was not a delivery of the coal, so as to deprive the railroad company of its lien for freight. *Id.*

Unloading and placing merchandise on a wharf does not indicate any intention of parting with the possession of it before the payment of freight. *Boggs v. Martin*, 13 B. Mon. (Ky.) 239. See also 151 Tons of Coal, 4 Blatchf. (U.S.) 368.

The placing by a carrier of a car on the team track, to be unloaded by the consignee, is not such an absolute delivery to him of the lumber therein as to cut off any future right of lien thereon of the carrier for demurrage charges because of the consignee not unloading in the time limit therefor. *Southern Ry. Co. v. Lockwood Mfg. Co.*, (Ala.) 37 So. 667.

66. N. Y.—New York Cent., etc., R. Co. v. Davis, *supra*.

U. S.—*Brittan v. Barnaby*, 21 How. (U. S.) 527; *Cuff v. 95 Tons of Coal*, 46 Fed. 670, nor where special delivery is made of the remainder subject to the lien.

Conn.—*Fox v. Holt*, 36 Conn. 558; *Pinney v. Wells*, 10 Conn. 104.

Iowa.—*Chicago, etc., R. Co. v. Northwestern Union Packet Co.*, 38 Iowa, 377.

Ky.—*Boggs v. Martin*, 13 B. Mon. (Ky.) 239.

Mass.—*Potts v. New York, etc.*, R. Co., 131 Mass. 455, 41 Am. Rep. 247, 3 Am. & Eng. R. Cas. 424; *New Haven, etc., R. Co. v. Campbell*, 128 Mass. 104, 35 Am. Rep. 360; *Ware River R. Co. v. Vibbard*, 114 Mass. 447; *Lane v. Old Colony, etc., R. Co.*, 14 Gray (Mass.) 143. See *New York, etc., R. Co. v. Sanders*, 134 Mass. 53, 16 Am. & Eng. R. Cas. 280, where a purchaser appropriated the remainder of goods after notice of lien.

Pa.—*Fuller v. Bradley*, 25 Pa. St. 120; *Philadelphia, etc., R. Co. v. Dows*, 15 Phila. (Pa.) 101; *Steinman v. Wilkins*, 7 W. & S. (Pa.) 466, 42 Am. Dec. 254.

Wis.—*Jeffris v. Fitchburg R. Co.*, 93 Wis. 250.

Eng.—*Alsager v. St. Katherine's Dock Co.*, 14 M. & N. 794; *Foster v. Colby*, 3 H. & N. 705.

Where the goods of different shippers are covered by the same bill of lading, the carrier has no right to hold the goods of one shipper for charges upon the goods of the other. *Hale v. Barrett*, 26 Ill. 195.

on the part of the person receiving the goods, and, in such a case, the carrier may replevin the goods.⁶⁷ As against third persons without notice, the lien of a carrier for freight is lost by delivery to the consignee, though the latter agreed to hold until the freight was paid.⁶⁸ The lien of the carrier is released by the delivery of goods to the consignee, although they were consigned to him subject to the order of another.⁶⁹ And if a lien for freight is waived under a mistaken belief as to the solvency of the consignee, such fact does not entitle the carrier to relief in equity.⁷⁰ Where the consignee fails or refuses to receive the goods, or to pay freight charges, and the goods are deposited by the carrier in its warehouse or that of another, not the consignee's agent, whether so deposited by agreement with the consignee or not, or whether deposited in the name of the carrier or that of the owner subject to its lien, the lien is not lost, but is retained and may be enforced with the lien of the warehouseman added.⁷¹ If a common carrier, in order to sue out a writ of attachment against property on which he has a lien, makes affidavit, as required by statute, that his debt "is not secured by any lien," he thereby abandons his lien, and cannot afterwards assert it.⁷² The carrier or warehouseman also loses its lien by the acceptance of the consignee's note for the amount of the charges and cannot revive it by again getting possession of the goods.⁷³ A tender of the amount of the charges

67. Bigelow v. Heaton, 4 Den. (N. Y.) 496, 6 Hill (N. Y.) 43; Ash v. Putnam, 1 Hill (N. Y.) 302; Hays v. Riddle, 1 Sandf. (N. Y.) 248; One Hundred, etc., Tons of Coal, 4 Blatchf. (U. S.) 366, 18 How. (U. S.) 25; Wallace v. Woodgate, Ry. & N. 193, 21 E. C. L. 414; Bristol v. Wilsmore, 1 B. & S. 514, 8 E. C. L. 218.

68. Lembeck v. Jarvis Terminal, etc., Co., (N. J.) 59 Atl. 360.

69. Lake Shore, etc., R. Co. v. Ellsey, 85 Pa. St. 283, 18 Am. Ry. Rep. 413.

70. Sears v. Wills, 4 Allen (Mass.) 212, 1 Black (U. S.) 108.

71. Western Transp. Co. v. Barber, 56 N. Y. 544; Compton v. Shaw, 1 Hun (N. Y.) 441; Hall v. Dimond, 63 N. H. 565; The Eddy, 5 Wall. (U.

S.) 481; Brittan v. Barnaby, 21 How. (U. S.) 527; Gregg v. Illinois Cent. R. Co., 147 Ill. 550, 61 Am. & Eng. R. Cas. 216; Costello v. 734, 700 Laths, etc., 44 Fed. 105; 4, 885 Bags of Linseed, 1 Black (U. S.) 108; Hayward v. Grand Trunk R. Co., 32 U. C. Q. B. 392; Somes v. British Empire Shipping Co., 8 H. L. Cas. 338.

72. Wingard v. Banning, 39 Cal. 543.

73. Hale v. Barrett, 26 Ill. 195, 79 Am. Dec. 367. See the Bird of Paradise, 5 Wall. (U. S.) 545; The Kimball, 3 Wall. (U. S.) 37, holding that a note given for freight charges and falling due before the arrival of the goods, and protested and unpaid, is no waiver of the lien.

justly due discharges the lien.⁷⁴ The lien of a railroad for freight on goods shipped ceased when the company attempted to assign said lien to one who seized the goods for the debt of a stranger, and, therefore, the assigned lien was no defense to an action for conversion by the consignor against the attaching creditor.⁷⁵ The rule that the carrier loses his lien by parting with possession of the goods does not apply where the person with whom the contract was made makes an assignment for the benefit of his creditors according to their respective interests, and the lien of the carrier attaches to the money collected by the assignee on the assignor's contract, in performance of which the assignee delivered the goods to another.⁷⁶ The lien of a vessel upon cargo for demurrage is not lost by the mere unloading of the cargo, unless there are circumstances to show an abandonment of the lien,—as, where other security is taken, or the cargo when delivered is so mixed with other goods as to be incapable of separation and identification.⁷⁷ A railroad company does not waive prepayment of freight charges before delivery of the cars by responding "all right" to a statement by the consignee that he would give a disposal order for the cars and would send the amount of the freight whenever he got the expense notices and knew the amount.⁷⁸ The carrier's lien is lost where the goods have been wilfully diverted from the route designated by the carrier, through the fault of the carrier claiming the lien.⁷⁹ The detention of the goods by the carrier on a different and inconsistent ground from that of its lien for charges will operate as a waiver of the lien,⁸⁰ as, for example, where the refusal to deliver the goods is upon the ground that they are not in its possession at the place where demand is made.⁸¹

74. *Tiffany v. St. John*, 65 N. Y. 314, 22 Am. Rep. 612; *Burton v. Kingrose*, 63 Hun (N. Y.) 163, 17 N. Y. Supp. 665; *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468; *Martindale v. Smith*, 1 Q. B. 389, 41 E. C. L. 592; *Weeks v. Goode*, 6 C. B. N. S. 367, 95 E. C. L. 367.

75. *Rosencranz v. Swofford Bros. Dry Goods Co.*, 175 Mo. 518, 75 S. W. 445.

76. *Cayo v. Pool's Assignee*, (Ky.) 55 S. W. 887, 49 L. R. A. 251.

77. *A Cargo of Hard Coal*, 55 U.

S. App. 181, 84 Fed. 495, 28 C. C. A. 466.

78. *McEachran v. Grand Trunk R. Co.*, 115 Mich. 318, 4 Det. L. N. 879, 73 N. W. 231.

79. *Denver, etc., R. Co. v. Hill*, 13 Colo. 35, 40 Am. & Eng. R. Cas. 145.

80. *Tiffany v. St. John*, 65 N. Y. 314; *Louisville, etc., R. Co. v. McGuire*, 79 Ala. 395; *Leigh v. Mobile, etc., R. Co.*, 58 Ala. 165.

81. *Adams Express Co. v. Harris*, 120 Ind. 73, 16 Am. St. Rep. 315, 40 Am. & Eng. R. Cas. 153. See also

§ 11. Lien waived by express agreement or stipulation inconsistent with it.—The right to retain goods for freight grows out of the usage of trade, and is waived by a special agreement inconsistent with it, such as an agreement fixing the time and manner of the payment of the freight charges whereby a delivery of the goods is to precede the payment or security of payment of freight charges or the time when they become due and payable; or by stipulations inconsistent with the exercise of such a lien, or where it can be fairly inferred, from the language of the instrument, that the carrier did not intend to rely upon its lien but to trust to the personal responsibility of the owner or consignee of the goods.⁸² But a waiver of the lien is not to be readily presumed; it must be satisfactorily shown that the lien has been relinquished by stipulations so inconsistent with the existence of the lien as to fairly and clearly establish a waiver.⁸³

§ 12. How lien is enforced.—The carrier has no right at common law and in the absence of statutory authority to enforce its lien by a sale of the goods except pursuant to a judicial order or legal process, to be obtained in a proceeding in equity. It can only detain them until payment of the sum for which they are chargeable.⁸⁴ And if the carrier sells the goods he is liable to the owner for the value of the goods less the amount of charges

Mathis v. Thomas, 101 Ind. 119; *Vinton v. Baldwin*, 95 Ind. 433.

82. *Chandler v. Belden*, 18 Johns. (N. Y.) 159, 9 Am. Dec. 193; *Raymond v. Tyson*, 17 How. (U. S.) 53; *The Schooner Volunteer*, 1 Sumn. (U. S.) 551; *Certain Logs of Mahogany*, 2 Sumn. (U. S.) 589; *Ruggles v. Buckner*, 1 Paine (U. S.) 363; *The Bird of Paradise*, 5 Wall. (U. S.) 545; *Chase v. Westmore*, 5 M. & S. 180; *Crawshay v. Homfray*, 4 B. & Ald. 50, 6 E. C. L. 385; *Lucas v. Nockells*, 4 Bing. 729, 15 E. C. L. 132; *Cowell v. Simpson*, 16 Ves. Jr. 275; *Saville v. Campion*, 2 B. & Ald. 503; *Campion v. Colvin*, 3 Bing. N. Cas. 17, 32 E. C. L. 19; *Alsager v. St. Katharine's Dock Co.*, 14 M. & W. 794.

83. *Pinney v. Wells*, 10 Conn. 104; *Howard v. Macondray*, 7 Gray (Mass.) 516; *The Kimball*, 3 Wall. (U. S.) 37; *Drinkwater v. The Brig Spartan*, 1 Ware (U. S.) 149; *Frothingham v. Jenkins*, 1 Cal. 42, 52 Am. Dec. 286; *Paige v. Hubbard*, 1 Sprague (U. S.) 338. See also cases cited in last preceding note.

84. *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; *Everett v. Saltus*, 15 Wend. (N. Y.) 474; *Chandler v. Belden*, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193; *Fox v. McGregor*, 11 Barb. (N. Y.) 41; 2 Kent's Com. 642.

U. S.—*Arthur v. Schooner Cassius*, 2 Story (U. S.) 97.

Ill.—*Indianapolis, etc., R. Co. v. Herndon*, 81 Ill. 143.

due under the lien.⁸⁵ And the purchaser, though *bona fide*, is liable for their value to the owner.⁸⁶ The carrier's lien may be enforced in an action at law against the owner or consignee, in which action an attachment or execution may issue.⁸⁷ In most of the States there are statutes which provide specifically for the enforcement of the lien by a sale of the property after a specified time, if the freight is not paid. These statutes provide the method of procedure necessary which, like other statutory remedies, must be strictly pursued.⁸⁸ But statutory remedies at law do not take away any previously existing equitable remedy, in the absence of an express provision to that effect.⁸⁹ The carrier can only sell the goods upon unquestionable proof that the consignee cannot be found, and that they are perishable. In the absence of a controlling necessity to sell the goods, the carrier can only enforce his lien by due process of law; meanwhile carefully storing them.⁹⁰ Under the New York statute perishable freight or baggage may be sold without notice, as soon as it can be, upon the best terms that can be obtained.⁹¹ In some of the other States at least twenty-four hours' notice is required.⁹² In an action by a carrier for freight, defendant may counterclaim or recoup damages for a breach of

Me.—Sullivan v. Park, 33 Me. 438; Hunt v. Haskell, 24 Me. 339, 41 Am. Dec. 387.

Mass.—Briggs v. Boston, etc., R. Co., 6 Allen (Mass.) 252; Doane v. Russell, 3 Gray (Mass.) 382.

Pa.—Lacky v. McDermott, 8 S. & R. (Pa.) 500.

Tenn.—Rankin v. Memphis, etc., Packet Co., 9 Heisk. (Tenn.) 564, 24 Am. Rep. 339.

Eng.—Jones v. Pearl, 1 Stra. 556; Lickbarrow v. Mason, 6 East. 21.

85. Briggs v. Boston, etc., R. Co., 6 Allen (Mass.) 253, 83 Am. Dec. 626; Gracie v. Palmer, 8 Wheat. (U. S.) 605; Binns v. Pigot, 9 C. & P. 208, 38 E. C. L. 82. See also Stevens v. Sayward, 3 Gray (Mass.) 108.

86. Everett v. Saltus, 15 Wend. (N. Y.) 474.

87. Galt v. Archer, 7 Gratt. (Va.) 307.

88. See N. Y. Railroad Law and statutes of other states. The sale of freight within less than the time provided by statute is a conversion of the goods. Central, etc., R. Co. v. Chicago Portrait Co., 122 Ga. 11, 49 S. E. 727. A sale without notice as provided by statute is illegal and renders the carrier liable for conversion. Gulf, etc., R. Co. v. North Texas Grain Co., (Tex. Civ. App.) 74 S. W. 567.

89. Crass v. Memphis, etc., R. Co., 96 Ala. 447, 55 Am. & Eng. R. Cas. 659.

90. Rankin v. Memphis, etc., Packet Co., 9 Heisk. (Tenn.) 564, 24 Am. Rep. 339; Arthur v. The Schooner Cassius, 2 Story (U. S.) 97.

91. N. Y. Railroad Law, chap. 565 Laws 1890, sec. 46.

92. Martin v. McLaughlin, 9 Colo. 153. See statutes of other states.

his contract,⁹³ but cannot set off against the carrier's charges the amount of damages sustained by the goods from an act of God,⁹⁴ and the last of connecting carriers cannot set off damages for an injury occurring on a previous line.⁹⁵ The consignee is entitled to a reasonable time after tender of goods and demand of payment of charges in which to pay charges,⁹⁶ and demand of charges due and neglect or refusal to pay are conditions precedent to the right to bring action or to exercise the statutory right to sell.⁹⁷ If the consignee is ready and willing to pay the freight due, on having the goods delivered to him, and the carrier refuses to deliver them unless he will pay more than is due, the consignee may maintain detinue for the goods, or trover for their conversion, without making a formal tender or paying the money into court.⁹⁸ Where the carrier insists upon the payment of more freight than it is entitled to, or refuses to allow proper deductions for damages or other cause, the consignee may bring replevin to recover possession of the goods, upon tendering the proper amount due.⁹⁹

93. *N. Y.*—Gleadell v. Thomson, 56 N. Y. 194.

U. S.—Willard v. Dorr, 3 Mason (U. S.) 171; Snow v. Carruth, 1 Sprague (U. S.) 324.

Ill.—Edwards v. Todd, 2 Ill. 462. *Ky.*—Boggs v. Martin, 13 B. Mon. (Ky.) 239.

Me.—Hill v. Leadbetter, 42 Me. 572, 66 Am. Dec. 305.

Pa.—Leech v. Baldwin, 5 Watts (Pa.) 446; Bartram v. McKee, 1 Watts (Pa.) 39; Humphreys v. Reed, 6 Whart. (Pa.) 435.

S. C.—Ewart v. Kerr, Rice L. (S. C.) 203.

Hawaii.—La Motte v. Angel, 1 Hawaiian, 237.

Eng.—Dakin v. Oxley, 15 C. B. N. S. 646, 109 E. C. L. 646, 10 Jur. N. S. 655, 12 W. R. 557; Sheels v. Davies, 6 Taunt. 65.

94. Lee v. Salter, Hill, & D. Supp. (N. Y.) 163; Newhall v. Vargas, 15 Me. 314, 33 Am. Dec. 617; Galt v. Archer, 7 Gratt. (Va.) 207.

95. Bowman v. Hilton, 11 Ohio, 303.

96. Great Western R. Co. v. Crouch, 3 H. & N. 183, 4 Jur. N. S. 457.

97. Central R., etc., Co. v. Sawyer, 78 Ga. 784; Field v. Newport, etc., R. Co., 3 H. & N. 409, 27 L. J. Exch. 396.

98. Long. v. Mobile, etc., R. Co., 51 Ala. 512. See also Adams v. Clark, 9 Cush. (Mass.) 215, 57 Am. Dec. 41; Isham v. Greenham, Handy (Ohio) 357; Adams Express Co. v. Harris, 120 Ind. 73, 16 Am. St. Rep. 315, 40 Am. & Eng. R. Cas. 153; Bird v. Georgia R. Co., 72 Ga. 655, 27 Am. & Eng. R. Cas. 39.

99. Fitch v. Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 33; Ohio, etc., R. Co. v. Noe, 77 Ill. 513; Dyer v. Grand Trunk R. Co., 42 Vt. 441, 1 Am. Rep. 350; Lane v. Chadwick, 146 Mass. 68, 32 Am. & Eng. R. Cas. 548, but replevin cannot be maintained where the carrier is instructed to deliver only upon the payment of an itemized bill, which the consignee refuses to pay.

CHAPTER XVII.

CONNECTING CARRIERS.

SECTION 1. Who are connecting carriers.

2. Relation of connecting carriers to shipper and to each other.
3. Carrier not bound to carry beyond its own line.
4. Delivery to succeeding carrier.
5. Notice of arrival of goods.
6. Duty to receive goods from connecting carrier.
7. Liability for delay.
8. Liability of initial carrier for loss or injury limited to its own line.
9. Liability of initial carrier for loss or injury extends over whole route.
10. Liability of intermediate carriers.
11. Liability of terminal carrier.
12. Liability for miscarriage or diversion of goods.
13. Special contracts for through transportation.
14. What is sufficient to establish a through contract.
15. Charging and collecting entire freight in advance.
16. Collection of entire charges by terminal carrier.
17. Accepting goods to be transported to or delivered at a certain point.
18. Carrier as forwarder or warehouseman.
19. Limitation of carrier's liability to its own line.
20. When connecting carriers entitled to benefit of limitations.
21. What constitutes delivery to a connecting carrier.
22. Notice to connecting carrier of arrival of goods.
23. Presumptions and burden of proof.
24. Connecting lines as partners.
25. Rights of connecting carriers as to charges.

§ 1. Who are connecting carriers.—Ordinarily a connecting carrier is one whose route, not being the first one, lies somewhere between the point of shipment and the point of destination, and the term is used to distinguish the other carrier or carriers on the route over which the shipment is transported from the first or initial carrier. Used in this sense, a carrier who does not receive goods from another carrier under original contract for through

transportation is not a connecting carrier.¹ The term is, however, sometimes used to indicate any one of the several carriers whose lines together constitute the entire route. A transfer company employed by one carrier to transfer the goods to the next carrier,² or a cartage company employed by the last carrier to deliver the goods to the consignee,³ or a company employed by the consignee to remove the goods from the carrier's station,⁴ is not a connecting carrier. Ordinarily it is the duty of the first carrier to deliver the goods to the connecting carrier, and of one connecting carrier to deliver the goods to another, and the transferring company is the agent of the company so bound to make delivery to the next carrier.⁵

§ 2. Relation of connecting carriers to shipper and to each other.—In the absence of statute or contract, one carrier cannot compel another to stop trains at a junction of the two roads, or compel the other to permit the use of its tracks, or to make rates with it and haul its cars. The common law obligations of one connecting carrier to another with respect to receiving, transporting, and delivering goods are the same as those owing from a carrier to a shipper.⁶ Carriers may make contracts for through shipment or interchange of freight between each other and may issue through bills of lading.⁷ But the Interstate Commerce Commission has no power to compel carriers against their consent to enter into arrangements for through rates and for through billing,⁸ nor has a court of equity such power, either at common law or under

1. *Nanson v. Jacob*, 12 Mo. App. 125.

2. *Hooper v. Chicago, etc., R. Co.*, 27 Wis. 81, 9 Am. Rep. 439; *Missouri Pac. R. Co. v. Young*, 25 Neb. 651; *Western, etc., R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 35 Am. & Eng. R. Cas. 602.

3. *Roach v. Canadian Pac. R. Co.*, 1 Manitoba 158.

4. *Nanson v. Jacob*, 93 Mo. 331, 3 Am. St. Rep. 531, 32 Am. & Eng. R. Cas. 553.

5. *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 18 Am. St. Rep.

119; *Missouri Pac. R. Co. v. Young*, 25 Neb. 651; *Hooper v. Chicago, etc., R. Co.*, 27 Wis. 81.

6. *Shelbyville R. Co. v. Louisville, etc., R. Co.*, 82 Ky. 541, 21 Am. & Eng. R. Cas. 233; *Pennsylvania R. Co. v. Baltimore, etc., R. Co.*, 60 Md. 263. See also *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667, 16 Am. & Eng. R. Cas. 57.

7. *Graham & Ward v. Macon, etc., R. Co.*, 120 Ga. 575, 49 S. E. 75.

8. *Capehart v. Louisville, etc., R. Co.*, 3 Inter. Com. Rep. 278, 4 I. C. C. 265.

the Interstate Commerce Act.⁹ At common law a carrier is not bound to carry except on its own line, and if it contracts to go beyond, in the absence of statutory regulations to the contrary, it may determine for itself what agencies it will employ.¹⁰

§ 3. Carrier not bound to carry beyond its own line.—In the absence of a special contract or established usage, a common carrier is not bound to receive goods for carriage to a point beyond its own line; but it may become liable for refusing to receive and ship goods to points beyond its line, where it has specially undertaken to do so, or a custom or usage of so doing has been established, or it has held itself out to the public as carrying such goods as were tendered to points where the shipper desires to send them, although such points may be beyond its own line.¹¹ And where it undertakes, by special contract, or usage, or such holding out to the public, to carry beyond its own line, the necessary means of transportation to the point of destination must be provided by it.¹²

§ 4. Delivery to succeeding carrier.—In the absence of a special contract, where it is necessary for a carrier to deliver the shipment to another carrier before the point of destination is reached, the liability of the first carrier ceases when it has safely carried and delivered the shipment to the second without unreasonable delay.¹³ The duty of a connecting carrier to deliver goods

9. Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 41 Fed. 559, 42 Am. & Eng. R. Cas. 490; Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co., 3 I. C. C. 1.

10. Atchison, etc., R. Co. v. Denver, etc., R. Co., 110 U. S. 667; Pullman Palace Car Co. v. Missouri Pac. R. Co., 115 U. S. 587, 23 Am. & Eng. R. Cas. 537; Detroit, etc., R. Co. v. Interstate Commerce Commission, 74 Fed. 838; St. Louis Drayage Co. v. Louisville, etc., R. Co., 65 Fed. 39; Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 63 Fed. 775; Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. 567; Chicago, etc., R. Co. v. Pennsylvania R. Co., 1 I. C. C.

Rep. 86; Chicago, etc., R. Co. v. Osborne, 52 Fed. 915.

11. Chicago, etc., R. Co. v. Wollcott, 141 Ind. 267; Cobb v. Illinois Cent. R. Co., 38 Iowa, 601; Lotspeich v. Central R., etc., Co., 73 Ala. 305, 18 Am. & Eng. R. Cas. 490; Southern Kansas R. Co. v. Duncan, 40 Kan. 503.

12. Bussey v. Memphis, etc., R. Co., 4 McCrary (U. S.), 405, 13 Fed. 330; Coles v. Central R., etc., Co., 86 Ga. 251, 45 Am. & Eng. R. Cas. 328; Deming v. Norfolk, etc., R. Co., 21 Fed. 25, 16 Am. & Eng. R. Cas. 232, 17 Phila. (Pa.) 540.

13. Chicago, etc., R. Co. v. Woodward, (Ind.), 72 N. E. 558;

shipped under a through bill of lading to the next carrier is, however, not discharged by tendering them when in an unfit condition, whether it arises from an injury received while in the carrier's hands or from some unusual cause.¹⁴ Where a carrier accepts goods for carriage, directed to a place beyond the terminus of its route, the law, in the absence of special circumstances, implies an undertaking on its part to deliver them at the end of its route, to the next succeeding carrier, and if it does not so deliver them, or tender them, it is liable for any injury happening to them.¹⁵ A different custom or usage between the carriers may be shown,¹⁶ but the burden is on the carrier to show affirmatively the custom or regulation it relies on to excuse it from its duty to make such delivery.¹⁷ The obligation does not exist where the goods have been safely carried to their place of destination and the freight charges paid by the consignee after inspection of the goods,¹⁸ or where there is no agent of the connecting line whose duty it is to receive the goods.¹⁹ Where, on receiving a trunk for transportation, an express company gives the owner a receipt therefor, containing in explicit terms an agreement to forward the trunk to the agency of the company nearest destination only, and that the company may there deliver the trunk to another express company, and in such case the company to which the trunk was so delivered shall

Pennsylvania Co. v. Dickson, (Ind. App.), 67 N. E. 538; Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 324; Rock Island, etc., R. Co. v. Potter, 36 Ill. App. 590; Hooper v. Chicago, etc., R. Co., 27 Wis. 81.

14. Boston v. Pennsylvania Co., 116 Fed. 235; Alabama G. S. R. Co. v. Thomas, 89 Ala. 294, 18 Am. St. Rep. 119.

15. Rawson v. Holland, 59 N. Y. 611. But it is not responsible for delay in delivery due to the inability of the connecting carrier to receive. Palmer v. Atchinson, etc., R. Co., 101 Cal. 187.

16. Hansen v. Flint, etc., R. Co., 73 Wis. 346, 9 Am. St. Rep. 791, 37 Am. & Eng. R. Cas. 628.

17. Irish v. Milwaukee, etc., R.

Co., 19 Minn. 376, 18 Am. Rep. 340, 19 Am. Ry. Rep. 89.

18. Melbourn v. Louisville, etc., R. Co., 88 Ala. 443, and a subsequent agreement to transfer them to the connecting carrier is without consideration and unenforceable, although, if entered upon, the carrier will become liable for negligence in its performance.

19. St. Louis, etc., R. Co. v. Marrs (Ark.), 31 S. W. 42.

Action for refusal to deliver cannot be maintained by a connecting carrier against the first carrier who transported the goods under a special contract to which the former was not a party. Wilmington, etc., R. Co. v. Greenville, etc., R. Co., 9 S. C. 325, 30 Am. Rep. 23.

be regarded as the agent of the owner, and liable for damages or loss thereafter, and the express company carries the trunk to its agency nearest the destination, and there delivers it to a transfer company, which makes deliveries for the express company in the place of destination, the express company is not liable for the loss of the trunk by the transfer company.²⁰ There is a delivery of freight by a railroad company to a steamship company, so as to relieve the railroad company from further liability, as stipulated in its bill of lading on the happening of such event, though it is unloaded on a wharf belonging to the railroad company; the railroad company having given the steamship company notice by letter, which was unanswered, and seemingly acquiesced in, that unloading of steamship freight at that place constituted delivery by the railroad company, and that thereafter it assumed no liability therefor.²¹ A railroad company does not, by unloading cotton on a pier under its sole and absolute control and possession, and notifying a steamship company, the succeeding carrier, of its arrival, deliver the cotton, "to the steamship company or on the steamship pier," within the meaning of a clause in the bill of lading providing that its liability shall terminate on such delivery, even assuming that such pier was the place agreed upon between the railroad and steamship companies to make delivery of cotton to be thereafter carried by the steamship company, where the railroad company still continues to retain full control of the cotton, and could, under certain contingencies, and at any time before delivery to the steamship, send the cotton by another steamer, and by agreement between the parties the steamship company was not to take the property until it sent a steamer to the pier for that purpose.²² Where the consignee of freight, on its arrival at the destination named in the bill of lading, directs the car forwarded over connecting lines, and by transfer of the original bill of lading the shipment is continued, all the carriers treating the consignment as a single consignment, the transportation may be considered as a single shipment, in an action for damages to the freight.²³ A final carrier, having accepted a shipment for

20. Mills v. Weir, 82 App. Div. (N. Y.) 396, 81 N. Y. Supp. 801.

21. Washburn-Crosby Co. v. Boston, etc., R. Co., 180 Mass. 252, 62 N. E. 590.

22. Texas, etc., R. Co. v. Callender, 183 U. S. 632, 22 S. Ct. 257, Adv. S. U. S. 257.

23. Missouri, etc., R. Co. v. Mazie (Tex. Civ. App.), 68 S. W. 56.

transportation from an initial carrier, under a bill of lading issued by the initial carrier, is bound by such bill in so far as the same is a contract for carriage.²⁴

§ 5. Notice of arrival of goods.—The responsibility of a common carrier for the safety of goods transported by it continues until actual delivery, or notice to the succeeding carrier of the arrival of the goods at the place where the latter is to receive them. Such notice is essential to complete the delivery and fix the liability of the succeeding carrier.²⁵ The notice must be given to an authorized representative of the succeeding carrier, and must state the destination of the goods, and the instructions given by the shipper to the initial carrier.²⁶ An initial or intermediate carrier is not bound to give notice to the consignee of the delivery of the goods by it to a succeeding carrier,²⁷ but is bound to give the shipper notice when the connecting carrier refuses to receive the goods.²⁸

§ 6. Duty to receive goods from connecting carrier.—In the absence of a legal excuse for not doing so, a common carrier is bound to receive and carry all goods properly tendered to it for carriage by connecting carriers.²⁹ Upon failure or refusal to do so under proper circumstances, a mandatory injunction will lie to compel the acceptance and transfer of the freight so tendered.³⁰

24. Texas, etc., R. Co. v. Kelly (Tex. Civ. App.), 74 S. W. 343, but in so far as bill of lading issued by an initial carrier is a receipt for goods, a final carrier, on receiving the goods for transportation from the initial carrier, is not bound by the admissions contained therein.

25. Sprague v. New York Cent. R. Co., 52 N. Y. 637; Dunn v. Hannibal, etc., R. Co., 68 Mo. 268; Myrick v. Michigan Cent. R. Co., 9 Biss. (U. S.) 44, duty to notify succeeding carrier of the terms of the contract of carriage. See § 21, *post*.

26. Selma, etc., R. Co. v. Butts, 43 Ala. 385, 94 Am. Dec. 694.

27. Mason v. Grand Trunk R. Co., 37 U. C. Q. B. 163.

28. Louisville, etc., R. Co. v. Campbell, 7 Heisk. (Tenn.) 253, 12 Am. Ry. Rep. 490; Lesinsky v. Great Western Dispatch, 10 Mo. App. 134.

29. Chicago, etc., R. Co. v. Wolcott, 141 Ind. 267; Gulf, etc., R. Co. v. Dwyer, 75 Tex. 572, 16 Am. St. Rep. 926; Gulf, etc., R. Co. v. Godair, 3 Tex. Civ. App. 514.

30. Toledo, etc., R. Co. v. Pennsylvania Co., 54 Fed. 730, 53 Am. & Eng. R. Cas. 307; Beers v. Wabash, etc., R. Co., 34 Fed. 244, 35 Am. & Eng. R. Cas. 646; Chicago, etc., R. Co. v. Burlington, etc., R. Co., 34 Fed. 481; Payne v. Kansas City, etc., R. Co., 46 Fed. 546, 47 Am. & Eng. R. Cas. 228; Chicago, etc., R. Co. v. New York, etc., R. Co., 24

A carrier cannot be compelled to receive freight from a connecting road and transport it in cars other than its own, although it receives freight from another competing line in cars of the latter and transports it over the road, when its own cars are not in use but are free to be employed in the transportation desired, or where a transfer of freight will not be injurious to it, and such action is not an unreasonable discrimination against another carrier or a denial to it of reasonable and proper facilities.³¹ A connecting carrier is not bound to receive goods tendered to it for transportation, if they are not in fit condition for shipment when so tendered.³² And a regulation of a carrier that it will not receive goods that have been damaged while in the hands of other roads, unless it is indemnified against liability for such damage, is reasonable and valid, and may be enforced without rendering the carrier liable for refusing to receive such freight.³³

§ 7. Liability for delay.—Where a carrier contracts to convey goods over its own and connecting lines, and to deliver them at their destination, at a place beyond its terminus, within a certain time, or within a reasonable time, it is liable to the shipper or consignee for losses caused by delays in transportation over the connecting roads.³⁴ Where a carrier agrees to transport goods over its own line and to deliver them with due diligence to a succeeding carrier for transportation to their place of destination it is responsible for delay in forwarding them by the succeeding carrier.³⁵ And an intermediate carrier which receives from a connecting line, with which it has a traffic arrangement, perishable goods, and

Fed. 516, 22 Am. & Eng. R. Cas. 265; Denver, etc., R. Co. v. Atchison, etc., R. Co., 110 U. S. 670; Coe v. Louisville, etc., R. Co., 3 Fed. 775; Wolverhampton, etc., R. Co. v. London, etc., R. Co., L. R. 16 Eq. 433.

31. Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co., 61 Fed. 160, 51 Fed. 465, 51 Am. & Eng. R. Cas. 145; Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 59 Fed. 408; McAlister v. Chicago, etc., R. Co., 74 Mo. 351, 7 Am. & Eng. R. Cas. 373.

32. Paramore v. Western R. Co., 53 Ga. 833.

33. Missouri Pac. R. Co. v. Weissman, 2 Tex. Civ. App. 86.

34. St. Louis, etc., R. Co. v. Edwards, 78 Fed. 745, 49 U. S. App. 52; Pereira v. Central Pac. R. Co., 66 Cal. 92, 18 Am. & Eng. R. Cas. 565; Central R., etc., Co. v. Georgia Fruit, etc., Exch., 91 Ga. 389, 55 Am. & Eng. R. Cas. 606; St. Louis Southwestern R. Co. v. Cates (Tex. Civ. App.), 38 S. W. 648.

35. McKay v. New York Cent., etc., R. Co., 50 Hun (N. Y.), 563, 3 N. Y. Supp. 708.

detains them in the car in which they were received until repairs are made, during which time the goods spoil, is liable for the damages caused by the delay.³⁶ A common carrier which has received goods consigned to a place beyond the terminus of its route is bound only to diligently convey them to such terminus and deliver them to the connecting carrier, unless it has contracted to transport them farther.³⁷ Where, however, the carrier contracts to transport the goods to the place of destination, unless relieved by some limitation of liability in its contract, it is responsible for the consequences of any default or want of reasonable diligence on the part of the carrier on any part of the route.³⁸ Where there is no special contract the initial carrier is not bound in all cases to ship over its own route, but may select the route by which the goods may be carried. It is responsible, however, as for delay, where the route selected is a roundabout one, requiring an unreasonable time for transportation.³⁹ Where injury to goods is due to a delay on the initial carrier's own line, or such delay concurred in or contributed to the injury, as, for example, where goods were frozen on a connecting line but there was a delay on the initial line without which the loss would not have occurred, the initial carrier is liable.⁴⁰ So, an intermediate carrier is liable for in-

36. Cartwright v. Rome, etc., R. Co., 85 Hun (N. Y.), 517, 33 N. Y. Supp. 147; San Antonio, etc., R. Co. v. Thompson (Tex. Civ. App.), 66 S. W. 792.

37. Jennings v. Grand Trunk R. Co., 127 N. Y. 438, 49 Am. & Eng. R. Cas. 98; Rawson v. Holland, 59 N. Y. 611, 18 Am. Rep. 394.

38. Jennings v. Grand Trunk R. Co., *supra*; Condict v. Grand Trunk R. Co., 54 N. Y. 500, 4 Lans. (N. Y.) 106; Root v. Great Western R. Co., 45 N. Y. 524.

39. United States Express Co. v. Kountze, 8 Wall. (U. S.), 342; Snow v. Indiana, etc., R. Co., 109 Ind. 425; Wells, etc., Express Co. v. Fuller, 4 Tex. Civ. App. 213; Inman v. St. Louis Southwestern R. Co. (Tex. Civ. App.), 37 S. W. 37, and it is the duty of the carrier to inform the

shipper, if the shipment over a particular route will cause delay.

A charterer of a vessel, and not a railway company which has contracted with him to receive and carry the cargo, is the proper party defendant to a suit by a ship owner for damages from delay at the railway wharf due to the wrongful suspension by the railway of the receipt of cargo. Freeman v. Louisville, etc., R. Co., 32 Fla. 420, 13 So. 892.

40. St. Louis, etc., R. Co. v. Coolidge (Ark.), 83 S. W. 333, 67 L. R. A. 555; Fox v. Boston, etc., R. Co., 148 Mass. 220, 37 Am. & Eng. R. Cas. 632; Reynolds v. Boston, etc., R. Co., 121 Mass. 291; Fort Worth, etc., R. Co. v. Byers (Tex. Civ. App.), 35 S. W. 1082, initial line liable for decrease in market value of cattle, due to delay on both lines.

juries due to its own negligence or unreasonable delay, or where its delay concurred in, contributed to, or was a proximate cause of the loss.⁴¹ A connecting carrier does not become liable for damages by accepting a shipment from another line when unavoidable obstructions exist on its own line, where it expects that they will be remedied within a reasonable time and it will be able to forward the goods, and the rule that failure to notify the shipper of the obstruction will render it liable does not apply.⁴² A connecting carrier cannot justify its delay in forwarding goods, from which damage resulted, by showing that its regulations required that goods received from a connecting road should not be forwarded until the receipt of a bill for back charges, and that such bill had not been received.⁴³ But it is not responsible for a delay caused by its refusal to receive the goods until such a regulation has been complied with provided such regulation is shown to be a reasonable one.⁴⁴ Nor for delay caused by its refusal to accept the goods for immediate transportation when tendered by the initial line, where an accumulation of freight caused an unusual and unexpected pressure of business necessitating the use of all its facilities to transport the freight already received.⁴⁵ A carrier, receiving goods in the natural way from a connecting carrier, on which charges are to be collected at their destination, cannot avoid liability for delay in forwarding the same because of excessive freight charges, since it is not bound to collect more than legal charges, and can adjust the same after collection.⁴⁶ Where negligence of a carrier was alleged in delaying goods, causing the dam-

Compare Michigan Cent. R. Co. v. Burrows, 33 Mich. 6.

41. *Waite v. New York Cent., etc. R. Co.*, 110 N. Y. 635, 17 N. E. 730; *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Michigan Cent. R. Co. v. Curtis*, 80 Ill. 324; *Sisson v. Cleveland, etc., R. Co.*, 14 Mich. 489, 90 Am. Dec. 252; *Detroit, etc., R. Co. v. McKenzie*, 43 Mich. 609; *Almand v. Georgia, etc., R. Co.*, 95 Ga. 775. See *East Tennessee, etc., R. Co. v. Johnson*, 85 Ga. 497, where an intermediate carrier was held not liable in an action based on the contract of carriage; *Johnson v. East Tennessee, etc., R.*

Co., 90 Ga. 810, 55 Am. & Eng. R. Cas. 446, where it was held liable under the same state of facts in an action for tort.

42. *St. Louis, etc., R. Co. v. Bland* (Tex. Civ. App.), 34 S. W. 675.

43. *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Dunham v. Boston, etc., R. Co.*, 70 Me. 164, 35 Am. Rep. 314.

44. *Reynolds v. Boston, etc., R. Co.*, 121 Mass. 219.

45. *Crawford v. Great Western R. Co.*, 18 U. C. C. P. 510.

46. *Texas & P. Ry. Co. v. Hassell* (Tex. Civ. App.), 58 S. W. 54.

ages sued for, and evidence showed defendant delivered the goods to another carrier without giving the name of the consignee or directing notification of the arrival of the goods, and that they were afterwards unloaded and stored for over five months, and it was fairly inferable that defendant knew, or could have ascertained, the address of the consignee, an instruction in the nature of a demurrer to the evidence, was properly denied.⁴⁷ Where a shipping receipt issued by a carrier provided that it should not be liable for any damage by causes beyond its control, nor for loss or damage not occurring upon its own road, and a connecting carrier delivered goods received to the next connecting carrier without negligence on its part, it is not liable to its consignor for delay because of a subsequent transaction between the last connecting carrier and the consignee, whereby the goods were stored at the terminus, by his request, until he could communicate with his consignor, which resulted in the absolute refusal of the consignee to receive the goods five weeks later.⁴⁸ In the absence of a special contract an initial carrier is bound only to deliver the goods within a reasonable time to the next carrier and to exercise only reasonable diligence in procuring reshipment by other connecting lines, and not necessarily accept the first opportunity for reshipment that may present itself.⁴⁹ But it is liable for the non-performance of a special agreement to forward a through shipment by the steamer of a connecting carrier sailing on a designated day.⁵⁰

§ 8. Liability of initial carrier for loss or injury limited to its own line.—The recognized rule in the United States courts and in the courts of New York and most of the other States is that, in the absence of a special contract, the initial carrier accepting goods

47. Hall v. Wabash R. Co., 80 Mo. App. 463, 2 Mo. App. Rep. 619.

48. Harris v. Minneapolis, etc., R. Co., 36 Misc. Rep. (N. Y.), 181, 73 N. Y. Supp. 159.

49. Arnold v. Shade, 3 Phila. (Pa.) 82; Merchants' Wharf Boat Assoc. v. Wood, 64 Miss. 661, 60 Am. Rep. 76; Frank v. Memphis, etc., R. Co., 52 Miss. 570.

50. Northern Pac. R. Co. v. American Trading Co., 195 U. S. 39, 25 Sup. Ct. 84, 49 L. Ed. 269; Farmers'

Loan & Trust Co. v. Northern Pac. R. Co., 120 Fed. 873, 57 C. C. A. 533, and such non-performance is not excused by the refusal of the deputy collector of the port to grant a clearance while the freight was on board because it was contraband of war, where the contract was not unlawful by any subsequent legislation, and was made with knowledge that difficulties might arise in the course of transportation because of the character of the freight.

for transportation beyond its line performs its whole duty by transporting the goods to the extent of its own route and delivering them to the next connecting carrier, and is liable as a carrier only over its own road for losses and injuries or failure to deliver in good order to the next carrier, and as a forwarder from the terminus of its line, and a contract will not be implied on the part of the initial carrier to carry the goods, or provide for their carriage, beyond the terminus of its own road.⁵¹ Where trans-

51. *U. S.*—*Myrick v. Mich. Cent. R. Co.*, 107 U. S. 102, 9 Am. & Eng. R. Cas. 25; *St. Louis Ins. Co. v. St. Louis*, etc., R. Co., 104 U. S. 146, 3 Am. & Eng. R. Cas. 260; *Sumner v. Charles P. Choteau*, 37 Fed. 532; etc., R. Co. v. Pratt, 22 Wall (U. S.) 123; *Stewart v. Terre Haute*, etc., R. Co., 3 Fed. 768, 1 McCrary (U. S.) 312; *Harding v. International Nav. Co.*, 12 Fed. 168; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318; *Central Trust Co. v. Wabash*, etc., R. Co. (Mo.), 31 Am. & Eng. R. Cas. 103. But see *Richardson v. The Walker*, 30 Fed. 261; *Ogdensburg, Harp v. The Grand Era*, 1 Woods (U. S.), 186.

N. Y.—*Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, 49 Am. & Eng. R. Cas. 98; *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *Rawson v. Holland*, 59 N. Y. 611, 17 Am. Rep. 394; *Irwin v. New York Cent. R. Co.*, 59 N. Y. 653; *Babcock v. Lake Shore*, etc., R. Co., 49 N. Y. 491; *Root v. Great Western R. Co.*, 45 N. Y. 524; *Maghee v. Camden*, etc., R. Co., 45 N. Y. 514, 6 Am. Rep. 124; *Reed v. United States Express Co.*, 48 N. Y. 462, 8 Am. Rep. 561; *Lamb v. Camden*, etc., R. Co., 46 N. Y. 271, 7 Am. Rep. 327; *Marshall v. New York Cent. R. Co.*, 48 N. Y. 660; *Klein v. Dunlap*, 16 Misc. Rep. (N. Y.) 34; *Van Santvoord v. St. John*, 6 Hill (N. Y.), 158; *Dillon v.*

New York, etc., R. Co., 1 Hilt. (N. Y.) 231; *Hunt v. New York*, etc., R. Co., 1 Hilt. (N. Y.) 228. See also *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500, 6 Am. Ry. Rep. 410; *King v. Macon*, etc., R. Co., 62 Barb. (N. Y.) 161; *Le Sage v. Great Western R. Co.*, 1 Daly (N. Y.), 306, where the carrier by special contract assumed through liability. Compare *Burtis v. Buffalo*, etc., R. Co., 24 N. Y. 269, under statute of 1847; *Green v. New York Cent. R. Co.*, 4 Daly (N. Y.), 553, 12 Abb. Pr. N. S. 473; *Wilcox v. Parmalee*, 3 Sandf. (N. Y.) 610; *Foy v. Troy*, etc., R. Co., 24 Barb. (N. Y.) 382, where special contract was implied.

Ark.—*St. Louis*, etc., R. Co. v. *Weakly*, 50 Ark. 397, 7 Am. St. Rep. 104; *Packard v. Taylor*, 35 Ark. 402, 37 Am. Rep. 37.

Conn.—*Converse v. Norwich*, etc., Transp. Co., 33 Conn. 166; *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 468; *Elmore v. Naugatuck R. Co.*, 23 Conn. 457, 63 Am. Dec. 143; *Hood v. New York*, etc., R. Co., 22 Conn. 502.

Del.—*Truax v. Philadelphia*, etc., R. Co., 3 Houst. (Del.) 233.

Fla.—*Savannah*, etc., R. Co. v. *Harris*, 26 Fla. 148, 23 Am. St. Rep. 551, 42 Am. & Eng. R. Cas. 457.

Ind.—*Pittsburgh*, etc., R. Co. v. *Morton*, 61 Ind. 539, 28 Am. Rep. 682; *Cummins v. Dayton*, etc., R. Co. (Ind.), 9 Am. & Eng. R. Cas. 36;

portation is by connecting lines, each road, confining itself to its common law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier, but any one of the carriers may

Michigan, etc., R. Co. v. Caster, 13 Ind. 164.

Iowa.—Hewett v. Chicago, etc., R. Co., 63 Iowa, 611, 18 Am. & Eng. R. Cas. 568.

Ky..—Thomas v. Frankfort, etc., R. Co., 25 Ky. L. Rep. 1051, 76 S. W. 1093; Louisville, etc., R. Co. v. Tarter (Ky.), 39 S. W. 698.

La..—Vaughan v. Providence, etc., R. Co., 13 R. I. 578, 9 Am. & Eng. R. Cas. 41.

Me..—Plantation No. 4 v. Hall, 61 Me. 517; Skinner v. Hall, 60 Me. 477; Perkins v. Portland, etc., R. Co., 47 Me. 573, 74 Am. Dec. 507.

Md..—Baltimore, etc., R. Co. v. Schumacer, 29 Md. 176, 96 Am. Dec. 510.

Mass..—Aigen v. Boston, etc., R. Co., 132 Mass. 423, 6 Am. & Eng. R. Cas. 426; Washburn, etc., Mfg. Co. v. Providence, etc., R. Co., 113 Mass. 490; Hill Mfg. Co. v. Boston, etc., R. Corp., 104 Mass. 122, 6 Am. Rep. 202; Pratt v. Ogdensburg, etc., R. Co., 102 Mass. 557; Pendergast v. Adams Express Co., 101 Mass. 120; Burroughs v. Norwich, etc., R. Co., 100 Mass. 26, 1 Am. Rep. 78; Darling v. Boston, etc., R. Corp., 11 Allen (Mass.), 295; Lowell Wire Fence Co. v. Sargent, 8 Allen (Mass.), 189; Northern R. Co. v. Fitchburg R. Co., 6 Allen (Mass.), 254; Nutting v. Connecticut River R. Co., 1 Gray (Mass.), 502.

Mich..—Marquette, etc., R. Co. v. Kirkwood, 45 Mich. 51, 40 Am. Rep. 453, 9 Am. & Eng. R. Cas. 85; Hope v. Delaware, etc., Canal Co. (Mich.), 69 N. W. 487; Detroit, etc., R. Co. v. McKenzie, 43 Mich. 609, 9 Am. &

Eng. R. Cas. 15; Rickerson Roller Mill Co. v. Grand Rapids, etc., R. Co., 67 Mich. 110, 32 Am. & Eng. R. Cas. 487; McMillan v. Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

Minn..—Ortt v. Minneapolis, etc., R. Co., 36 Minn. 396; Irish v. Milwaukee, etc., R. Co., 19 Minn. 376, 18 Am. Rep. 340; Lawrence v. Winona, etc., R. Co., 15 Minn. 390, 2 Am. Rep. 130.

Miss..—Illinois Cent. R. Co. v. Kerr, 68 Miss. 14; Mobile, etc., R. Co. v. Francis (Miss.), 9 So. 508; Mobile, etc., R. Co. v. Tupelo Mfg. Co., 67 Miss. 35, 19 Am. St. Rep. 262; Crawford v. Southern R. Assoc., 51 Miss. 222, 24 Am. Rep. 626.

Mo..—Crouch v. Louisville, etc., R. Co., 42 Mo. App. 248; McCarthy v. Terre Haute, etc., R. Co., 9 Mo. App. 159; Grover, etc., Mach. Co. v. Missouri Pac. R. Co., 70 Mo. 672, 35 Am. Rep. 444; Freeburg Coal Co. v. Union R., etc., Co., 10 Mo. App. 596.

Neb..—Fremont, etc., R. Co. v. Waters (Neb.), 70 N. W. 225; Chicago, etc., R. Co. v. Gustin, 35 Neb. 86; Missouri Pac. R. Co. v. Twiss, 35 Neb. 267, 37 Am. St. Rep. 437, 55 Am. & Eng. R. Cas. 434.

N. C..—Knott v. Raleigh, etc., R. Co., 98 N. C. 73, 2 Am. St. Rep. 321, 32 Am. & Eng. R. Cas. 481; Weinberg v. Albemarle, etc., R. Co., 91 N. C. 31, 18 Am. & Eng. R. Cas. 597; Phillips v. North Carolina R. Co., 78 N. C. 294, 16 Am. Ry. Rep. 206; Phifer v. Carolina Cent. R. Co., 89 N. C. 311, 45 Am. Rep. 687.

Okl..—Church v. Atchison, etc., R. Co., 1 Okl. 44.

agree that its liability shall extend over the whole route. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory

Pa.—New York Cent., etc., R. Co. v. Eby (Pa.), 12 Atl. 482, 32 Am. & Eng. R. Cas. 486; Hostetter v. Baltimore, etc., R. Co. (Pa.), 32 Am. & Eng. R. Cas. 549; American Express Co. v. Titusville Second Nat. Bank, 69 Pa. St. 394, 8 Am. Rep. 268; Camden, etc., R. Co. v. Forsyth, 61 Pa. St. 81; Pennsylvania Cent. R. Co. v. Schwarzenberger, 45 Pa. St. 208, 84 Am. Dec. 490; Mullarkey v. Philadelphia R. Co., 9 Phila. (Pa.) 114; Clyde v. Hubbard, 88 Pa. St. 358, if carrier holds itself out as a "through freight line," or a contract can be fairly inferred from the bill of lading, it would be liable for all losses occurring up to the point of destination. And see Baltimore, etc., Steamboat Co. v. Brown, 54 Pa. St. 77; Chouteaux v. Leech, 18 Pa. St. 224, 57 Am. Dec. 602.

R. I.—Harris v. Grand Trunk R. Co., 15 R. I. 371, 26 Am. & Eng. R. Cas. 323; Knight v. Providence, etc., R. Co., 13 R. I. 572, 43 Am. Rep. 46, 9 Am. & Eng. R. Cas. 90.

S. C.—Dunbar v. Port Royal, etc., R. Co., 36 S. C. 110, 31 Am. St. Rep. 860, 55 Am. & Eng. R. Cas. 466; Wallingford v. Columbia, etc., R. Co., 26 S. C. 258, 30 Am. & Eng. R. Cas. 40; Piedmont Mfg. Co. v. Columbia, etc., R. Co., 19 S. C. 353, 16 Am. & Eng. R. Cas. 194. But see earlier cases holding the English doctrine: Kyle v. Laurens R. Co., 10 Rich. L. (S. C.) 382, 70 Am. Dec. 231; Bradford v. South Carolina R. Co., 7 Rich. L. (S. C.) 201, 62 Am. Dec. 411.

Vt.—Hadd v. United States, etc., Express Co., 52 Vt. 335, 36 Am. Rep.

757, 6 Am. & Eng. R. Cas. 443; Newell v. Smith, 49 Vt. 255, 17 Am. Ry. Rep. 100; Cutts v. Brainerd, 42 Vt. 566, 1 Am. Rep. 353; Sprague v. Smith, 29 Vt. 426, 70 Am. Dec. 424; Noyes v. Rutland, etc., R. Co., 27 Vt. 110; Brintnall v. Saratoga, etc., R. Co., 32 Vt. 665; Farmers', etc., Bank v. Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68.

Va.—McConnell v. Norfolk, etc., R. Co., 86 Va. 248, 40 Am. & Eng. R. Cas. 155.

Tex.—Miller v. Texas, etc., R. Co., 83 Tex. 518; Hunter v. Southern Pac. R. Co., 76 Tex. 195, 42 Am. & Eng. R. Cas. 501; Gulf, etc., R. Co. v. Baird, 75 Tex. 256; Wichita Valley R. Co. v. Swenson (Tex. Civ. App.), 25 S. W. 47; Missouri Pac. R. Co. v. Groesbeck (Tex. Civ. App.), 24 S. W. 702; Galveston, etc., R. Co. v. Van Winkle, 3 Tex. App. Civ. Cas., § 443; Missouri Pac. R. Co. v. Weissman, 2 Tex. Civ. App. 86; Houston, etc., R. Co. v. Park, 1 Tex. App. Civ. Cas., § 333; Galveston, etc., R. Co. v. Short (Tex. Civ. App.), 25 S. W. 142; Gulf, etc., R. Co. v. Griffith (Tex. Civ. App.), 24 S. W. 362. But see Gulf, etc., R. Co. v. Insurance Co. of N. A. (Tex. Civ. App.), 28 S. W. 237; Galveston, etc., R. Co. v. Allison, 59 Tex. 193, 12 Am. & Eng. R. Cas. 28, holding the initial carrier responsible over the entire route where it has undertaken to carry goods to a certain point beyond its own line; Texas, etc., R. Co. v. Fort (Tex.), 9 Am. & Eng. R. Cas. 392; Missouri Pac. R. Co. v. Creath, 3 Tex. App. Civ. Cas., § 84; Gulf, etc., R. Co. v. Gold-

evidence.⁵² But the initial carrier is liable for any loss or injury directly attributable to its own negligence or of which its own negligence was the proximate cause, although the loss or injury may have occurred or developed on the line of a succeeding carrier, as, for example, where it furnished a car which was defective and unsuitable for the transportation of particular freight,⁵³ or where the freezing of goods while being carried over a connecting line was due to the negligent delay of the initial carrier,⁵⁴ or injury to stock was due to the failure of the initial carrier to feed and water it,⁵⁵ or cattle were lost by being mingled with other cattle and loaded in the wrong car.⁵⁶ A carrier who receives goods under a bill of lading containing special instructions as to delivery, and who without giving like instructions, forwards them by

ing (Tex. App.), 23 Am. & Eng. R. Cas. 732, holding that each carrier is the agent of all the others and they are jointly and severally liable for all injuries to through billed goods.

Under Statutory Provisions.—

The shipment of plaintiff's goods having been made between points within this State, and over two connecting lines, the case falls within the statute making connecting lines within the State the agents of each other, and each liable under the contract with the shipper for any loss or damage accruing. Houston, etc., R. Co. v. Ney (Tex. Civ. App.), 58 S. W. 43. See McElveen v. Railway Co., 109 Ga. 249; Southern R. Co. v. McElveen, 109 Ga. 249; United States Mail Line Co. v. Mfg. Co., 101 Ky. 658; Gulf, etc., R. Co. v. Jones, 1 Ind. Ter. 354. Where goods are consigned over several connecting lines from a point outside the State, and are lost before they come into the State or into the possession of the last connecting carrier, the latter is not liable therefor, either at common law, or under a statute making each of several connecting

carriers who have recognized, acquiesced in, or acted on a contract for a through shipment of goods between points in the State liable for the loss thereof. Goldstein v. Sherman, etc., R. Co. (Tex. Civ. App.), 61 S. W. 336.

52. Myrick v. Michigan Cent. R. Co., 107 U. S. 102, 9 Am. & Eng. R. Cas. 25.

53. International, etc., R. Co. v. Aten (Tex. Civ. App.), 81 S. W. 346, a shipment of bees; Searles v. Alabama, etc., R. Co., 69 Miss. 186, 71 Miss. 744, a shipment of oats; Hunt v. Nutt (Tex. Civ. App.), 27 S. W. 1031, where the carrier failed to furnish clean cars for the shipment of metal; Shea v. Chicago, etc., R. Co. (Minn.), 68 N. W. 608.

54. Fox v. Boston, etc., R. Co., 148 Mass. 220, 37 Am. & Eng. R. Cas. 632; International, etc., R. Co. v. Anderson, 3 Tex. Civ. App. 8.

55. Galveston, etc., R. Co. v. Herring (Tex. Civ. App.), 24 S. W. 939; Norfolk, etc., R. Co. v. Harman, 91 Va. 601.

56. Norfolk, etc., R. Co. v. Sutherland, 89 Va. 703.

intermediate carriers, is liable for any loss or injury.⁵⁷ But if, upon delivering the goods to the next connecting carrier, it informs such carrier of the special provisions, its duty is discharged and it cannot be held liable.⁵⁸

§ 9. Liability of initial carrier for loss or injury extends over whole route.—The rule in England, Canada, and some of the States of the United States is that the initial carrier in the absence of restrictions, consented to by the shipper, limiting its contract of carriage to its own line, by accepting for shipment goods marked to a point beyond its own terminus, or receiving goods for transportation over its own and connecting lines, and issuing a through bill of lading, impliedly agrees to carry the goods to their destination and assumes responsibility for the safe transportation of the goods over the entire route, and is, therefore, liable for any loss or injury occurring during the transportation whether on its own line or that of connecting carriers.⁵⁹ It is held by the Eng-

57. North v. Merchants', etc., Transp. Co., 146 Mass. 315.

58. Rickerson Roller Mill Co. v. Grand Rapids, etc., R. Co., 67 Mich. 110, 32 Am. & Eng. R. Cas. 487.

59. Ala.—Alabama G. S. R. Co. v. Mt. Vernon Co., 84 Ala. 173, 35 Am. & Eng. R. Cas. 657; Louisville, etc., R. Co. v. Meyer, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44; Montgomery, etc., R. Co. v. Culver, 75 Ala. 587, 51 Am. Rep. 483, 22 Am. & Eng. R. Cas. 411; Mobile, etc., R. Co. v. Copeland, 63 Ala. 219, 35 Am. Rep. 13. But see Alabama G. S. R. Co. v. Thomas, 89 Ala. 294, 18 Am. St. Rep. 119, 32 Am. & Eng. R. Cas. 464; Lotspeich v. Central R., etc., Co., 73 Ala. 306, 18 Am. & Eng. R. Cas. 490; Montgomery, etc., R. Co. v. Moore, 51 Ala. 394.

Ga.—Central R. Co. v. Hasselkus, 91 Ga. 382; East Tennessee, etc., R. Co. v. Johnson, 85 Ga. 497; Savannah, etc., R. Co. v. Pritchard, 77 Ga. 412, 4 Am. St. Rep. 92; Falvey v. Georgia R. Co., 76 Ga. 597, 2 Am. St. Rep.

58; Central R. Co. v. Dwight Mfg. Co., 75 Ga. 609; Cohen v. Southern Express Co., 45 Ga. 148; Southern Express Co. v. Shea, 38 Ga. 519; Mosher v. Southern Express Co., 39 Ga. 37.

Ill.—Lehigh Valley Transp. Co. v. Pittsburgh, etc., Co., 92 Ill. App. 628; Wabash R. Co. v. Hafris, 55 Ill. App. 159; Ohio, etc., R. Co. v. Hamlin, 42 Ill. App. 441; Illinois Cent. R. Co. v. Carter, 165 Ill. 570; Wabash, etc., R. Co. v. Jaggerman, 115 Ill. 407, 23 Am. & Eng. R. Cas. 680; Erie R. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451; Adams Express Co. v. Wilson, 81 Ill. 339; Field v. Chicago, etc., R. Co., 71 Ill. 458; Milwaukee, etc., R. Co. v. Smith, 74 Ill. 197; Chicago, etc., R. Co. v. Montfort, 60 Ill. 175; United States Express Co. v. Haines, 67 Ill. 137; Chicago, etc., R. Co. v. People, 56 Ill. 365, 8 Am. Rep. 690; Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Illinois Cent. R. Co. v. Johnson, 34 Ill. 389; Illinois Cent. R. Co. v. Cowles, 32 Ill.

lish cases and some American cases that the shipper's contract of shipment in such cases is with the initial carrier alone, that there is no privity of contract between the shipper and the succeeding carriers, and that, therefore, the initial carrier alone is liable. The courts of some of those States in this country which maintain the same rule of liability hold the initial carrier to be the agent of the succeeding carriers in the making of the contract and adopt

117; Illinois Cent. R. Co. v. Copeland, 24 Ill. 332, 76 Am. Dec. 749; Baldwin v. American Express Co., 23 Ill. 197, 74 Am. Dec. 190; Porter v. Chicago, etc., R. Co., 20 Ill. 407, 71 Am. Dec. 286; Anchor Line v. Dater, 68 Ill. 369; Illinois Cent. R. Co. v. Jonte, 13 Ill. App. 424. But see East St. Louis, etc., R. Co. v. Wabash, etc., R. Co., 123 Ill. 594, 32 Am. & Eng. R. Cas. 522; Toledo, etc., R. Co. v. Lockhart, 71 Ill. 627.

Iowa.—Beard v. St. Louis, etc., R. Co., 79 Iowa, 527, 42 Am. & Eng. R. Cas. 509; Mulligan v. Illinois Cent. R. Co., 36 Iowa, 181, 14 Am. Rep. 514; Angle v. Mississippi, etc., R. Co., 9 Iowa, 487. But see Hewett v. Chicago, etc., R. Co., 63 Iowa, 611, 18 Am. & Eng. R. Cas. 568.

Kan.—Atchison, etc., R. Co. v. Davis, 34 Kan. 199, 25 Am. & Eng. R. Cas. 305; Atchison, etc., R. Co. v. Roach, 35 Kan. 740, 57 Am. Rep. 199, 27 Am. & Eng. R. Cas. 257; Berg v. Atchison, etc., R. Co., 30 Kan. 561, 16 Am. & Eng. R. Cas. 229.

N. H..—Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1; Nashua Lock Co. v. Worcester, etc., R. Co., 48 N. H. 339, 2 Am. Rep. 265.

Ohio.—Baltimore, etc., R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617, 3 Am. & Eng. R. Cas. 246. But see Brown v. Mott, 22 Ohio St. 149.

Tenn.—Merchants Despatch Transp. Co. v. Bloch, 86 Tenn. 393, 6 Am. St. Rep. 847; Louisville, etc., R. Co. v.

Weaver, 9 Lea (Tenn.) 38, 42 Am. Rep. 654, 16 Am. & Eng. R. Cas. 218; East Tennessee, etc., R. Co. v. Brumley, 5 Lea (Tenn.) 401, 6 Am. & Eng. R. Cas. 356; Sumner v. Southern R. Assoc., 7 Baxt. (Tenn.) 345, 32 Am. Rep. 565, 9 Am. & Eng. R. Cas. 18; Louisville, etc., R. Co. v. Campbell, 7 Heisk. (Tenn.) 253; Western, etc., R. Co. v. McElwee, 6 Heisk. (Tenn.) 208; East Tennessee, etc., R. Co. v. Rogers, 6 Heisk. (Tenn.) 143, 19 Am. Rep. 589, 12 Am. Ry. Rep. 47; East Tennessee, etc., R. Co. v. Nelson, 1 Coldw. (Tenn.) 272; Carter v. Peck, 4 Sneed. (Tenn.) 203, 67 Am. Dec. 604.

Wis.—Candee v. Pennsylvania R. Co., 21 Wis. 584, 94 Am. Dec. 566. But see Tolman v. Abbot, 78 Wis. 192; Blodgett v. Abbot, 72 Wis. 516, 7 Am. St. Rep. 873.

Eng.—Crouch v. London, etc., R. Co., 14 C. B. 255, 78 E. C. L. 255, 23 L. J. C. P. 73; Bristol, etc., R. Co. v. Collins, 5 H. & N. 969; Mylton v. Midland R. Co., 4 H. & N. 615, 28 L. J. Exch. 385; Wilby v. West Cornwall R. Co., 2 H. & N. 703, 27 L. J. Exch. 181, 4 Jur. N. S. 284; Watson v. Ambergate, etc., R. Co., 15 Jur. 448; Scothorn v. South Staffordshire R. Co., 8 Exch. 341, 22 L. J. Exch. 121, 7 Railw. Cas. 870; Muschamp v. Lancaster, etc., R. Co., 8 M. & W. 421, 5 Jur. 656, 2 Eng. R. & C. Cas. 607; Gill v. Manchester, etc., R. Co., L. R. 8 Q. B. 186, 42 L. J. Q. B. 89, 21 W. R. 525.

the rule upon grounds of convenience and public policy.⁶⁰ Where the first carrier has become liable to the owner for loss or injury of goods occurring on a succeeding line, it may recover from the connecting carrier on whose line the loss or injury actually occurred.⁶¹ The judgment against the initial carrier is not, however, conclusive against a connecting carrier to whom it delivered the goods as to the liability of the latter, although it was notified of the pendency of the suit and required to defend. It is conclusive only on such privies as are liable over, and only as to the fact that the judgment was recovered, and that it was for the value of the goods lost; it is not so far conclusive of the question of privity, as to fix the liability of the person served with notice.⁶²

§ 10. Liability of intermediate carriers.—The English rule that the shipper can only recover against the initial carrier, because there is no privity of contract between him and the succeeding carriers, does not obtain in this country. The recognized rule here is that the shipper may recover for loss or injury from any one of the connecting carriers whose act or neglect contributed to or whose departure from the line of its duty caused the loss or injury.⁶³ The remedy of the owner of the goods is not limited to

Can.—*Crawford v. Great Western R. Co.*, 18 U. C. C. P. 510; *Grand Trunk R. Co. v. McMillan*, 16 Can. Sup. Ct. 543, 42 Am. & Eng. R. Cas. 468; *MERCHANTS DESPATCH TRANSP. CO. v. Hately*, 14 Can. Sup. Ct. 572, 35 Am. & Eng. R. Cas. 565; *Gordon v. Great Western R. Co.*, 34 U. C. Q. B. 224; *Rennie v. Northern R. Co.*, 27 U. C. C. P. 153; *Brant v. Northern Pac. R. Co.*, 22 Ont. Rep. 645; *Richardson v. Canadian Pac. R. Co.*, 19 Ont. Rep. 369, 45 Am. & Eng. R. Cas. 313; *La Pointe v. Grand Trunk R. Co.*, 26 U. C. Q. B. 479.

60. See cases cited in last note.

61. *Chicago, etc., R. Co. v. Northern Line Packet Co.*, 70 Ill. 217; *Conkey v. Milwaukee, etc., R. Co.*, 31 Wis. 619, 11 Am. Rep. 630, 2 Am. Ry. Rep. 353; *Richardson v. The Charles P. Chouteau*, 37 Fed. 532;

Gill v. Manchester, etc., R. Co., L. R. 8 Q. B. 186, 21 W. R. 525; *Baxendale v. London, etc., R. Co.*, L. R. 10 Exch. 35, 44 L. J. Exch. 20, 32 L. T. N. S. 330.

62. *Chicago, etc., R. Co. v. Northern Line Packet Co.*, 70 Ill. 217.

63. *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Knowles v. Pittsburgh, etc., R. Co.*, 4 Biss. (U. S.) 466; *St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, 7 Am. St. Rep. 104, 35 Am. & Eng. R. Cas. 635; *Johnson v. East Tennessee, etc., R. Co.*, 90 Ga. 810, 55 Am. & Eng. R. Cas. 446; *Bryant v. Southwestern R. Co.*, 68 Ga. 805, 6 Am. & Eng. R. Cas. 388; *Chesapeake, etc., R. Co. v. Radbourne*, 52 Ill. App. 203; *Aigen v. Boston, etc., R. Co.*, 132 Mass. 423, 6 Am. & Eng. R. Cas. 426; *Erie R. Co. v. Lockwood*,

an action against the carrier with whom he actually contracted, but he may sue the particular carrier in whose custody and by whose negligence the goods were lost or injured, in which case the action is not upon any contract, but upon the obligation and duty which that carrier assumed from the public nature of its employment, and through whose negligence and omission the injury is presumed to have occurred, unless it shows that it arose from the act of God or of a public enemy.⁶⁴ Where the action against the connecting carrier is brought on contract, it has been held that the connecting carrier, by receiving the goods from the contracting carrier, becomes its agent for the purpose of completing its contract with the shipper, and where the contract of the shipper contemplates the employment of connecting lines, the law will imply from this circumstance sufficient privity between the shipper and the connecting carrier to enable the shipper to maintain an action against such carrier on the contract of shipment.⁶⁵ Where an intermediate carrier receives goods from a preceding one marked to a point beyond its line, in the absence of an express agreement to carry to the place of destination, its full duty is discharged by carrying to the end of its line and there delivering to a responsible carrier for further transportation, and giving such connecting carrier proper instructions as to further carriage; and, in the absence of evidence to the contrary, it will be presumed that such instructions were given.⁶⁶ Where goods are lost or damaged in transit, the burden of proving that they were delivered to the first carrier, in good order, and were lost or injured, is upon the shipper; but this being established a *prima facie* case is made, and

28 Ohio St. 358, 14 Am. Ry. Rep. 143; International, etc., R. Co. v. Tisdale, 74 Tex. 8; Conkey v. Milwaukee, etc., R. Co., 31 Wis. 619, 11 Am. Rep. 630, 2 Am. Ry. Rep. 353.

64. Smith v. New York Cent. R. Co., 41 N. Y. 620, 43 Barb. (N. Y.) 225; Lamb v. Camden, etc., R. Co., 46 N. Y. 271, 2 Daly (N. Y.) 454; Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

65. Halliday v. St. Louis, etc., R. Co., 74 Mo. 159, 41 Am. Rep. 311.

66. Hemstead v. New York Cent. R. Co., 28 Barb. (N. Y.) 485.

Agreement with prior carrier. —An intermediate carrier which has received for transportation perishable goods from a connecting carrier cannot justify its failure to transport them promptly by showing that they were in defective cars, and that, under an agreement between the carriers, it was the duty of the preceding carrier to repair the cars. Cartwright v. Rome, etc., R. Co., 85 Hun (N. Y.), 517, 33 N. Y. Supp. 147.

the burden of proof is shifted to the carrier on whom it is incumbent to show that the goods were not injured while in its possession but were safely delivered, in good order, to the next succeeding carrier. Failing to show this the carrier will be held liable.⁶⁷ The liability of a common carrier, for freight received from a connecting carrier, begins whenever the course of business has been duly observed by the agents of that road,⁶⁸ and the sending of way-bills to it may be sufficient to render it liable for unreasonable delay in taking possession of and forwarding the freight.⁶⁹ Where carriers transport over connecting lines, the one which receives the goods undertaking to deliver to the other, the liability of the second carrier as such does not commence until that of the first terminates, until the delivery of the whole consignment is completed.⁷⁰ Hence, in order to fix liability for a loss or injury to goods upon an intermediate carrier, it is necessary to allege and prove the receipt by it of the shipment in good order. In the absence of allegation and proof the action cannot be maintained.⁷¹ But the mere fact of receiving goods marked for a place beyond the terminus of its own route, in the absence of proof of an undertaking, express or implied, to carry them to their final destination, or to carry the goods over the entire route, using prior and subsequent carriers as its own agents, or proof of a partnership between the carriers, imposes on an intermediate carrier only an obligation

67. Smith v. New York Cent. R. Co., 41 N. Y. 620, 43 Barb. (N. Y.) 225; Wing v. New York, etc., R. Co., 1 Hilt. (N. Y.) 235; Savannah, etc., R. Co. v. Harris, 26 Fla. 148, 23 Am. St. Rep. 551, 42 Am. & Eng. R. Cas. 457; Brintnall v. Saratoga, etc., R. Co., 32 Vt. 665.

68. Mills v. Michigan Cent. R. Co., 45 N. Y. 622, 6 Am. Rep. 152.

69. Livingston v. New York Cent., etc., R. Co., 76 N. Y. 631.

70. Gass v. New York, etc., R. Co., 99 Mass. 220, 96 Am. Dec. 742.

71. Western R. Co. v. Harwell, 91 Ala. 340, 97 Ala. 341; Joseph v. Georgia R., etc., Co., 88 Ga. 426; Chicago, etc., R. Co. v. Goldman, 46 Ill. App. 625; Church v. Atchison,

etc., R. Co., 1 Okla. 44; South Carolina R. Co. v. Bradford, 10 Rich. L. (S. C.) 307; Gulf, etc., R. Co. v. Godair, 3 Tex. Civ. App. 514, unless its duty to receive was violated; Felder v. Columbia, etc., R. Co., 21 S. C. 35, 53 Am. Rep. 656, 27 Am. & Eng. R. Cas. 264.

Receipt of goods is presumed when the connecting carrier is shown to have received the car in which they were when shipped. Central R., etc., Co. v. Bayer, 91 Ga. 115; East Tennessee, etc., R. Co. v. Wright, 76 Ga. 532. Especially where it is shown that the car was sealed and the seals were unbroken. Newport News, etc., R. Co. v. Mendell (Ky.) 34 S. W. 1081.

to deliver the goods safely to the next carrier, and will not render it liable for loss or damage occurring on another line, either prior or subsequent.⁷² An intermediate carrier is liable for failure to furnish cars reasonably fit for transportation of goods received by it from a connecting carrier in cars defective or unsuitable for such shipment, and is not excused by showing that it carried the goods in the same cars in which it received them from the prior line, unless it notified the consignee of the condition of the cars and shipment and obtained instructions in regard thereto.⁷³ If a loss of or injury to goods has occurred while in the custody of an intermediate line, its liability is not affected by the fact that the initial carrier is also liable, by express contract or otherwise.⁷⁴ Where several common carriers form a continuous line, and contract to carry goods through and divide the compensation among

72. Root v. Great Western R. Co., 45 N. Y. 524; Hunt v. New York, etc., R. Co., 1 Hilt. (N. Y.) 228; Dillon v. New York, etc., R. Co., 1 Hilt. (N. Y.) 231; Smith v. New York Cent. R. Co., 41 N. Y. 620, 43 Barb. (N. Y.) 225, the act of 1847 only applies to the road which receives the goods for transportation, not to an intermediate road; East St. Louis, etc., R. Co. v. Wabash, etc., R. Co., 123 Ill. 594; Chicago, etc., R. Co. v. Northern Line Packet Co., 70 Ill. 217; Hill v. Burlington, etc., R. Co., 60 Iowa, 196; Carson v. Harris, 4 Greene (Iowa) 516; Swetland v. Boston, etc., R. Co., 102 Mass. 276; South Carolina R. Co. v. Bradford, 10 Rich. L. (S. C.) 307; Galveston, etc., R. Co. v. Van Winkle, 3 Tex. App. Civ. Cas., § 443; Missouri Pac. R. Co. v. Weissman, 2 Tex. Civ. App. 86; St. Louis, etc., R. Co. v. Lear, 54 Ark. 399, and shipper cannot offset, against its claim for freight charges and back charges paid with his knowledge to a preceding carrier, damages caused while the goods were in charge of the preceding line.

Intermediate carrier under-

taking through carriage.—Gulf, etc., R. Co. v. Lewine (Tex. Civ. App.), 29 S. W. 835; Norfolk, etc., R. Co. v. Reed, 87 Va. 185; Grant v. Northern Pac. R. Co., 22 Ont. Rep. 645.

73. Cartwright v. Rome, etc., R. Co., 85 Hun (N. Y.), 517; Shea v. Chicago, etc., R. Co., 66 Minn. 102, 68 N. W. 608; Beard v. Illinois Cent. R. Co., 79 Iowa, 518, 18 Am. Rep. 381, 42 Am. & Eng. R. Cas. 445; Wallingford v. Columbia, etc., R. Co., 26 S. C. 258, 30 Am. & Eng. R. Cas. 40; St. Louis, etc., R. Co. v. Henderson, 57 Ark. 402, 21 S. W. 878, and the failure of its agent to sign the bill of lading is no defense. But see McCarthy v. Louisville, etc., R. Co., 102 Ala. 193, 48 Am. St. Rep. 29.

74. Aigen v. Boston, etc., R. Co., 132 Mass. 423, 6 Am. & Eng. R. Cas. 426; Johnson v. East Tennessee, etc., R. Co., 90 Ga. 810; Chesapeake, etc., R. Co. v. Radbourne, 52 Ill. App. 203; San Antonio, etc., R. Co. v. Moore (Tex. Civ. App.), 39 S. W. 960; Anchor Line v. Dater, 68 Ill. 369.

themselves, they are jointly and severally liable to the shipper for any loss on the whole line.⁷⁵

§ 11. Liability of terminal carrier.—The rules stated in the last section by which the liability of intermediate carriers are determined apply as well to the last carrier, and upon proof of its having received the goods and of the loss or injury of the goods, it devolves upon the last carrier to prove that the loss or injury did not occur on its own line, but occurred on a prior line, or before delivery to it, or as a result of some cause set in operation before delivery to it, the consequences of which it could not prevent.⁷⁶ Where the goods are received by the initial carrier in good condition they are presumed to remain so, and where they are subsequently delivered to the consignee by the terminal carrier in a damaged condition, the presumption is that the injury occurred on its own line, and a *prima facie* case is made against the delivering carrier.⁷⁷ Evidence that goods were in a damaged condition when tendered by a terminal carrier makes a *prima facie* case against it for the entire amount of damage, which is not overcome by simply showing that the goods were damaged to some extent,

75. Robert C. White Live Stock Com. Co. v. Chicago, etc., R. Co., 87 Mo. App. 330.

Under the English rule that there is no privity of contract between the shipper and subsequent lines, the initial carrier only is liable, except where a partnership exists between it and the subsequent lines. Coxon v. Great Western R. Co., 5 H. & N. 274, 29 L. J. Exch. 165; Foulkes v. Metropolitan Dist. R. Co., 28 W. R. 526; Kent v. Midland R. Co., L. R. 10 Q. B. 1, 44 L. J. Q. B. 18.

76. Smith v. New York Cent. R. Co., 41 N. Y. 620, 43 Barb. (N. Y.) 228; Georgia R. Co. v. Gann, 68 Ga. 350; Wolf v. Central R. Co., 68 Ga. 653, 45 Am. Rep. 501, 6 Am. & Eng. R. Cas. 441; Hawley v. Screvens, 62 Ga. 347, 35 Am. Rep. 126; Louisville, etc., R. Co. v. Tennessee Brewing Co., 96 Tenn. 677; Ft. Worth, etc., R. Co.

v. Williams, 77 Tex. 121, 42 Am. & Eng. R. Cas. 464; Roach v. Canadian Pac. R. Co., 1 Manitoba, 158.

77. Smith v. New York Cent. R. Co., *supra*; Missouri, etc., R. Co. v. Mazzie (Tex, Civ. App.), 68 S. W. 56; Dixon v. Richmond, etc., R. Co., 74 N. C. 538; Gulf, etc., R. Co. v. Jones (Ind. Ter.), 37 S. W. 208; Grant v. Northern Pac. R. Co., 22 Ont. Rep. 645, the last carrier is liable when the first carrier acted as its agent on a through contract of shipment; Northern Transp. Co. v. McClary, 66 Ill. 233, both carriers held liable where both were negligent; Peoria, etc., R. Co. v. United States Rolling Stock Co., 136 Ill. 643, 29 Am. St. Rep. 348, 49 Am. & Eng. R. Cas. 81, last carrier not liable for loss while cars are on switch being unloaded by the consignee. See also Presumptions, § 23, *post*.

the amount of which is not shown, when they were delivered to it.⁷⁸ The terminal carrier has the burden of separating the damage sustained before it received them from that inflicted while the goods were in its charge.⁷⁹ Where grain was delivered to a carrier for shipment to a destination beyond its own line under a through bill of lading; a sight draft, with the bill of lading attached, was forwarded through certain banks, for collection from the consignee, who refused to accept the same because of the non-arrival of the grain; the draft was protested and returned to the shippers, and thereafter the connecting carrier delivered the grain to the consignee on a bond, without presentation of the bill of lading, and without payment of the draft, such delivery constituted a conversion of the grain by the connecting carrier.⁸⁰ Where a traffic arrangement exists between two or more carriers, the connecting carrier receiving goods from the contracting carrier becomes a privy to the contract with the shipper; but without such traffic arrangement no such privity will be implied, and the connecting carrier who received the goods independent of the contract is not responsible for the wrongdoing of the contracting carrier.⁸¹

§ 12. Liability for miscarriage or diversion of goods from proper route.—If a bill of lading does not stipulate for a particular route beyond the terminus of the line of the connecting carrier, the implication is that any usual or reasonably direct route satisfies the contract.⁸² The absence of special instructions as to route amounts to an assent to the carrier's shipping by the usual route.⁸³ And the burden is on the shipper to prove a contract to ship by a particular route.⁸⁴ Where goods were delivered to one carrier and its receipt for them delivered to two other carriers, whose roads formed part of a continuous route, and the agent gave a receipt for the goods, agreeing to transport them, the latter companies were liable for loss of the goods resulting from their

78. Gulf, etc., R. Co. v. Edloff, 89 Tex. 454, 34 S. W. 414.

109 Ind. 422, and parol evidence is inadmissible to show that a certain route was agreed upon.

79. Texas, etc., R. Co. v. Brown (Tex. Civ. App.), 37 S. W. 785.

83. Southern Kansas R. Co. v. Duncan., 40 Kan. 503; Frank v. Memphis, etc., R. Co., 52 Miss. 570; Hostetter v. Baltimore, etc., R. Co. (Pa.), 32 Am. & Eng. R. Cas. 549.

80. Marshall, etc., Grain Co. v. Kansas City, etc., R. Co., 176 Mo. 480, 75 S. W. 638.

84. Dixon v. Columbus, etc., R. Co., 4 Biss. (U. S.) 137.

81. Shewalter v. Missouri Pac. R. Co., 84 Mo. App. 589.

82. Snow v. Indiana, etc., R. Co.,

being sent in another direction from the point at which they should have been taken under the engagement entered into by the agent, unless they could show that the miscarriage of the goods was under circumstances that would relieve them from responsibility.⁸⁵ A common carrier undertaking to forward goods beyond its terminus and disobeying the shipper's directions in regard thereto is liable for their loss.⁸⁶ And a deviation from instructions of the shipper works a forfeiture of a special contract of shipment under which the initial carrier had limited its liability.⁸⁷ Special instructions of the shipper to forward by a specified route must be followed, and if disregarded will render the carrier liable for any loss or delay, as for a conversion.⁸⁸ An initial carrier which receives goods for shipment with special instructions as to the route over which the consignment is to go, or under special conditions as to the manner of transportation, is bound to transmit to the connecting carrier such special instructions and conditions, and is liable for its failure to so advise the connecting carrier as for a diversion of the consignment from its proper route.⁸⁹ It must so deliver the consignment to the connecting carrier that the latter will be under the same obligations to the shipper with respect to the goods as it would have been had it received them directly from the shipper.⁹⁰ If an intermediate carrier, which

85. Le Sage v. Great Western R. Co., 1 Daly (N. Y.), 306.

86. Johnson v. New York Cent. R. Co., 33 N. Y. 610, 88 Am. Dec. 416; Alabama G. S. R. Co. v. Thomas, 89 Ala. 294, 18 Am. St. Rep. 119.

87. Uptegrove v. Central R. Co., 16 Misc. Rep. (N. Y.) 14.

88. Michigan Southern, etc., R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278; Georgia R. Co. v. Cole, 68 Ga. 623; Congar v. Galena, etc., R. Co., 17 Wis. 477.

89. Patten v. Union Pac. R. Co., 29 Fed. 590; Selma, etc., R. Co. v. Butts, 43 Ala. 385, 94 Am. Dec. 695; Colfax Mountain Fruit Co. v. Southern Pac. Co. (Cal.), 46 Pac. 668, the burden is on the carrier to show that it performed this duty; North v.

Merchants', etc., Transp. Co., 146 Mass. 315.

90. Palmer v. Chicago, etc., R. Co., 56 Conn. 137, 35 Am. & Eng. R. Cas. 629; Little Miami, etc., R. Co. v. Washburn, 22 Ohio St. 324; Booth v. Missouri, etc., R. Co. (Tex. Civ. App.), 37 S. W. 168; Southern Pac. R. Co. v. Booth (Tex. Civ. App.), 39 S. W. 585, such a failure, while it will render the initial carrier liable for damages caused to the goods by their being diverted from their proper route, will not constitute a conversion and render the carrier absolutely liable for their value; Brown, etc., Co. v. Pennsylvania Co., 63 Minn. 546, the initial line is responsible for the damages occasioned, although it had no reason to expect special damage. See also Indianapolis, etc., R. Co. v. Murray, 72 Ill. 128.

limits responsibility to that of a forwarder only, neglect to give proper instructions to the connecting carrier, as to the destination and delivery of the property, it is liable to the consignor for the damages sustained thereby.⁹¹ Whether or not special instructions were given to the carrier is a question of fact.⁹² Where the contract for carriage is in writing, partly printed and partly written, the intent of the parties is to be gathered from the entire instrument, the written part controlling where that and the printed part are in conflict.⁹³ A subsequent carrier named in the bill of lading cannot sue the first carrier for loss of profits where it fails to carry out its contract of transportation with the shipper.⁹⁴

§ 13. Special contracts for through transportation.—That a railroad or other corporation may bind itself, by a contract, to carry goods to a point beyond the terminus of its own line of road, and to be responsible for the safe carriage of such goods for the entire distance, is affirmed by the general current of authority, in England and in this country, and such contract is not *ultra vires*.⁹⁵ It may also contract to receive goods away from its terminus, to

91. Dana v. New York Cent. R. Co., 50 How. Pr. (N. Y.) 428. Where the initial carrier gave to the shipper a receipt providing that goods consigned to any place beyond the terminus of its road should be forwarded by a carrier or freighter willing to receive the same unconditionally, and that after delivery to it, the former should not be liable, evidence of an oral direction at the time to forward by rail only was incompetent. **Hinckley v. New York Cent., etc., R. Co.**, 56 N. Y. 429.

92. Johnson v. New York Cent. R. Co., 39 How. Pr. (N. Y.) 127; **Bird v. Georgia R. Co.**, 72 Ga. 655, 7 Am. & Eng. R. Cas. 39, marks on the goods and similar circumstances may be considered in determining the question.

93. Babcock v. Lake Shore, etc., R. Co., 49 N. Y. 491, 43 How. Pr. (N. Y.) 317.

94. St. Louis, etc., Packet Co. v.

Missouri Pac. R. Co., 35 Mo. App. 272.

95. Eng.—Wilby v. West Cornwall R. Co., 2 H. & N. 703, 4 Jur. N. S. 284, 27 L. J. Exch. 181; **Muschamp v. Lancaster R. Co.**, 8 M. & W. 421.

U. S.—Ohio, etc., R. Co. v. McCarthy, 96 U. S. 258; **Ogdensburg, etc., R. Co. v. Pratt**, 22 Wall. (U. S.) 133; **Evansville, etc., R. Co. v. Androseoggan Mills**, 22 Wall. (U. S.) 594; **Woodward v. Illinois Cent. R. Co.**, 1 Biss. (U. S.) 403.

N. Y.—Jennings v. Grand Trunk R. Co., 127 N. Y. 438, 49 Am. & Eng. R. Cas. 98; **Lyon v. Western New York, etc., R. Co.**, 88 Hun (N. Y.) 27, 34 N. Y. Supp. 532; **Condict v. Grand Trunk R. Co.**, 54 N. Y. 500; **Burtis v. Buffalo, etc., R. Co.**, 24 N. Y. 269; **Weed v. Saratoga, etc., R. Co.**, 19 Wend. (N. Y.) 534; **Hart v. Rensselaer, etc., R. Co.**, 8 N. Y. 37, 59 Am. Dec. 447; **Schroeder v. Hudson River R. Co.**, 5 Duer (N. Y.) 55;

be transported to such terminus over the route of another carrier, and then to be forwarded over its route, when the making of such contract is in the prosecution of and incidental to its corporate business. But this right is not absolute and unqualified, but must be exercised within reasonable limits and in such circumstances

Ogdensburg, etc., R. Co. v. Pratt, 49 How. Pr. (N. Y.) 84.

Cal.—Pereira v. Central Pac. R. Co., 66 Cal. 92, 18 Am. & Eng. R. Cas. 566.

Ga.—Rome R. Co. v. Sullivan, 25 Ga. 228, but it cannot bind other connecting lines, without authority.

Ill.—Wabash R. Co. v. Harris, 55 Ill. App. 159; *St. Louis, etc., R. Co. v. Larned*, 103 Ill. 293, 6 Am. & Eng. R. Cas. 436.

Ind.—Cummins v. Dayton, etc., R. Co., (Ind.) 9 Am. & Eng. R. Cas. 36.

Kan.—Atchison, etc., R. Co. v. Roach, 35 Kan. 740, 57 Am. Rep. 199; *Atchison, etc., R. Co. v. Fletcher*, 35 Kan. 236, 24 Am. & Eng. R. Cas. 34.

Ky.—Bryan v. Memphis, etc., R. Co., 11 Bush (Ky.) 597, 14 Am. Ry. Rep. 395.

Me.—Perkins v. Portland, etc., R. Co., 47 Me. 573, 74 Am. Dec. 507.

Mass.—Hill Mfg. Co. v. Boston, etc., R. Corp., 104 Mass. 122, 6 Am. Rep. 202.

Mich.—Johnson v. Toledo, etc., R. Co., (Mich.) 95 N. W. 724, 10 Det. L. N. 324.

Minn.—Stewart v. Erie, etc., Transp. Co., 17 Minn. 372, 5 Am. Ry. Rep. 333, 8 Am. Ry. Rep. 149.

Mo.—Faulkner v. Chicago, etc., R. Co., (Mo. App.) 73 S. W. 927, a station agent's authority to bind the road must be proved but may be inferred from a previous course of dealing; *Davis v. Jacksonville, etc., Line*, 126 Mo. 69; *Wiggins Ferry Co. v. Chicago, etc., R. Co.*, 73 Mo. 389, 5

Am. & Eng. R. Cas. 1, 39 Am. Rep. 519; *Moore v. Henry*, 18 Mo. App. 35; *Coates v. United States Express Co.*, 45 Mo. 238; *Snider v. Adams Express Co.*, 63 Mo. 576; *Cherry v. Kansas City, etc., R. Co.*, 1 Mo. App. Rep. 253.

Neb.—Missouri Pac. R. Co. v. Twiss, 35 Neb. 267.

N. H.—Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1; *Nashua Lock Co. v. Worcester, etc., R. Co.*, 48 N. H. 339, 2 Am. Rep. 242.

N. C.—Knott v. Raleigh, etc., R. Co., 98 N. C. 73, 32 Am. & Eng. R. Cas. 481, 2 Am. St. Rep. 321; *Lindley v. Richmond, etc., R. Co.*, 88 N. C. 547, 9 Am. & Eng. R. Cas. 31; *Phillips v. North Carolina R. Co.*, 78 N. C. 294.

Pa.—Baltimore, etc., Steamboat Co. v. Brown, 54 Pa. St. 77.

Tex.—Texas, etc., R. Co. v. Lynch (Tex. Civ. App.), 73 S. W. 65; *Gulf, etc., R. Co. v. Insurance Co. of N. A.*, (Tex. Civ. App.) 28 S. W. 237; *Houston, etc., R. Co. v. Park*, 1 Tex. App. Civ. Cas. § 332.

Va.—Herring v. Chesapeake & W. R. Co. (Va.), 45 S. E. 322, but the fact that a car is waybilled to a particular place is no evidence of such a contract.

Vt.—Hadd v. United States, etc., Express Co., 52 Vt. 335, 36 Am. Rep. 757, 6 Am. & Eng. R. Cas. 443; *Morse v. Brainerd*, 41 Vt. 550; *Noyes v. Rutland, etc., R. Co.*, 27 Vt. 110. *Contra: Hood v. New York, etc., R. Co.*, 22 Conn. 1, 502.

that it may fairly be said to be incident to its legitimate corporate business.⁹⁶ The contract must be shown to have been made with a competent and authorized agent, since the carrier is not bound by such a contract of its agent, in the absence of express authority, or an established usage.⁹⁷ A general freight agent has been held to have implied authority.⁹⁸ Such a contract will be inferred only from clear and satisfactory evidence; it will not be presumed, but the proof must be clear and explicit.⁹⁹ Whether such an agreement was in fact made is a question for the jury, unless it is a matter of the construction of the terms of a bill of lading.¹ A carrier contracting for through transportation is bound to furnish adequate facilities for such transportation, and it cannot excuse its failure to do so by showing that the usual means of transportation beyond its own line failed or refused to carry for it.²

§ 14. What is sufficient to establish a through contract.— The custom and usage of the carrier in accepting merchandise for transportation over its road and connecting lines, the extent to which it has held itself out to the public as undertaking the responsibility of through transportation, the giving of a through bill of lading or waybill, the collection in advance of freight charges for the entire route, the relations existing between the initial carrier and the connecting lines, are facts and circumstances which constitute competent evidence to be taken into consideration by the jury in determining whether or not there was an undertaking for through liability.³ The weight of it is a question for the

96. *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206, 30 Am. & Eng. R. Cas. 105, 12 N. E. 583.

97. *Wait v. Albany*, etc., R. Co., 5 Lans. (N. Y.) 475; *Moore v. Henry*, 18 Mo. App. 35; *Taylor v. Chicago*, etc., R. Co., 74 Ill. 86; *Michigan Southern*, etc., R. Co. v. *Day*, 20 Ill. 375, 71 Am. Dec. 278.

98. *Riley v. New York*, etc., R. Co., 34 Hun (N. Y.), 97; *Schroeder v. Hudson River R. Co.*, 5 Duer (N. Y.), 55; *Wiggins Ferry Co. v. Chicago*, etc., R. Co., 73 Mo. 389; *Baugh v. McDaniel*, 42 Ga. 641.

99. *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 9 Am. & Eng. R.

Cas. 25; *Baugh v. McDaniel*, 42 Ga. 641; *Baltimore*, etc., R. Co. v. *Green*, 25 Md. 72; *Pennsylvania R. Co. v. Berry*, 68 Pa. St. 272, 1 Am. Ry. Rep. 501.

1. *Pereira v. Central Pac. R. Co.*, 66 Cal. 92 18 Am. & Eng. R. Cas. 565.

2. *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500, 6 Am. Ry. Rep. 410; *Bussey v. Memphis*, etc., R. Co., 13 Fed. 330, 4 McCrary (U. S.), 405; *Frank v. Memphis*, etc., R. Co., 52 Miss. 570; *Arnold v. Shade*, 3 Phila. (Pa.) 82.

3. *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, 49 Am. & Eng. R. Cas.

jury.⁴ The authorities generally which maintain the American rule that the liability of the initial carrier is limited to its own line, in the absence of an express contract, hold that the mere acceptance by a carrier of goods marked to a point beyond its line, or the mere issuing of a through bill of lading, or the mere failure to stipulate that it shall be liable only for injuries occurring on its own line, is not sufficient to create, by implication, a contract to carry over the entire distance and to establish an undertaking for through liability, but there must be an express contract.⁵ On the other hand

98, wherein the giving and accepting of rates for through transportation and the unqualified delivery and acceptance of the goods in pursuance thereof were held to show an undertaking for through transportation, which was not modified by stipulations and conditions in shipping bills which the shipper's agents, who delivered the goods, were not authorized to execute and of which the shipper had no knowledge; Ogdensburg, etc., R. Co. v. Pratt, 22 Wall. (U. S.) 123, 11 Am. Ry. Rep. 431, a waybill held to be evidence whether looked upon as a contract or as a declaration or admission; Mallory v. Burrett, 1 E. D. Sm. (N. Y.) 234; Dresbach v. California Pac. R. Co., 57 Cal. 462, 3 Am. & Eng. R. Cas. 281; Stewart v. Terre Haute, etc., R. Co., 1 McCrary (U. S.), 312, contract not established by proof of the acceptance of the goods by the carrier with knowledge of their destination, and of its naming the through rate for the same. *Compare* McCarthy v. Terre Haute, etc., R. Co., 9 Mo. App. 159.

Where there were no directions to the carrier except that the goods were to be forwarded by a particular line, the carrier's receipt of the goods under such circumstances did not establish a through liability. Jacobs v. Hooker, 1 Edm. Sel. Cas. (N. Y.) 472.

Through liability held to be established by stipulations and conditions of way-bills and shipping receipts; Toledo, etc., R. Co. v. Merriaman, 52 Ill. 123, 4 Am. Rep. 590; Cummins v. Dayton, etc., R. Co. (Ind.), 9 Am. & Eng. R. Cas. 36; Wahl v. Holt, 26 Wis. 703; Cutts v. Brainerd, 42 Vt. 566, 1 Am. Rep. 353; Morse v. Brainerd, 41 Vt. 550; Webber v. Great Western R. Co., 3 H. & C. 771, 4 H. & C. 582, 13 W. R. 755. *Contra:* Alabama G. S. R. Co. v. Thomas, 83 Ala. 343, 32 Am. & Eng. R. Cas. 464; Savannah, etc., R. Co. v. Collins, 77 Ga. 376, 4 Am. St. Rep. 87, 32 Am. & Eng. R. Cas. 496, note.

4. Ogdensburg, etc., R. Co. v. Pratt, 22 Wall. (U. S.) 123; Central R., etc., Co. v. Skellie, 86 Ga. 686; Pereira v. Central Pac. R. Co., 66 Cal. 92; Philadelphia, etc., R. Co. v. Ramsey, 89 Pa. St. 474; Central R., etc., Co. v. Georgia Fruit, etc., Exch., 91 Ga. 389; McGill v. Grand Trunk R. Co., 19 Ont. App. 245; Page v. Chicago, etc., R. Co., 7 S. Dak. 297.

5. Van Santvoord v. St. John, 6 Hill (N. Y.), 157, revg. 25 Wend. 660; Jacobs v. Hooker, 1 Edm. Sel. Cas. (N. Y.) 472; Wright v. Boughton, 22 Barb. (N. Y.) 561; Central Trust Co. v. Wabash, etc., R. Co., 31 Fed. 247; Stewart v. Terre Haute, etc., R. Co., 3 Fed. 768, 1 McCrary (U. S.), 312; Nutting v. Connecti-

the authorities generally which maintain the English rule that the liability of the initial carrier extends over the whole route, hold that a mere acceptance of goods marked to a point beyond the terminus of its lines establishes by inference an undertaking *prima facie* for through transportation and liability.⁶ But where the bill of lading or shipping receipt given by the carrier, although it is for through shipment at a fixed rate, contains express provisions or conditions that the receiving carrier will forward the goods beyond its own line by public carriers and will not be responsible beyond its own line, such conditions or limitations are a part of the receipt and it cannot be held to constitute a contract for through carriage, but only to carry to the end of the initial carrier's line and to deliver to the next carrier.⁷

§ 15. Charging and collecting entire freight in advance.—The acceptance of goods marked to a point beyond the terminus of its

cut River R. Co., 1 Gray (Mass.), 504, the receipt adds nothing to the contract and imposes no further obligation than the law imposes; Elmore v. Naugatuck R. Co., 23 Conn. 472, 63 Am. Dec. 143, holding the same as to the effect of a receipt; Converse v. Norwich, etc., Transp. Co., 33 Conn. 166; Louisville, etc., R. Co. v. Tarter (Ky.), 39 S. W. 698; Ortt v. Minneapolis, etc., R. Co., 36 Minn. 396; Crawford v. Southern R. Assoc., 51 Miss. 222; Piedmont Mfg. Co. v. Columbia, etc., R. Co., 19 S. C. 353; Hunter v. Southern Pac. R. Co., 76 Tex. 195; Washburn, etc., Mfg. Co. v. Providence, etc., R. Co., 113 Mass. 490; Ft. Worth, etc., R. Co. v. Williams, 77 Tex. 121; San Antonio, etc., R. Co. v. Mayfield (Tex. App.), 15 S. W. 503; International, etc., R. Co. v. Wentworth, 87 Tex. 311; Taylor v. Maine Central R. Co., 87 Me. 299. See also Story Bailm., § 538.

6. Elgin, etc., R. Co. v. Bates Mach. Co., 98 Ill. App. 311; Illinois Cent. R. Co. v. Johnson, 34 Ill. 389; Illinois Cent. R. Co. v. Miller, 32 Ill.

App. 259; Crouch v. Louisville, etc., R. Co., 42 Mo. App. 248; Missouri Pac. R. Co. v. Twiss, 35 Neb. 267; Ogdensburg, etc., R. Co. v. Pratt, 22 Wall. (U. S.) 123; Evansville, etc., R. Co. v. Androscoggin Mills, 22 Wall. (U. S.) 594; Kyle v. Laurens R. Co., 10 Rich. L. (S. C.) 382; Hance v. Wabash Western R. Co., 56 Mo. App. 476, so held under a statute. Compare McCarthy v. Terre Haute, etc., R. Co., 9 Mo. App. 159.

The absence of limitation of its liability upon receipt of the goods is held *prima facie* evidence of an undertaking in Fortier v. Pennsylvania R. Co., 18 Ill. App. 260; Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88; Louisville, etc., R. Co., v. Weaver, 9 Lea (Tenn.), 38.

7. Central R., etc., Co. v. Bridger, 94 Ga. 471; Chicago, etc., R. Co. v. Church, 12 Ill. App. 17; Dunbar v. Port Royal, etc., R. Co., 36 S. C. 110; 31 Am. St. Rep. 860, 55 Am. & Eng. R. Cas. 466; Detroit, etc., R. Co. v. Farmers', etc., Bank, 20 Wis. 122.

own line, billing them through to such point on the line of a connecting carrier in accordance with the usual course of business on the receiving company's line without any limitation of its liability, and charging and collecting in advance the freight for the entire route, have been held sufficient to constitute *prima facie* a through contract which will bind the initial carrier.⁸ But accepting the goods for shipment, fixing the value of through freight and contracting for the entire carriage at a fixed price and receiving the same in advance, does not necessarily have the effect of making a through contract,⁹ unless there are other circumstances showing the carrier's intention to undertake through transportation of the goods to the place of destination.¹⁰

§ 16. Collection of entire charges by terminal carrier.—Where several common carriers run lines of transportation, each covering a part only of a certain continuous line of through transportation of goods, and a rate of freight fixed by mutual agreement is charged for the through service, collected by the carrier whose line includes the end of the route, and divided between the carriers in an agreed proportion, no partnership or joint liability to shippers of goods is created by these facts, and each line is liable only for injury caused by its own negligence.¹¹ In such a case, the last carrier has a lien on the consignment for all the

8. Stevens v. Lake Shore, etc., R. Co., 20 Ohio C. C. R. 41, 11 O. C. D. 168; Central R., etc., Co. v. Georgia Fruit, etc., Exch., 91 Ga. 380, 55 Am. & Eng. R. Cas. 606; Atlanta, etc., R. Co. v. Texas Grate Co., 81 Ga. 602; Crouch v. Louisville, etc., R. Co., 42 Mo. App. 248; Harris v. Cheshire R. Co. (R. I.), 16 Atl. 512; Mann v. Birchard, 40 Vt. 326.

A requirement of guaranty of payment of through freight by the shipper is, however, not conclusive of a contract for through transportation. Illinois Cent. R. Co. v. Kerr, 68 Miss. 14, 8 So. 330.

9. Aetna Insurance Co. v. Wheeler, 49 N. Y. 616, 3 Am. Ry. Rep. 390; Lamb v. Camden, etc., R. Co., 46 N. Y. 271, revg. 2 Daly (N. Y.), 454;

Camden, etc., R. Co. v. Forsyth, 61 Pa. St. 81; Goldsmith v. Chicago, etc., R. Co., 12 Mo. App. 479; Pontifex v. Hartley, 62 L. J. Q. B. 196.

10. McCarthy v. Terre Haute, etc., R. Co., 9 Mo. App. 159; Piedmont Mfg. Co. v. Columbia, etc., R. Co., 19 S. C. 353, 16 Am. & Eng. R. Cas. 194; Gulf, etc., R. Co. v. Griffith (Tex. Civ. App.), 24 S. W. 362. Compare Fort Worth, etc., R. Co. v. McAnulty, 7 Tex. Civ. App. 321; Jennings v. Grand Trunk R. Co., 127 N. Y. 438, 49 Am. & Eng. R. Cas. 98.

11. Gass v. New York, etc., R. Co., 99 Mass. 220, 96 Am. Dec. 742; Darling v. Boston, etc., R. Corp., 11 Allen (Mass.), 295; Coxon v. Great Western R. Co., 5 H. & N. 274.

charges, including those paid to preceding carriers, and any damages to the goods cannot be set off against such charges unless the injury occurred on the last line.¹² Where, by a written contract between an express company and a railroad, the latter agreed to "receive, load and unload, deliver and waybill" all freight sent by the former, and other railroads, forming a continuous line with the first, made similar agreements, each to be responsible for all loss or damage to the goods while in its possession, and the last road to deduct its charges and account to the preceding, and so on to the first, the different roads did not become partners, and each was liable only for its own negligence.¹³

§ 17. Accepting goods to be transported to or delivered at a certain point.—Where a railroad company receives goods for transportation properly addressed to a person at a point beyond the terminus of its road, it must be understood, in the absence of any proof to the contrary, to have agreed to deliver the property in the same order and condition in which it was received, to the consignee.¹⁴ By giving a receipt for goods specifying that they are to be transported to a point beyond its terminus, it makes itself liable not only for its own default, but for that of the other carriers on that line.¹⁵ A bill of lading given by the receiving carrier for goods to be delivered as addressed implies an undertaking for through delivery, and the carrier is not released from liability for loss by the fact that the goods were warehoused at the termination of its line for the purpose of being forwarded by the connecting carriers.¹⁶ Where the carrier specially contracts to deliver the

12. *Bowman v. Hilton*, 11 Ohio, 303.

13. *St. Louis Insurance Co. v. St. Louis*, etc., R. Co., 104 U. S. 146, 3 Am. & Eng. R. Cas. 260.

14. *Foy v. Troy*, etc., R. Co., 24 Barb. (N. Y.) 382. But see *Wright v. Boughton*, 22 Barb. (N. Y.) 561, holding that where a carrier, whose route was a short one, received goods which were to be transported to a point far beyond its terminus, and which were addressed accordingly, the copy of the address which was entered in the receipt it gave, was

matter of description, and did not constitute an undertaking on its part to transport them beyond its own route.

15. *King v. Macon*, etc., R. Co., 62 Barb. (N. Y.) 160; *Maghee v. Camden*, etc., R. Co., 45 N. Y. 514, and the liability of companies in this respect is not effected by the provisions of the Georgia Code, in case of transportation beyond the boundaries of the State.

16. *Hansen v. Flint*, etc., R. Co., 73 Wis. 346, 9 Am. St. Rep. 791, 37 Am. & Eng. R. Cas. 628. See also

goods at a certain place by a special time, it is liable for any delay occurring on a connecting line.¹⁷

§ 18. Carrier as forwarder or warehouseman.—Where goods are received by a carrier “to be forwarded” to a destination not on its own line, or to transport over its own route and to deliver to a connecting carrier “to be forwarded” to their destination, a through contract is not made or to be implied thereby, and the receiving carrier is liable only for such injuries as occurred on its own line or through its own negligence.¹⁸ Where, in an action against forwarders for loss of goods, the goods were shipped on the first steamer leaving the port of consignment according to the custom of the parties, and the vessel on which they were shipped was not unseaworthy at the time of her departure, plaintiff was not entitled to recover.¹⁹ Defendant railroad company received cotton from a connecting carrier, to be transported over its line, and delivered to a steamship company for further shipment. Before it was tendered, fire broke out in two of the cars, and on a subsequent tender the steamship company refused to receive it, deeming it in an unsafe condition, and the steamer on which it was to be shipped sailed without it. Notice was promptly given to the shipper, and instructions asked for, but none were given. Defendant again offered the cotton to the steamship company to be taken on a later vessel, but, another fire having occurred before the time for sailing, the company definitely refused to take it. The owner was again notified, and, no instructions being received, defendant stored the cotton subject to the owner's order, having held it over a month. Defendant was in no way responsible for the fires nor the condition of the cotton. It was held, that it had discharged its duty by tendering the cotton to the connecting carrier, and notify-

Wald v. Holt, 26 Wis. 703; *Peet v. Chicago, etc., R. Co.*, 20 Wis. 594, 91 Am. Dec. 446; *Parmalee v. Western Transp. Co.*, 26 Wis. 439.

17. Pereira v. Central Pac. R. Co., 66 Cal. 92; *Savannah, etc., R. Co. v. Pritchard*, 77 Ga. 412.

18. Aetna Ins. Co. v. Wheeler, 49 N. Y. 616, 3 Am. Ry. Rep. 390; *Blossom v. Griffin*, 13 N. Y. 575, 67 Am. Dec. 75; *Wright v. Boughton*, 22 Barb. (N. Y.) 561; *MERCHANTS' DES-*

patch, etc., Co. v. Moore, 88 Ill. 136, 30 Am. Rep. 541; *McEacheran v. Michigan Cent. R. Co.*, 101 Mich. 264; *Crawford v. Southern R. Assoc.*, 51 Miss. 222, 24 Am. Rep. 626; *Phillips v. North Carolina R. Co.*, 78 N. C. 294, 16 Am. Ry. Rep. 206; *Armstrong v. Grand Trunk R. Co.*, 18 New Bruns. 445; *Rogers v. Great Western R. Co.*, 16 U. C. Q. B. 389.

19. Fowle v. Pitt Scott, 183 Mass. 351, 67 N. E. 343.

ing the owner of its refusal, and was not required to put it in condition and again tender it, but was justified in storing it to await the owner's orders.²⁰ It has been held in some cases that a contract "to forward" goods means the same as to "transport" or "carry," and that the carrier under such a contract becomes responsible even beyond its own line, except so far as it has limited that responsibility by special contract.²¹ Where there is a conflict between the written and printed portions of a contract, the one indicating a through contract and the other not, if it is not possible to reconcile them, the written portion must prevail.²² In the United States courts it is held that what constitutes a contract of carriage over connecting lines is not a question of local law, upon which the decision of a State court must control, but that it is a matter of general law upon which the United States courts will exercise their own judgment. The Federal courts, therefore, follow an independent rule.²³

§ 19. Limitation of carrier's liability to its own line.—The rule is generally maintained, even in those jurisdictions where the acceptance by the carrier of goods marked to a point beyond the terminus of its line is held to render it liable for the safe transportation of the goods over the whole route, that special contracts or stipulations limiting the liability of the carrier to loss or injury occurring on its own line, not being inconsistent with the common-law liability, are valid, and will be given effect, and the carrier held to have discharged its full duty by the delivering of the goods in safety to the next connecting carrier.²⁴ A proviso in a

20. *Boston v. Pennsylvania R. Co.*, 119 Fed. 808.

21. *St. Louis, etc., R. Co. v. Piper*, 13 Kan. 505, 8 Am. Ry. Rep. 204; *Davis v. Jacksonville, etc., Line*, 126 Mo. 69; *Christenson v. American Express Co.*, 15 Minn. 270, 2 Am. Rep. 122.

22. *Babcock v. Lake Shore, etc., R. Co.*, 49 N. Y. 491; *Peet v. Chicago, etc., R. Co.*, 19 Wis. 118.

23. *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 9 Am. & Eng. R. Cas. 25.

24. *Aetna Ins. Co. v. Wheeler*, 49

N. Y. 616; *Reed v. United States Express Co.*, 48 N. Y. 462, 8 Am. Rep. 561; *Marmonstein v. Pennsylvania R. Co.*, 13 Misc. Rep. (N. Y.) 32; *Lamb v. Camden, etc., R. Co.*, 2 Daly (N. Y.), 454; *Gibson v. American, etc., Express Co.*, 1 Hun (N. Y.), 387; *Ricketts v. Baltimore, etc., R. Co.*, 61 Barb. (N. Y.) 18; *Witbeck v. Holland*, 55 Barb. (N. Y.) 443; *Hinkley v. New York Cent., etc., R. Co.*, 3 T. & C. (N. Y.) 281.

Where a shipping contract exempts the carrier from liability for damages by wet, and limits his lia-

bill of lading that no connecting carrier shall be liable for any

bility to damages occurring on its own line, evidence that within a reasonable time it delivered plaintiff's goods at the freight house of another company in the same condition in which they were received, and that at no time were they exposed to the weather, is sufficient to relieve the carrier from liability for damages because the goods were wet when finally delivered. *Thyll v. New York, etc., R. Co.*, 84 N. Y. Supp. 175, 87 N. Y. Supp. 345.

Where a bill of lading providing that the carrier should not be liable for loss or damage not occurring on its route or on its proportion of the through route, etc., contained, after the description of the property, which was perishable, the statement, "Ice when needed," the carrier did not thereby obligate itself to see that the goods were properly iced on all connecting routes. *Farnsworth v. New York Cent., etc., R. Co.*, 84 N. Y. Supp. 658, 88 App. Div. (N. Y.) 320.

Where on receiving a trunk for transportation, an express company gives the owner a receipt therefor, containing in explicit terms an agreement to forward the trunk to the agents of the company nearest to destination only, and that the company may there deliver the trunk to another express company, and in such case the company to which the trunk is so delivered shall be regarded as the agent of the owner, and liable for damages or loss thereafter, such contract is binding on the shipper whether he reads the receipt or not. *Mills v. Weir*, 82 App. Div. (N. Y.) 396, 81 N. Y. Supp. 801.

U. S.—*Deming v. Norfolk, etc., R. Co.*, 21 Fed. 25, 16 Am. & Eng. R.

Cas. 232; *Ogdensburg, etc., R. Co. v. Pratt*, 22 Wall. (U. S.) 123; *Evansville, etc., R. Co. v. Androscoggin Mills*, 22 Wall. (U. S.) 594; *St. John v. Southern Express Co.*, 1 Woods (U. S.) 615.

Cotton unloaded by a connecting carrier at its pier, without giving any notice of its arrival to the succeeding carrier, does not await further conveyance, within the meaning of a clause in the bill of lading relieving the carrier from liability other than as a warehouseman "while the said property awaits further conveyance." *Texas, etc., R. Co. v. Reiss*, 183 U. S. 621, 22 S. Ct. 253, Adv. S. U. S. 253.

A carrier remains liable as at common law for a loss of cotton by fire while in its possession, although it was "ready for delivery" to the next carrier, or was awaiting further conveyance within the meaning of clauses in the bill of lading modifying its common-law liability for the loss of goods under such circumstances, where such bill of lading also declares that "cotton is excepted from any clause herein on the subject of fire, and the carrier shall be liable as at common law for loss or damage of cotton by fire," since this specific clause takes effect to the exclusion of general clauses containing matters of general exemption. *Texas, etc., R. Co. v. Callender*, 183 U. S. 632, 22 S. Ct. 257, Adv. S. U. S. 257.

Ala.—*Jones v. Cincinnati, etc., R. Co.*, 89 Ala. 376, 45 Am. & Eng. R. Cas. 321, where the shipper could not read and did not know the limitation was in the bill of lading when he accepted it. *Compare Alabama G. S. R. Co. v. Thomas*, 83 Ala. 343.

Ark.—*Little Rock, etc., R. Co. v.*

loss or damage, except on its own route, limits the liability of each

Odom, 63 Ark. 326; *Taylor v. Little Rock*, etc., R. Co., 32 Ark. 393, 29 Am. Rep. 1, 17 Am. Ry. Rep. 251.

Conn.—*Mears v. New York*, etc., R. Co. (Conn.), 52 Atl. 610, 56 L. R. A. 884.

Ga.—*Richmond*, etc., R. Co. v. *Shomo*, 90 Ga. 496; *Central R.*, etc., Co. v. *Avant*, 80 Ga. 195, 32 Am. & Eng. R. Cas. 475.

Ill.—*Elgin*, etc., R. Co. v. *Bates Mach. Co.*, 98 Ill. App. 311, but in the absence of such limitation its liability will extend to injuries occurring on the lines of other connecting roads; *Wabash R. Co. v. Harris*, 55 Ill. App. 159; *Coles v. Louisville*, etc., R. Co., 41 Ill. App. 607; *Ohio*, etc., R. Co. v. *Emerich*, 24 Ill. App. 245; *Wabash*, etc., R. Co. v. *Jaggerman*, 115 Ill. 407, 23 Am. & Eng. R. Cas. 680; *Field v. Chicago*, etc., R. Co., 71 Ill. 458; *United States Express Co. v. Haines*, 67 Ill. 137; *Erie R. Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451, 16 Am. Ry. Rep. 457; *Chicago*, etc., R. Co. v. *Montfort*, 60 Ill. 175; *Illinois Cent. R. Co. v. Frankenber*g, 54 Ill. 88, 5 Am. Rep. 92; *Illinois Cent. R. Co. v. Miller*, 32 Ill. App. 259. See *Chicago*, etc., R. Co. v. *Simon*, 57 Ill. App. 502, holding a different rule under the Statute.

Ind.—*Lake Erie*, etc., R. Co. v. *Condon*, 10 Ind. App. 536; *United States Express Co. v. Rush*, 24 Ind. 403.

Iowa.—*Hartley v. St. Louis*, etc., R. Co. (Iowa), 89 N. W. 88; *Mulligan v. Illinois Cent. R. Co.*, 36 Iowa, 181, 14 Am. Rep. 514.

Kan.—*Atchison*, etc., R. Co. v. *Richardson*, 53 Kan. 157; *Berg v. Atchison*, etc., R. Co., 30 Kan. 561, 16 Am. & Eng. R. Cas. 229; *St. Louis*, etc., R. Co. v. *Piper*, 13 Kan. 505, 8 Am. Ry. Rep. 204.

Ky.—*Louisville*, etc., R. Co. v. S. D. *Chestnut & Bro.*, 24 Ky. L. Rep. 1846, 72 S. W. 351; *Louisville*, etc., R. Co. v. *Tarter (Ky.)*, 39 S. W. 698.

La.—*Oakey v. Gordon*, 7 La. Ann. 235.

Mass.—*Burroughs v. Norwich*, etc., R. Co., 100 Mass. 26, 1 Am. Rep. 78; *Pemberton Co. v. New York Cent. R. Co.*, 104 Mass. 144; *Pendergast v. Adams Express Co.*, 101 Mass. 120; *Sullivan v. Thompson*, 99 Mass. 259. But see *Black v. Fitchburg R. Co.*, 139 Mass. 308, 21 Am. & Eng. R. Cas. 1.

Mich.—*Hope v. Delaware*, etc., *Canal Co. (Mich.)*, 69 N. W. 487; *Smith v. American Express Co.*, 66 N. W. 479; *Black v. Ashley*, 80 Mich. 90, 42 Am. & Eng. R. Cas. 428.

Minn.—*Ortt v. Minneapolis*, etc., R. Co., 36 Minn. 396.

Miss.—*Mobile*, etc., R. Co. v. *Francis (Miss.)*, 9 So. 508.

Mo.—*McCann v. Eddy*, 133 Mo. 59; *Nines v. St. Louis*, etc., R. Co., 107 Mo. 475; *Winter v. Southern Kan. R. Co.*, 56 Mo. App. 282; *Hill v. Missouri Pac. R. Co.*, 46 Mo. App. 517.

Neb.—*Fremont*, etc., R. Co. v. *New York*, etc., R. Co. (Neb.), 92 N. W. 131; *New York*, etc., R. Co. v. *Fremont*, etc., R. Co., Id.

N. C.—*Weinberg v. Albemarle*, etc., R. Co., 91 N. C. 31, 18 Am. & Eng. R. Cas. 597; *Phifer v. Carolina Cent. R. Co.*, 89 N. C. 311, 45 Am. Rep. 687.

Ohio.—*Stevens, v. Lake Shore*, etc., R. Co., 11 O. C. D. 168, 20 Ohio C. C. R. 41; *Cincinnati*, etc., R. Co. v. *Pontius*, 19 Ohio St. 221, 2 Am. Rep. 391.

Or.—*Taffe v. Oregon R. Co. (Or.)*, 67 Pac. 1015; *Taffe v. Oregon R. & Nav. Co. (Or.)*, 68 Pac. 732.

carrier.²⁵ A clause in a contract of a common carrier limiting its

Pa.—*Keller v. Baltimore, etc., R. Co.*, 174 Pa. St. 62, 38 W. N. C. (Pa.) 152; *American Express Co. v. Titusville Second Nat. Bank*, 69 Pa. St. 394, 8 Am. Rep. 268; *Camden, etc., R. Co. v. Forsyth*, 61 Pa. St. 81; *Pennsylvania Cent. R. Co. v. Schwarzenburger*, 45 Pa. St. 208, 84 Am. Dec. 490.

S. C.—*Dunbar v. Charleston, etc., R. Co. (S. C.)*, 40 S. E. 884; *Hill v. Georgia, etc., R. Co.*, 43 S. C. 461; *Dunbar v. Port Royal, etc., R. Co.*, 36 S. C. 110, 31 Am. St. Rep. 860.

Tenn.—*MERCHANTS' DESPATCH TRANSP. CO. V. BLOCK*, 86 Tenn. 393, 6 Am. St. Rep. 857; *East Tennessee, etc., R. Co. v. Brumley*, 5 Lea (Tenn.), 401, 6 Am. & Eng. R. Cas. 356.

Tex.—*McCarn v. International, etc., R. Co.*, 84 Tex. 352, 31 Am. St. Rep. 51, 55 Am. & Eng. R. Cas. 406, regardless of whether the shipment is wholly within the State or is interstate; *Gulf, etc., R. Co. v. Harris* (Tex. Civ. App.), 72 S. W. 71, but the carrier is liable for the negligence of its agent in billing the freight to a different place on the line of the connecting carrier from that called for in the contract; *Ft. Worth, etc., R. Co. v. Wright* (Tex. Civ. App.), 58 S. W. 846; *Galveston, etc., R. Co. v. Short* (Tex. Civ. App.), 25 S. W. 142, but the carrier is not liable for any injury occurring on a connecting line, although it may not have chosen the through route the shipper preferred; *Gulf, etc., R. Co. v. Thompson* (Tex. Civ. App.), 21 S. W. 186; *New York, etc., Steamship Co. v. Wright* (Tex. Civ. App.), 26 S. W. 106; *San Antonio, etc., R. Co. v. Mayfield* (Tex. App.), 15 S. W. 503; *Texas, etc., R. Co. v. Haw-*

kins (Tex. Civ. App.), 30 S. W. 113; *Rogers v. Missouri, etc., R. Co.* (Tex. Civ. App.), 28 S. W. 1024; *Gulf, etc., R. Co. v. Edloff* (Tex. Civ. App.), 34 S. W. 410; *Gulf, etc., R. Co. v. Malone* (Tex. Civ. App.), 25 S. W. 1077; *Gulf, etc., R. Co. v. Tennant* (Tex. Civ. App.), 22 S. W. 761; *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89; *Texas, etc., R. Co. v. Adams*, 78 Tex. 372; *Hunter v. Southern Pac. R. Co.*, 76 Tex. 195; *Fort Worth, etc., R. Co. v. Williams*, 77 Tex. 121; *International, etc., R. Co. v. Campbell*, 1 Tex. Civ. App. 509; *International, etc., R. Co. v. Thornton*, 3 Tex. Civ. App. 197; *Gulf, etc., R. Co. v. Crossman*, 11 Tex. Civ. App. 622; *International, etc., R. Co. v. Mahula*, 1 Tex. Civ. App. 182; *Gulf, etc., R. Co. v. Wilbanks*, 7 Tex. Civ. App. 489. *Compare Texas, etc., R. Co. v. Scrivener*, 2 Tex. App. Civ. Cas. § 328; *Gulf, etc., R. Co. v. Golding*, 3 Tex. App. Civ. Cas. § 33.

When the connecting lines are really partners such contracts are not valid. *Gulf, etc., R. Co. v. Wilson*, 7 Tex. Civ. App. 128. Nor where the initial line leases the subsequent line. *International, etc., R. Co. v. Anderson*, 3 Tex. Civ. App. 8. But such a contract is valid, where the connecting carrier was not sued as a partner, even though the agent acting for it in making the contract was also agent of the other connecting line. *Askew v. Gulf, etc., R. Co. (Tex. Civ. App.)*, 73 S. W. 486.

Vt.—*Farmers', etc., Bank v. Champlain Transp. Co.*, 23 Vt. 186, 56 Am. Dec. 68.

Wis.—*Tolman v. Abbot*, 78 Wis. 192; *Detroit, etc., R. Co. v. Farmers', etc., Bank*, 20 Wis. 122; *Martin v. American Express Co.*, 19 Wis. 336.

liability for goods shipped to a point beyond its own line is, in effect, a stipulation to carry the property only to the terminus of its own line, and need not be supported by any other consideration than the contract of shipment.²⁶ If any other consideration were necessary, outside of the contract itself, the increased facilities and reduced rate of transportation would afford a sufficient consideration.²⁷ A limitation of the liability of a carrier for goods shipped to a point beyond its own line, appearing only in the receipt or bill of lading given to the shipper, however clearly expressed, is not conclusively binding upon him by his mere acceptance without objection, unless he had a full understanding of the limitation at the time and intentionally assented to it.²⁸ But if the shipper accepts and acts upon a bill of lading containing such a limitation, it will be conclusively presumed, in the absence of fraud or mistake, that he knew of its terms, and he will not be permitted to plead his actual ignorance of its contents,²⁹ or if it appears that he had previously shipped like arti-

Eng.—*Aldridge v. Great Western R. Co.*, 15 C. B. N. S. 582, 109 E. C. L. 582; *Fowles v. Great Western R. Co.*, 7 Exch. 699, 22 L. J. Exch. 76; *Kent v. Midland R. Co.*, L. R. 10 Q. B. 1; *Garside v. Trent, etc., Nav. Co.*, 4 T. R. 581.

Can.—*Neil v. American Express Co.*, Rap. Jud. Que. 20 C. S. 253; *La Pointe v. Grand Trunk R. Co.*, 26 U. C. Q. B. 479; *Canadian Pac. R. Co. v. Charbonneau*, 6 Montreal L. R. Q. B. 287; *Brodie v. Northern R. Co.*, 6 Ont. Rep. 180; *Grand Trunk R. Co. v. McMillan*, 16 Can. Sup. Ct. 543, 42 Am. & Eng. R. Cas. 468, 15 Ont. App. 14; *Beaumont v. Canadian Pac. R. Co.*, 5 Montreal L. R. Super. Ct. 255. *Contra*.—See *Chicago, etc., R. Co. v. Western Hay & Grain Co.* (Neb.), 90 N. W. 205.

25. *Schiff v. New York Cent., etc., R. Co.*, 16 Hun (N. Y.), 278, 52 How. Pr. (N. Y.) 91, affd. 81 N. Y. 638; *Ricketts v. Baltimore, etc., R. Co.*, 59 N. Y. 637, affg. 61 Barb. (N. Y.) 18, 4 Lans. (N. Y.) 466, notwith-

standing previous conversation with defendant's agent; *Weinberg v. Albemarle, etc., R. Co.*, 91 N. C. 31, 18 Am. & Eng. R. Cas. 597. *Compare International, etc., R. Co. v. Anderson*, 3 Tex. Civ. App. 8.

26. *Hance v. Wabash Western R. Co.*, 56 Mo. App. 476.

27. *Phifer v. Carolina Cent. R. Co.*, 89 N. C. 319, 45 Am. Rep. 687; *Western R. Co. v. Harwell*, 97 Ala. 341.

28. *Wabash R. Co. v. Harris*, 55 Ill. App. 159; *Louisville, etc., R. Co. v. Meyer*, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44; *Wild v. Merchants' Despatch Transp Co.*, 47 Iowa, 247. In the last two cases cited the bill of lading was delivered after shipment of the goods.

29. *Chicago, etc., R. Co. v. Montfort*, 60 Ill. 175, 12 Am. Ry. Rep. 332; *Fortier v. Pennsylvania Co.*, 18 Ill. App. 260; *Mulligan v. Illinois Cent. R. Co.*, 36 Iowa, 181, 14 Am. Ry. Rep. 514, 2 Am. Ry. Rep. 322; *Patterson v. Kansas City, etc., R. Co.*,

cles under similar bills of lading.³⁰ The liability of an initial carrier will not be limited by a custom of issuing bills of lading in exchange for the freight receipt, where the shipper is not shown to have had any knowledge of such custom and did not in fact obtain such bill of lading.³¹ A carrier which contracts for through delivery, either expressly or impliedly, as where the acceptance of the goods marked to a point beyond its line and the receipt of freight charges for the entire distance is held to imply a contract for through shipment, although it may limit its common law liability as an insurer of the goods, cannot exempt itself from liability for loss or injury caused by its negligence or the negligence of a connecting carrier.³²

§ 20. When connecting carriers entitled to benefit of limitations.—A contract made by one carrier for the transportation of goods over its own and connecting lines for an agreed price, by authority, express or implied, of all the carriers, or adopted and acted upon by the other carriers, in the absence of any authority in advance, or any usage from which an authority might be inferred, inures to the benefit of all thus ratifying it and performing service under it. In such cases the contract has respect to, and provides for, the services of the carriers upon the connecting routes, and they are entitled to the benefit of any and all stipulations limiting the liability of the carrier, in the absence of an express provision to the contrary. This rule is maintained by the weight of authority.³³ In such cases there is held to be suffi-

56 Mo. App. 657. *Compare* Illinois Cent. R. Co. v. Carter, 165 Ill. 570..

30. East Tennessee, etc., R. Co. v. Brumley, 5 Lea. (Tenn.) 401, 6 Am. & Eng. R. Cas. 356.

31. Little v. Fargo, 43 Hun (N. Y.), 233.

32. Condict v. Grand Trunk R. Co., 54 N. Y. 500; Redmon v. Chicago, etc., R. Co., 90 Mo. App. 68; Jones v. St. Louis, etc., R. Co., 89 Mo. App. 653; Western Sash & Door Co. v. Chicago, etc., R. Co., 177 Mo. 641, 76 S. W. 998; Marshall & Michel Grain Co. v. Kansas City, etc., R. Co., 176 Mo. 480, 75 S. W. 638, or for a con-

version of the property by a connecting carrier; Halliday v. St. Louis, etc., R. Co., 74 Mo. 159, 41 Am. Rep. 311; Cincinnati, etc., R. Co. v. Pontius, 19 Ohio St. 221, 2 Am. Rep. 391; Gulf, etc., R. Co. v. Leatherwood (Tex. Civ. App.), 69 S. W. 119; Galveston, etc., R. Co. v. Allison, 59 Tex. 193, 12 Am. & Eng. R. Cas. 28; Grand Trunk R. Co. v. McMillan, 16 Can. Sup. Ct. 543, 42 Am. & Eng. R. Cas. 468. See also Fatman v. Cincinnati, etc., R. Co., 2 Disney (Ohio), 248; Texas, etc., R. Co. v. Logan, 3 Tex. Civ. Cas. § 186.

33. N. Y.—Whitworth v. Erie R.

cient privity of contract between the shipper and the subsequent lines to entitle the latter to the benefit of the original contract, whether the initial carrier be regarded as the agent of the subsequent lines in making the contract for transportation, or the subsequent lines be considered as the agents of the initial carrier for completing the transportation.³⁴ On the other hand, where a common carrier contracts to transport freight over its route and deliver it to a connecting carrier to be forwarded to its destination, under a special contract limiting its common law liability, it has no authority to enter into a special contract on behalf of the owner with the next carrier limiting or restricting its liability, and the fact that the initial carrier's contract fixes the price for the entire carriage does not entitle the connecting carrier to the benefit of exemptions from liability contained in the con-

Co., 87 N. Y. 413, 6 Am. & Eng. R. Cas. 349; Maghee v. Camden, etc., Transp. Co., 45 N. Y. 514, 6 Am. Rep. 124; Babcock v. Lake Shore, etc., R. Co., 49 N. Y. 419, 43 How. Pr. (N. Y.) 317; Lamb v. Camden, etc., Transp. Co., 46 N. Y. 272, 7 Am. Rep. 327; Schiff v. New York Cent., etc., R. Co., 52 How. Pr. (N. Y.) 91; Ricketts v. Baltimore, etc., R. Co., 59 N. Y. 637, affg. 4 Lans. (N. Y.) 446. In a through contract for the transportation of goods made by a carrier, a clause exempting it from liability "for loss or damage by fire, or other casualty while in depots or places of trans-shipment," inures to the benefit of a connecting carrier, although the contract expressly exempted connecting carriers in certain other respects. Manhattan Oil Co. v. Camden, etc., Transp. Co., 54 N. Y. 197, 6 Am. Ry. Rep. 189; Deming v. Norfolk, etc., R. Co., 21 Fed. 25, 16 Am. & Eng. R. Cas. 232.

U. S.—Fairbank v. Cincinnati, etc., R. Co., 66 Fed. 471; Evansville, etc., R. Co. v. Androscoggin Mills, 22 Wall. (U. S.) 594, 11 Am. Ry. Rep.

113; Woodward v. Illinois Cent. R. Co., 1 Biss. (U. S.) 447.

Ala.—Western R. Co. v. Harwell, 97 Ala. 341, 45 Am. & Eng. R. Cas. 358; Jones v. Cincinnati, etc., R. Co., 89 Ala. 376.

Ark.—St. Louis, etc., R. Co. v. Weakly, 50 Ark. 397; St. Louis, etc., R. Co. v. Lesser, 46 Ark. 236; Taylor v. Little Rock, etc., R. Co., 39 Ark. 148.

Conn.—Mears v. New York, etc., R. Co. (Conn.), 52 Atl. 610, 56 L. R. A. 884.

Ga.—Southern Express Co. v. Palmer, 48 Ga. 85.

Kan.—Kiff v. Atchison, etc., R. Co., 32 Kan. 263, 18 Am. & Eng. R. Cas. 618.

Mo.—Holliday v. St. Louis, etc., R. Co., 74 Mo. 159, 41 Am. Rep. 311.

Pa.—Fairchild v. Philadelphia, etc., R. Co., 148 Pa. St. 527. But see Camden, etc., R. Co. v. Forsyth, 61 Pa. St. 81.

Tex.—International, etc., R. Co., v. Mahula, 1 Tex. Civ. App. 182.

Eng.—Hall v. Northeastern R. Co., L. R. 10 Q. B. 437.

34. See cases cited last note.

tract.³⁵ It is held in some jurisdictions that where the contract specially provides that the stipulations of the contract by which the liability of the carrier is limited shall extend to and inure to the benefit of the connecting carriers, or the original contract contemplated the employment of connecting carriers or they have been designated in the contract, the connecting carriers are entitled to all limitations in the original contract.³⁶ Where the contract is silent on the subject and does not provide that it shall inure to the benefit of subsequent carriers, or designate any subsequent carriers, but designates only one carrier, and the contract is solely for the benefit of the original parties, its provisions apply only to the carrier with whom the contract was made; since there is no privity of contract between the owners and the undesignated carriers, and it cannot be justly inferred that the contract was intended for the benefit of all who perform services under it.³⁷ Such special limitations of liability inure only to the benefit of such carriers as are fairly embraced within the terms of the contract,³⁸ and only to the extent provided by the terms of the contract.³⁹ Where a railroad company, on receiving goods from a connecting carrier, gives a receipt limiting its liability, it cannot be made liable, in an action by the owner, for loss within the terms of the exception.⁴⁰ But it is not entitled to the benefit of provisions in the bill of lading given by the initial carrier, if it

35. Babcock v. Lake Shore, etc., R. Co., 49 N. Y. 491, 43 How. Pr. (N. Y.) 317; Aetna Insurance Co. v. Wheeler, 49 N. Y. 616; Merchants' Despatch Transp. Co. v. Bolles, 80 Ill. 473.

36. Evansville, etc., R. Co. v. Androscoggin Mills, 22 Wall. (U. S.) 594; United States Express Co. v. Harris, 51 Ind. 127; Holliday v. St. Louis, etc., R. Co., 74 Mo. 159; Levy v. Southern Express Co., 4 S. C. 234.

37. Adams Express Co. v. Harris, 120 Ind. 73, 16 Am. St. Rep. 315, 40 Am. & Eng. R. Cas. 151; Bancroft v. Merchants' Despatch Transp. Co., 47 Iowa, 262, 29 Am. St. Rep. 482; Burroughs v. Grand Trunk R. Co., 67 Mich. 351, 32 Am. & Eng. R. Cas. 467; Camden, etc., R. Co. v. Forsyth,

61 Pa. St. 81; Wallingford v. Columbia, etc., R. Co., 26 S. C. 258, 30 Am. & Eng. R. Cas. 40; Martin v. American Express Co., 19 Wis. 336; Crawford v. Great Western R. Co., 18 U. C. C. P. 510.

38. Western, etc., R. Co. v. Harwell, 91 Ala. 340; Merchants' Despatch Transp. Co. v. Bolles, 80 Ill. 473.

39. Liverpool, etc., Steam Co. v. Phenix Insurance Co., 129 U. S. 397, 37 Am. & Eng. R. Cas. 681, a steamship company held not entitled to benefit of provisions specifically allowed only to railroad company.

40. Hinkley v. New York Cent. R. Co., 3 T. & C. (N. Y.) 281, affd. 60 N. Y. 644; Chicago, etc., R. Co. v. Northern Line Packet Co., 70 Ill. 217.

makes a new contract upon taking the goods from the latter, and gives a bill of lading stating the extent of its liability.⁴¹

§ 21. What constitutes delivery to a connecting carrier.— The duty of any carrier is discharged and its liability terminates, except in jurisdictions where the initial carrier is held to liability throughout the entire journey, when within a reasonable time it has carried and delivered the goods to and at the freight house of the succeeding carrier, or to the consignee, in good order and condition, or in the same condition in which they were received.⁴² What constitutes delivery in a given case depends largely upon the circumstances. Thus, delivery may be made by a transfer of the goods to a car of the subsequent carrier, or by delivery of the car itself containing the goods, in good order, to the subsequent carrier.⁴³ There must be an actual transfer of the possession. A deposit in its warehouse as a mere accessory to the carriage and for the purpose of further carriage, without delivery or notice to the next carrier, is not sufficient.⁴⁴ There may be a constructive delivery, by express agreement, the custom or usage of trade, or previous course of delivery, which will be

41. Browning v. Goodrich Transp. Co., 78 Wis. 391, 23 Am. St. Rep. 414; Gordon v. Great Western R. Co., 25 U. C. C. P. 488.

42. Thyll v. New York, etc., R. Co., 92 App. Div. (N. Y.) 513, 87 N. Y. Supp. 345, 84 N. Y. Supp. 175; Peterson v. Case, 21 Fed. 885, 18 Am. & Eng. R. Cas. 578; Condon v. Marquette, etc., R. Co., 55 Mich. 218, 54 Am. Rep. 367; Erie R. Co. v. Lockwood, 28 Ohio St. 358, 14 Am. Ry. Rep. 143. See also James S. Davis Clothing Co. v. Merchants' Despatch Transp. Co., 106 Mo. App. 487, 71 S. W. 226.

A railroad is not an intermediate carrier where the goods are shipped by it to a certain point from which they are to be removed to their final destination by the owner, and the rules applicable in such a case are those which govern delivery at the place of destination. Fenner v.

Buffalo, etc., R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Conkey v. Milwaukee, etc., R. Co., 31 Wis. 619, 11 Am. Rep. 630.

43. Hewett v. Chicago, etc., R. Co., 63 Iowa, 611, 18 Am. & Eng. R. Cas. 568; Newport News, etc., R. Co. v. Mendell (Ky.), 34 S. W. 1081. But see Patten v. Union Pac. R. Co., 29 Fed. 590; Merchants' Despatch Transp. Co. v. Hately, 14 Can. Sup. Ct. 572.

44. Ladue v. Griffith, 25 N. Y. 364, 82 Am. Dec. 360; Condon v. Marquette, etc., R. Co., 55 Mich. 218; Bennett v. Missouri Pac. R. Co., 46 Mo. App. 656. Compare Pratt v. Grand Trunk R. Co., 95 U. S. 43.

But deposit in a common warehouse, with notice of its arrival and destination, is sufficient delivery. Aetna Ins. Co. v. Wheeler, 49 N. Y. 616, 3 Am. Ry. Rep. 390.

binding as between the carriers, but such a delivery is not binding upon the owner of the goods.⁴⁵ Delivery cannot be considered complete if something remains to be done by the first carrier before the next carrier is required to or has a right to take possession of the goods.⁴⁶ Termination of liability may be fixed by special contract,⁴⁷ or by statute.⁴⁸

§ 22. Notice to connecting carrier of arrival of goods.—A connecting carrier is entitled to notice of the arrival of goods for the purpose of shipment over its line before it can be charged with liability. Unloading the goods and storing them in a warehouse, without delivery or notice, or any attempt to deliver to the connecting carrier, will not relieve the prior carrier of liability.⁴⁹ But actual notice is not always essential. Notice may be given, in accordance with a custom between the carriers, by deposit of

45. McDonald v. Western R. Corp., 34 N. Y. 497; Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318; Packard v. Taylor, 35 Ark. 402; Reynolds v. Boston, etc., R. Co., 121 Mass. 291; Irish v. Milwaukee, etc., R. Co., 19 Minn. 375; Erie R. Co. v. Lockwood, 28 Ohio St. 358; Louisville, etc., R. Co. v. Campbell, 7 Heisk. (Tenn.) 253; Conkey v. Milwaukee, etc., R. Co., 31 Wis. 619. But see Van Santvoord v. St. John, 6 Hill (N. Y.), 157; Converse v. Norwich, etc., Transp. Co., 33 Conn. 166. See also Dresbach v. California Pac. R. Co., 57 Cal. 462; Thomas v. Boston, etc., R. Corp., 10 Met. (Mass.) 478; Gulf, etc., R. Co. v. Insurance Co. of N. A. (Tex. Civ. App.), 28 S. W. 237; Smith v. Missouri, etc., R. Co., 58 Mo. App. 80; Hermann v. Goodrich, 21 Wis. 536; Garside v. Trent, etc., Nav. Co., 4 T. R. 581.

46. Livingston v. New York Cent., etc., R. Co., 76 N. Y. 631; Judson v. Western R. Corp., 4 Allen (Mass.) 520, where bill of expense was not delivered; Alabama G. S. R. Co. v.

Mt. Vernon Co., 84 Ala. 173; Mt. Vernon Co. v. Alabama G. S. R. Co., 92 Ala. 296, no shipping directions given; Palmer v. Chicago, etc., R. Co., 56 Conn. 137, freight charges not paid; Deming v. Norfolk, etc., R. Co., 17 Phila. (Pa.) 540, goods stored by request of succeeding carrier; Missouri Pac. R. Co. v. Young, 25 Neb. 651, delivery to drayman to be sent to next carrier; Kentucky, etc., Ins. Co. v. Western, etc., R. Co., 8 Baxt. (Tenn.) 268, freight not examined and checked.

47. McCann v. Baltimore, etc., R. Co., 20 Md. 202.

48. Sutton v. Chicago, etc., R. Co., (S. D.) 84 N. W. 396; Miller v. South Carolina R. Co., 33 S. C. 359, 45 Am. & Eng. R. Cas. 332.

49. McDonald v. Western R. Corp., 34 N. Y. 497; Louisville, etc., R. Co. v. Bourne, (Ky.) 29 S. W. 975; Irish v. Milwaukee, etc., R. Co., 19 Minn. 376. See Hempstead v. New York Cent. R. Co., 28 Barb. (N. Y.) 485, as to presumption in favor of notice having been given.

a written notice in a letter box at its freight office appropriated to the use of the particular carrier whose agents are accustomed to get such notices from the box, and this will be regarded as sufficient notice.⁵⁰ The liability of the carrier continues until the delivery to the connecting line, or such notification as amounts to a tender of delivery. If the goods are stored by an intermediate carrier at the end of its route, without notice to the connecting carrier, in case of their destruction or injury, the carrier in whose possession the goods still remain is liable as a carrier to the owner or consignee.⁵¹

50. Mills v. Michigan Cent. R. Co., 45 N. Y. 622, 6 Am. Rep. 152; Shelton v. Merchants Dispatch Transp. Co., 59 N. Y. 258; Bennett v. Missouri Pac. R. Co., 46 Mo. App. 656.

51. *N. Y.*—Thyll v. New York, etc., R. Co., 92 App. Div. (N. Y.) 513, 87 N. Y. Supp. 345; Mills v. Michigan Cent. R. Co., 45 N. Y. 622; Fenner v. Buffalo, etc., R. Co., 44 N. Y. 505; McDonald v. Western R. Corp., 34 N. Y. 497; Ladue v. Griffith, 25 N. Y. 364; Goold v. Chapin, 20 N. Y. 266; Miller v. Steam Nav. Co., 10 N. Y. 431.

U. S.—Peterson v. Case, 21 Fed. 885; Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318; Ayres v. Western R. Corp., 14 Blatchf. (U. S.) 9.

Ark.—Packard v. Taylor, 35 Ark. 402.

Ill.—Illinois Cent. R. Co. v. Mitchell, 68 Ill. 417; Brown v. Louisville, etc., R. Co., 36 Ill. App. 140, but a special stipulation as to liability during trans-shipment will release the carrier.

Iowa.—Bancroft v. Merchants Dispatch Transp. Co., 47 Iowa 262.

Kan.—North Missouri R. Co. v. Akers, 4 Kan. 453.

Mich.—Condon v. Marquette, etc., R. Co., 55 Mich. 218; Moore v. Michigan Cent. R. Co., 3 Mich. 23, contract to deliver goods "on board" re-

quires delivery on board some suitable vessel. But see Michigan Cent. R. Co. v. Lantz, 32 Mich. 502; Michigan Cent. R. Co. v. Hall, 6 Mich. 243.

Minn.—Southard v. Minneapolis, etc., R. Co., 60 Minn. 382; Irish v. Milwaukee, etc., R. Co., 19 Minn. 376; Lawrence v. Winona, etc., R. Co., 15 Minn. 390.

Mo.—Larimore v. Chicago, etc., R. Co., 65 Mo. App. 167; Bennett v. Missouri Pac. R. Co., 46 Mo. App. 656.

Mass.—Gass v. New York, etc., R. Co., 99 Mass. 220, entire consignment must be delivered; Darling v. Boston, etc., R. Corp., 11 Allen (Mass.) 295.

Miss.—Merchants Wharfboat Assoc. v. Wood, 64 Miss. 661.

Pa.—Vanatta v. Central R. Co., 154 Pa. St. 262, whole shipment must be delivered.

Ohio.—Erie R. Co. v. Lockwood, 29 Ohio St. 358.

Texas.—Gulf, etc., R. Co. v. Edins, 7 Tex. Civ. App. 116, delivery of stock to stock yard.

Vt.—Brintnall v. Saratoga, etc., R. Co., 32 Vt. 666.

Wis.—Hermann v. Goodrich, 21 Wis. 536; Conkey v. Milwaukee, etc., R. Co., 31 Wis. 619; Hooper v. Chicago, etc., R. Co., 27 Wis. 81. But see Wood v. Milwaukee, etc., R. Co.,

§ 23. Presumptions and burden of proof.—The law presumes that a fact, continuous in its character, still continues to exist. This principle is applied to the condition of goods delivered to be transported over several railroads. The goods delivered in good order in such case, it is presumed continued so until they came to the possession of the carrier which delivers them at the place of destination in a damaged condition. Where property is delivered to one carrier to be transported by it and other carriers, over their respective roads, to its place of destination, in the event of a loss or injury while the goods are en route, the burden of proof is on the shipper or owner in an action against the company delivering the property or any intermediate carrier to recover damages for negligence, to show that he delivered the property to the first carrier in good order, and its receipt by such subsequent carrier. When such receipt by any subsequent carrier is shown, it is presumed that the goods were then in the same order as when received by the initial carrier. It is true that the owner or shipper must give evidence sufficient to show that the goods were in good condition when they came to the possession of the defendant, as a part of the evidence that they have been injured while in his custody; but this may be shown by proof of facts and circumstances from which the presumption of fact arises that the goods were in proper condition when the carrier received them. The burden is then cast upon the company delivering the goods thus injured, or the initial carrier or any intermediate carrier

27 Wis. 541; *Wood v. Crocker*, 18 Wis. 345.

Can.—Mason v. Grand Trunk R. Co., 37 U. C. Q. B. 163.

Notice where acceptance is refused.—An intermediate carrier is bound only to use reasonable diligence to secure further transportation of goods by tendering them to the connecting line, and, if acceptance be refused, then to notify the consignor or consignee without unreasonable delay, and store or otherwise care for the goods while awaiting instructions. Having done this, its liability as a carrier will cease, and liability as a warehouseman be substituted. *Boston v. Pennsylvania*

R. Co.

119 Fed. 808, 116 Fed. 235;
Fisher v. Boston & M. R. Co., 99 Me. 338, 59 Atl. 532.

Notice where transportation is interrupted.—Where the prior carrier is notified by a connecting line that it is unable to receive the goods, on account of a block in freight, the former will be liable for damages caused by delay, unless it notifies the shipper so that he may protect himself. *Johnson v. New York Cent. R. Co.*, 39 How. Pr. (N. Y.) 127; *Deming v. Norfolk, etc., R. Co.*, 21 Fed. 25; *Peterson v. Case*, 21 Fed. 885; *Louisville, etc., R. Co. v. Odil*, 96 Tenn. 61.

who may have been made a defendant, of proving that they were not injured while in its possession and were delivered in good order to the next carrier, or that the goods were damaged before being delivered to it and came into its possession thus injured.⁵² A question for the jury is raised in an action by a shipper to recover for injury to grain while in transit on account of unsuitable cars, by evidence of a rule and universal habit of the carrier to send out only safe cars, which is not met by evidence that when the grain reached its destination it was seriously damaged by water.⁵³

§ 24. Connecting lines as partners.—Two or more corporations, each carrying over a portion of a continuous route, may enter into joint contracts for transportation, or form a partnership or association for the purpose of through freight and passenger traffic,⁵⁴ although they have no power to form pools or asso-

52. N. Y.—Smith v. New York Cent. R. Co., 43 Barb. (N. Y.) 225, affd. 41 N. Y. 620.

U. S.—Dixon v. Columbus, etc., R. Co., 4 Biss. (U. S.) 137.

Ala.—Louisville, etc., R. Co. v. Jones, 100 Ala. 263; Cooper v. Georgia Pac. R. Co., 92 Ala. 329; Montgomery, etc., R. Co. v. Culver, 75 Ala. 587; Georgia Pac. R. Co. v. Hughart, 90 Ala. 36.

Fla.—Savannah, etc., R. Co. v. Harris, 26 Fla. 152.

Ga.—Forrester v. Georgia R., etc., Co., 92 Ga. 699; Central R., etc., Co. v. Bayer, 91 Ga. 115; Georgia R. Co. v. Gann, 68 Ga. 350; Central R. Co. v. Rogers, 66 Ga. 251.

Ill.—Lake Erie, etc., R. Co. v. Oakes, 11 Ill. App. 489.

Iowa.—Beard v. Illinois Cent. R. Co., 79 Iowa, 518.

Minn.—Leo v. St. Paul, etc., R. Co., 30 Minn. 438; Shriver v. Sioux City, etc., R. Co., 24 Minn. 506.

Miss.—Faison v. Alabama, etc., R. Co., 69 Miss. 569; Mobile, etc., R. Co. v. Tupelo Furniture Mfg. Co., 67 Miss. 35.

Mo.—Flynn v. St. Louis, etc., R. Co., 43 Mo. App. 424; Crouch v. Louisville, etc., R. Co., 42 Mo. App. 248; Orr. v. Chicago, etc., R. Co., 21 Mo. App. 333.

N. C.—Lindley v. Richmond, etc., R. Co., 88 N. C. 547; Dixon v. Richmond, etc., R. Co., 74 N. C. 538.

R. I.—Knight v. Providence, etc., R. Co., 13 R. I. 572.

Tenn.—Louisville, etc., R. Co. v. Tennessee Brewing Co., 96 Tenn. 677.

Tex.—Texas, etc., R. Co. v. Adams, 78 Tex. 372; Texas, etc., R. Co. v. Barnhart, 5 Tex. Civ. App. 601; International, etc., R. Co. v. Wolf, 3 Tex. Civ. App. 383.

Vt.—Brintnall v. Saratoga, etc., R. Co., 32 Vt. 665.

Wis.—Laughlin v. Chicago, etc., R. Co., 28 Wis. 204. Compare Swetland v. Boston, etc., R. Co., 102 Mass. 276; Farmington Mercantile Co. v. Chicago, etc., R. Co., 116 Mass. 154; Marquette, etc., R. Co. v. Kirkwood, 45 Mich. 51.

53. Searles v. Alabama, etc., R. Co., 69 Miss. 186, 13 So. 815.

54. Swift v. Pacific Mail Steam-

ciations for the purpose of suppressing competition.⁵⁵ The effect of such a relation of partnership renders them jointly liable and each liable for the defaults of the other.⁵⁶ Such a partnership is constituted when the connecting roads are jointly interested in a contract for the carrying of goods, in the running of the roads and the operating of the lines and share in the profits, or where they associate and form what, to the shipper, is a continuous line, and contract to carry goods through for an agreed price, which the shipper pays in one sum and the carriers divide between them. In all such cases, as to third parties with whom they contract, they are liable jointly for a loss taking place on any part of the whole line.⁵⁷ And the word "partners" or any particular similar word to describe the relation need not be used in the declara-

ship Co., 106 N. Y. 206, 30 Am. & Eng. R. Cas. 105; Wylde v. Northern R. Co., 53 N. Y. 156; St. Lopis Ins. Co. v. St. Louis, etc., R. Co., 104 U. S. 146; Investment Co. v. Ohio, etc., R. Co., 41 Fed. 378; Block v. Fitchburg R. Co., 139 Mass. 308; Aigen v. Boston & N. R. Co., 132 Mass. 423; Gass v. New York, etc., R. Co., 99 Mass. 220; Philadelphia, etc., R. Co. v. State, 58 Md. 372; Barter v. Wheeler, 49 N. H. 9; Hot Springs R. Co. v. Trippe, 42 Ark. 465. *Contra*: State v. Concord R. Corp., 62, N. H. 375; Burke v. Concord, R. Corp. 31 N. H. 160. But see Nashua Lock Co. v. Worcester, etc., R. Co., 48 N. H. 339; Stewart v. Erie, etc., Transp. Co., 17 Minn. 372.

55. Bissell v. Michigan Southern R. Co., 22 N. Y. 259; Pearce v. Madison, etc., R. Co., 21 How. (U. S.) 441.

56. *N. Y.*—Swift v. Pacific Mail Steamship Co., 106 N. Y. 206; Wylde v. Northern R. Co., 53 N. Y. 156.

Iowa.—Independence Mills Co. v. Burlington, etc., R. Co., 72 Iowa, 535.

Mass.—Block v. Fitchburg R. Co., 139 Mass. 308, and a special stipulation will not be construed to relieve from such liability, unless no

other reasonable construction is possible.

Mo.—Coates v. United States Express Co., 45 Mo. 238; Barrett v. Indianapolis, etc., R. Co., 9 Mo. App. 226; Wyman v. Chicago, etc., R. Co., 4 Mo. App. 35; Rice v. Indianapolis, etc., R. Co., 3 Mo. App. 27.

Neb.—Missouri Pac. R. Co. v. Twiss, 35 Neb. 267.

N. H.—Barter v. Wheeler, 49 N. H. 9.

N. C.—Washington v. Raleigh, etc., R. Co., 101 N. C. 239; Phillips v. North Carolina R. Co., 78 N. C. 249.

Tex.—Gulf, etc., R. Co. v. Wilson, 7 Tex. Civ. App. 128; Atchison, etc., R. Co. v. Grant, 6 Tex. Civ. App. 674; Miller v. Texas, etc., R. Co., 83 Tex. 518.

57. See cases cited in last preceding note. Rocky Mount Mills v. Wilmington, etc., R. Co., 119 N. C. 693; Felder v. Columbia, etc., R. Co., 21 S. C. 35; Bradford v. South Carolina R. Co., 7 Rich. L. (S. C.) 201; Harris v. Cheshire R. Co., (R. I.) 16 Atl. 512; Cincinnati, etc., R. Co. v. Spratt, 2 Duv. (Ky.) 4; Gulf, etc., R. Co. v. Edloff, (Tex. Civ. App.) 34 S. W. 410, 35 S. W. 144.

tion or petition.⁵⁸ It is held by some authorities that one of several lines in a partnership or association may by express stipulation relieve itself from liability except for losses occurring on its own line;⁵⁹ but other authorities hold to the contrary.⁶⁰ Where one railroad company projects, constructs, controls and manages another railroad for the purpose of a local line, it is liable for the negligence of those operating the local line; but otherwise, where it aids, as stockholder, or bondholder, or as guarantor of bonds, another company in constructing its own road in its own name.⁶¹ Courts will not take judicial notice of the fact that any line of railroad is a part of a general system. The fact must be established by competent proof.⁶² Where connecting lines each have exclusive ownership and control of its line, mere traffic arrangements for continuous transportation and a proper division of freight charges *pro rata*, or otherwise;⁶³ or an association for through carriage of freight and a division of receipts according to certain stipulated rates;⁶⁴ or an agreement to share expenses

58. Wyman v. Chicago, etc., R. Co., 4 Mo. App. 39; Barter v. Wheeler, 49 N. H. 25; International, etc., R. Co. v. Tisdale, 74 Tex. 8.

59. Milne v. Douglass, 4 McCrary, (U. S.) 368, 13 Fed. 37.

60. Weinberg v. Albemarle, etc., R. Co., 91 N. C. 31; Phifer v. Carolina Cent. R. Co., 89 N. C. 311.

61. Atchison, etc., R. Co. v. Davis, 34 Kan. 209, 25 Am. & Eng. R. Cas. 312; International, etc., R. Co. v. Anderson, 3 Tex. Civ. App. 8.

62. Brown v. Piper, 91 U. S. 37; Georgia Pac. R. Co. v. Gaines, 88 Ala. 377; Evansville, etc., R. Co. v. Smith, 65 Ind. 92; Miller v. Texas, etc., R. Co., 83 Tex. 518.

63. Merrick v. Gordon, 20 N. Y. 96; Deming v. Norfolk, etc., R. Co., 21 Fed. 25; Straiton v. New York, etc., R. Co., 2 E. D. Sm. (N. Y.) 184, certain business regulated by a joint committee; St. Louis Ins. Co. v. St. Louis, etc., R. Co., 104 U. S. 146, contract between a dispatch company and a railroad company; St. Louis, etc., R. Co. v. Neel, 56 Ark. 279, one

company furnishing facilities to another; Ellsworth v. Tartt, 26 Ala. 733, doing a business through a common agent; Converse v. Norwich, etc., Transp. Co., 33 Conn. 166; Irvin v. Nashville, etc., R. Co., 92 Ill. 103; Burroughs v. Norwich, etc., R. Co., 100 Mass. 26; Wehmann v. Minneapolis, etc., R. Co., 58 Minn. 22; Watkins v. Terre Haute, etc., R. Co., 8 Mo. App. 570, two roads doing a through business for a shipping association which furnished its own cars and agents and distributed the freight receipts; Washington v. Raleigh, etc., R. Co., 101 N. C. 239; Galveston, etc., R. Co. v. Johnson, (Tex. Civ. App.) 37 S. W. 243; Fort Worth, etc., R. Co. v. Johnson, 5 Tex. Civ. App. 24; Croft v. Baltimore, etc., R. Co., 1 McArthur (D. C.) 492.

64. Irwin v. New York Cent. R. Co., 1 T. & C. (N. Y.) 473, affd. 59 N. Y. 653; Hot Springs R. Co. v. Tripple, 42 Ark. 465; Burroughs v. Norwich Transp. Co., 100 Mass. 26; Gass v. New York, etc., R. Co., 99 Mass. 220; Darling v. Boston, etc.,

and warehouse facilities;⁶⁵ or to pay damages in certain cases in certain proportions,⁶⁶ do not constitute the several carriers partners, nor render one of them liable for loss or injury occurring on another line. Where there was no joint expense, or loss, or profit, except that where a loss could not be located on a particular road, a *pro rata* share of the loss was borne by all who carried the freight, there was no partnership created thereby.⁶⁷

§ 25. Rights of connecting carriers as to charges.—Where the initial carrier has guaranteed a fixed rate of freight over connecting lines, it is liable for the failure of the connecting lines to make the rate agreed, and the shipper has a right of action against it to recover for charges made in excess of the guaranteed rate.⁶⁸ But, in the absence of proof that the initial carrier was authorized to bind the connecting carrier by a contract to carry at a fixed rate, the shipper or consignee cannot recover such excess charges from the subsequent carrier.⁶⁹ Each connecting carrier is entitled to charge its regular rates over its own line, and is not bound by the acts of any previous carrier, unless such carrier was authorized to act for it, by special agreement or otherwise, and may recover its charges from the shipper or consignee although in excess of the amount fixed by the first carrier.⁷⁰ And each con-

R. Corp., 11 Allen (Mass.) 295; Phifer v. North Carolina Cent. R. Co., 89 N. C. 311; Fremont, etc., R. Co. v. Waters, (Neb.) 70 N. W. 225, a "system" is not a partnership; Bradford v. South Carolina R. Co., 10 Rich. L. (S. C.) 221; Fort Worth, etc., R. Co. v. Williams, 77 Tex. 121; Gulf, etc., R. Co. v. Baird, 73 Tex. 256; Miller v. Texas, etc., R. Co., 83 Tex. 518, entire freight charges collected by one line under agreement.

65. Mohawk, etc., R. Co. v. Niles, 3 Hill (N. Y.) 162.

66. Shiff v. New York Cent. etc., R. Co., 16 How. (N. Y.) 278, affd. 81 N. Y. 638; Aigen v. Boston, etc., R. Co., 132 Mass. 423.

67. Irwin v. Nashville, etc., R. Co., 92 Ill. 103, 34 Am. Rep. 116.

68. Little Rock, etc., R. Co. v.

Daniels, 49 Ark. 352; Little Rock, etc., R. Co. v. Odom, 63 Ark. 326, but it is not liable for the conversion of the consignment by the last carrier by a refusal to deliver except upon the payment of a greater rate. See also Sherman, etc., R. Co. v. Beebe, (Tex. Civ. App.) 39 S. W. 1102; Fry v. Louisville, etc., R. Co., 103 Ind. 265; Baltimore, etc., R. Co. v. Wilkens, 44 Md. 11; Tardos v. Chicago, etc., R. Co., 35 La. Ann. 15.

69. Detroit, etc., R. Co. v. McKenzie, 43 Mich. 609; Mt. Pleasant Mfg. Co. v. Cape Fear, etc., R. Co., 106 N. C. 207; Schneider v. Evans, 25 Wis. 241; Gulf, etc., R. Co. v. Dwyer, 75 Tex. 572.

70. Wells v. Thomas, 27 Mo. 17; Georgia, etc., R. Co. v. Smith, 83 Ga. 626.

necting carrier has a lien upon the goods for his unpaid freight until they are delivered to the consignee.⁷¹ Any carrier may pay to the preceding carrier back charges due for transportation to its line, and recover the amount of such advances, together with its own charges, from the owner of the goods;⁷² and may recover such advances, although he fails to perform his own contract.⁷³ But no intermediate carrier is obliged to advance charges due to a preceding line, or to assume the payment of such charges, in the absence of an express contract, or evidence of some usage, custom or settled course of dealing between the parties from which a contract might be implied.⁷⁴

71. Patten v. Union Pac. R. Co., 29 Fed. 590; Price v. Denver, etc., R. Co., 12 Colo. 402; Lewis v. Richmond, etc., R. Co., 25 S. C. 249; Southern Kansas R. Co. v. Duncan, 40 Kan. 503. See also St. Louis, etc., R. Co. v. Lear, 54 Ark. 399.

72. Bissel v. Price, 16 Ill. 408; White v. Vann, 6 Humph. (Tenn.) 70.

73. Western Transp. Co. v. Hoyt, 69 N. Y. 230, 25 Am. Rep. 175, and the fact that his bill of lading is for transportation and delivery upon

payment of freight and charges does not affect his right.

74. New York, etc., R. Co. v. National Steamship Co., 137 N. Y. 23, affg. 62 Hun (N. Y.) 621, 14 N. Y. Supp. 253; Oregon Short Line, etc., 145. See also Canfield v. North-Fed. 465, 51 Am. & Eng. R. Cas. R. Co. v. Northern Pac. R. Co., 51 ern R. Co., 18 Barb (N. Y.) 586, as to special contract for deduction of damages from charges by consignee, a carrier being an intermediate con-signee.

CHAPTER XVIII.

CARRIERS OF LIVE STOCK.

SECTION 1. Carriers of live stock are common carriers.

2. Duty to receive and carry.
3. Duty in respect to facilities and means of transportation.
4. Stock pens and yards.
5. Shipper's knowledge of defects in cars.
6. Duty to provide food, water, and rest for stock.
7. When shipper assumes duty of caring for stock.
8. Other duties in respect to transportation.
9. Statutes limiting the confinement of cattle.
10. Liability for loss or injury.
11. Commencement and termination of liability.
12. Liability for delay in transportation or delivery.
13. Delivery to carrier.
14. Delivery by carrier.
15. Contributory negligence of owner.
16. Measure of damages.
17. Limitation of liability.
18. Stipulations that shipper will accompany stock, load, and unload.
19. Injuries caused by viciousness of animals, or defects in cars.
20. Stipulations as to claim for damages.
21. Limitation of liability to a specified amount.
22. Loss or injury due to carrier's negligence.
23. Stipulation requiring shipper to report condition of stock.
24. Limitations rendered inoperative.
25. Presumptions and burden of proof.
26. Liability of connecting carriers.
27. Liability for improper loading or unloading.
28. Liability for animals escaping.

§ 1. **Carriers of live stock are common carriers.**—Carriers of live stock are common carriers, subject to all the duties, responsibilities, and liabilities, and entitled to all the rights and privileges, of a common carrier of merchandise or other inanimate property, save in one important respect. While common carriers are insurers of inanimate property against all loss and damage except such as is inevitable or attributable to the act of God, or caused by public enemies, and except that they are not held liable for losses which result from the inherent and intrinsic qualities

of the goods carried by them, as carriers of live stock they are not insurers of animals against injuries arising from or attributable to the natural or proper vices, or the inherent nature, propensities and habits of the animals themselves, and which could not be prevented by foresight, vigilance and care.¹ In Michigan the rule is maintained that a railroad company is not a common carrier of live stock unless it specially assumes to act as such.² Carriers of live stock include all who hold themselves out as willing to carry such stock for all who ask for their service and offer to pay their hire, and who undertake the transportation for hire.³ Live stock includes swine,⁴ dogs,⁵ and pigeons,⁶ as well as all cattle.

§ 2. Duty to receive and carry.—Where a common carrier has held itself out as a carrier of live stock, or is made by statute a common carrier of all personal property, it is bound to accept and

1. N. Y.—*Mynard v. Syracuse, etc., R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28; *Penn v. Buffalo, etc., R. Co.*, 49 N. Y. 204, 10 Am. Rep. 355, 3 Am. Ry. Rep. 355; *Clarke v. Rochester, etc., R. Co.*, 14 N. Y. 570, 67 Am. Dec. 205.

U. S.—*Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 9 Am. & Eng. R. Cas. 25.

Ark.—*Fordyce v. McFlynn*, 56 Ark. 424.

Ill.—*Baltimore, etc., R. Co. v. Fox*, 113 Ill. App. 180; *Coles v. Louisville, etc., R. Co.*, 41 Ill. App. 607.

Ind.—*Chicago, etc., R. Co. v. Woodward*, (Ind.) 72 N. E. 558.

Mo.—*Cash v. Wabash R. Co.*, 81 Mo. App. 109; *Leonard v. Chicago, etc., R. Co.*, 54 Mo. App. 293; *Doan v. St. Louis, etc., R. Co.*, 38 Mo. App. 408.

Tenn.—*Baker v. Louisville, etc., R. Co.*, 10 Lea (Tenn.) 304, 16 Am. & Eng. R. Cas. 149; *Nashville, etc., R. Co. v. Jackson*, 6 Heisk. (Tenn.) 273.

Tex.—*Missouri Pac. R. Co. v.*

Graves, 2 Tex. App. Civ. Cas., § 675; *Gulf, etc., R. Co. v. Ellison*, 70 Tex. 491.

Vt.—*Kimball v. Rutland, etc., R. Co.*, 26 Vt. 247, 62 Am. Dec. 567.

Eng.—*Moffat v. Great Western R. Co.*, 15 L. T. N. S. 630; *Hodgman v. West Maryland R. Co.*, 5 B. & S. 173, 117 E. C. L. 173, 13 W. R. 758, 35 L. J. Q. B. 85. See also cases cited § 10, note 76.

2. Smith v. Michigan Cent. R. Co., 100 Mich. 148, 43 Am. St. Rep. 440; *Lake Shore, etc., R. Co. v. Perkins*, 25 Mich. 329, 12 Am. Rep. 275; *Michigan Southern, etc., R. Co. v. McDonough*, 21 Mich. 165, 4 Am. Rep. 466; *Great Western R. Co. v. Hawkins*, 18 Mich. 427.

3. See Common Carriers, chap. 2, § 3.

4. Central R. Co. v. Pickett, 87 Ga. 734.

5. See Common Carriers, chap. 2, § 40.

6. American M. U. Express Co. v. Phillips, 29 Mich. 515.

carry all live stock properly tendered for transportation, and will be liable to an action for refusal to receive and carry stock so tendered.⁷ Where a railroad company fails to furnish stock cars within a reasonable time after their being ordered, it is liable to the shipper for the expense of holding the cattle while waiting for the cars.⁸ A carrier cannot excuse its failure to receive and carry by showing that the stock was tendered by a connecting line on Sunday,⁹ or by setting up an unconstitutional statute which prohibited the transportation of such cattle as were tendered.¹⁰ An undertaking by the carrier to transport the property may be implied from the circumstances under which it comes into his possession, and in that case he is charged with the same responsibility for its safety as though his obligation to transport it was created by express agreement. An express contract to carry need not, therefore, be shown.¹¹

§ 3. Duty in respect to facilities and means of transportation.

—A common carrier is bound to employ safe and sufficient means of carriage, trustworthy and competent servants, and, by itself or its agents, to exercise an intelligent supervision over the system of carriage which it employs. It is therefore to all intents and purposes an insurer against such perils of transportation as it is its duty to provide against; and these include all the perils of the journey except such as arise from the act of God or the public enemies.¹² The obligation of a carrier to provide cars upon demand is the same in respect to the carriage of live stock as of merchandise.¹³ A carrier of live stock is bound to provide cars properly

7. South, etc., R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Wabash, etc., R. Co. v. Black, 11 Ill. App. 465; Ballentine v. North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315; Texas Pac. R. Co. v. Nicholson, 61 Tex. 491. See Louisville, etc., R. Co. v. Godman, 104 Ind. 490, holding failure to maintain fences and shutes in good order by reason of which cattle escaped, was insufficient to constitute a refusal to carry.

8. Texas & P. Ry. Co. v. Smith & White, (Tex. Civ. App.) 79 S. W. 614.

9. Philadelphia, etc., R. Co. v. Lehman, 56 Md. 209, 5 Am. & Eng. R. Cas. 194, 40 Am. Ry. Rep. 415; Guinn v. Wabash, etc., R. Co., 20 Mo. App. 453.

10. Chicago, etc., R. Co. v. Erickson, 91 Ill. 613, 33 Am. Rep. 70.

11. Aiken v. Chicago, etc., R. Co., 68 Iowa, 363, 25 Am. & Eng. R. Cas. 378.

12. Trace v. Pennsylvania R. Co., 26 Pa. Super. Ct. 466.

13. Newport News, etc. R. Co. v. Mercer, 96 Ky. 475; White v. Missouri Pac. R. Co., 19 Mo. App. 400;

constructed, of sufficient strength, safe, fit and suitable under existing conditions for the transportation of the stock tendered for shipment, due consideration being given to the kind, character, and value of the stock, and to exercise due care to carry safely.¹⁴ It has been held that the cars and doors must be absolutely and actually sufficient to prevent cattle breaking through and escaping although they may be unruly and vicious.¹⁵ On the other hand it has been held that it is enough if the cars are reasonably safe and suitable for the purpose for which they are to be used, and that the carrier is not bound to provide the safest and most approved cars or the best appliances in use.¹⁶ In an action to recover damages the shipper must prove the car to have been defective or unsuitable,¹⁷ and where there is a conflict of testimony as to whether the car or its fixtures were suitable, the question is one

Gulf, etc., R. Co. v. Hume, 87 Tex. 211; Lawrence v. Milwaukee, etc., R. Co., 84 Wis. 427. This duty is imposed by statute in Wisconsin and other States. Ayres v. Chicago, etc., R. Co., 71 Wis. 372, 75 Wis. 215.

Cars for exclusive use.—When a shipper requires a car at a railroad station for his exclusive use, he must give notice to the railroad company, after which it will have a reasonable time in which to furnish the car. Illinois Cent. R. Co. v. Bundy, 97 Ill. App. 202. Where shippers held their cattle at a certain point on account of a railroad's failure to furnish cars at an agreed time, they could recover on account of defects in the cars finally furnished them, whether they demanded other cars in writing or not. Gulf, etc., R. Co. v. Irvine & Woods. (Tex. Civ. App.) 73 S. W. 540.

14. Western R. Co. v. Harwell, 91 Ala. 340; Union Pac. R. Co. v. Rainey, 19 Colo. 225; Indianapolis, etc., R. Co. v. Strain, 81 Ill. 540; St. Louis, etc., R. Co. v. Dorman, 72 Ill. 504; Betts v. Chicago, etc., R. Co., 92

Iowa, 343; McDaniel v. Chicago, etc., R. Co., 24 Iowa, 412; Rhodes v. Louisville, etc., R. Co., 9 Bush (Ky.) 688; Great Western R. Co. v. Hawkins, 18 Mich. 427; Harrison v. Missouri Pac. R. Co., 74 Mo. 364; East Tennessee, etc., R. Co. v. Whittle, 27 Ga. 535; Chicago, etc., R. Co. v. Williams, 61 Neb. 608, 85 N. W. 832; Blower v. Great Western R. Co., L. R. 7 C. P. 655, 41 L. J. C. P. 268. See also The Brantford City, 29 Fed. 373, as to cattle fittings on vessel.

15. Pratt v. Ogdensburg, etc., R. Co., 102 Mass. 557; Smith v. New Haven, etc., R. So., 12 Allen (Mass.) 531, 90 Am. Dec. 166; Indianapolis, etc., R. Co. v. Strain, 81 Ill. 504; Betts v. Chicago, etc., R. Co., 92 Iowa, 343.

16. Illinois Cent. R. Co. v. Haynes, 63 Miss. 485; Selby v. Wilmington, etc., R. Co., 113 N. C. 588.

17. St. Louis, etc., R. Co. v. Henderson, 57 Ark. 402, car alleged to have been infected with Texas fever; Morrison v. Phillips, etc., Constr. Co., 44 Wis. 405, injury caused by car wheel breaking.

for the jury.¹⁸ The fact that the car used was similar to those the carrier had always used for the purpose is no defense if the car was in fact defective.¹⁹ The carrier is liable for negligence in failing to properly bed the cars, if it has undertaken to supply bedding.²⁰ But if the bedding of the cars was included in the loading to be done by the shipper,²¹ or if the shipper accepted and loaded a car without objection, knowing that it was not "bedded,"²² or was present when the cars were bedded and expressed his satisfaction therewith, whereupon the carrier ceased to bed the cars and turned them over to the shipper to be loaded,²³ such facts if found, constitute a defense. Where defendant carrier placed a horse delivered to it for transportation in a car, one door of which could not be closed, and the car was put in a train without being inspected, and, after the train started, the horse fell out of the car and was killed, the carrier was held guilty of gross negligence within a provision in the contract of shipment that the carrier should not be liable except for gross negligence.²⁴ The character of cars to be provided for transporting certain classes of live stock is sometimes provided by statute, and such provisions have been held to be reasonable regulations of common carriers and constitutional.²⁵ It is not necessary to plead or prove the defendant's negligence in an action against a carrier for injuries to a shipment of stock, caused by its failure to provide proper cars, since it is responsible for such injuries, without regard to the question of negligence.²⁶

§ 4. Stock pens and yards.—A railroad company as a carrier of live stock is obliged to provide necessary means and facilities, such as good and sufficient stock pens and yards at its depot, for

18. Haynes v. Wabash R. Co., 54 Mo. App. 582; Armstrong v. United States Express Co., 159 Pa. St. 640.

19. Leonard v. Fitchburg R. Co., 143 Mass. 307.

20. Powell v. Pennsylvania R. Co., 32 Pa. St. 414, 75 Am. Dec. 564.

21. Atchison v. Chicago, etc., R. Co., 80 Mo. 213.

22. East Tennessee, etc., R. Co. v. Johnson, 75 Ala. 596.

23. Texas Cent. R. Co. v. O'Laughlin, (Tex. Civ. App.) 72 S. W. 610.

24. Root v. New York, etc., R. Co., 83 Hun (N. Y.) 111, 31 N. Y. Supp. 357.

25. Emerson v. St. Louis, etc., R. Co., 111 Mo. 161, as to statute requiring double-decked cars for sheep; Paddock v. Missouri Pac. R. Co., 1 Mo. App. Rep. 87, as to statute requiring all stock cars to be provided with trap doors.

26. International, etc., R. Co. v. Pool (Tex. Civ. App.), 59 S. W. 911.

receiving live stock offered it for shipment, and for its delivery to the consignee,²⁷ and such other facilities as may be necessary for the safe and convenient loading and unloading of the stock.²⁸ But a railroad company, in providing pens for delivering cattle at a certain point, is only required to have such a number of pens as, according to the business of the carrier at that point, is sufficient for the ordinary and usual volume of business, and the business of other carriers there is immaterial.²⁹ The shipper is entitled to recover for any damages caused to his stock by reason of the carrier's failure to provide such facilities and to keep them safe, or to provide suitable facilities for stock unloaded en route to feed,³⁰ or on account of a delay,³¹ or for unloading the stock after

27. Covington Stock-Yards Co. v. Keith, 139 U. S. 128, 49 Am. & Eng. R. Cas. 149, 35 L. Ed. 73, 9 Ry. & Corp. L. J. 382, 11 Sup. Ct. 461; Lackland v. Chicago, etc., Ry. Co. (Mo. App.), 74 S. W. 505, and it is at least open to the jury to find pens on ground sloping to the south, with no shade, shelter or water thereon, and an embankment to the south, shutting off the breeze, are not safe pens for fat hogs in June; Flint v. Boston, etc., R. Co. (N. H.), 59 Atl. 938, duty of railroad under statute.

Railroad companies cannot absolve themselves from their statutory duty to keep suitable pens for the shipment of cattle, by showing that they were so badly kept or constructed as to make it contributory negligence upon the part of the shipper to use them. Gulf, etc., R. Co. v. Trawick, 80 Tex. 270, 15 S. W. 568; Gulf, etc., R. Co. v. Wood (Tex. Civ. App.), 30 S. W. 715; Galveston, etc., R. Co. v. Jackson (Tex. Civ. App.), 37 S. W. 255; Mason v. Missouri Pac. R. Co., 25 Mo. App. 473.

Delivery of live stock to a carrier is complete, so that its liability as such attaches, where the

shipper applies to the carrier's freight agent for transportation, and, at his direction, places the animals in the usual place for receiving them for shipment; the agent being then notified thereof, and taking directions for their shipment. Lackland v. Chicago, etc., Ry. Co. (Mo. App.), 74 S. W. 505. But a mere permission of the carrier's agent to use the stock pens, no contract of shipment having been made or bill of lading given, is insufficient. Fort Worth, etc., R. Co. v. Riley (Tex. App.), 1 S. W. 446, 27 Am. & Eng. R. Cas. 49.

28. East Tennessee, etc., R. Co. v. Herrman, 92 Ga. 384, defective platform; Owen v. Louisville, etc., R. Co., 87 Ky. 626; Armstrong v. Chicago, etc., R. Co., 45 Minn. 85; Missouri, etc., R. Co. v. Wood (Tex. Civ. App.), 31 S. W. 237.

29. Casey v. St. Louis S. W. Ry. Co. (Tex. Civ. App.), 83 S. W. 20.

30. International, etc., R. Co. v. McRae, 82 Tex. 614, 27 Am. St. Rep. 926.

31. Feinberg v. Delaware, etc., R. Co., 52 N. J. L. 451, 45 Am. & Eng. R. Cas. 348; Chapin v. Chicago, etc., R. Co., 79 Iowa, 582, 42 Am. & Eng. R. Cas. 542.

the transportation is ended and keeping them until called for by the owner or consignee.³² Where a railroad company does not provide suitable facilities for the delivery of live stock contracted to be carried by it, it may be compelled to deliver through facilities furnished by the consignee.³³ The carrier cannot, without special contract, require compensation from the shipper or consignee for providing such means and facilities for shipment, transportation, and delivery in addition to the charges for transportation, since it must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported.³⁴ But it may charge a separate item for the transfer from its line to stockyards not on its line over tracks owned by the stockyards company, where the printed schedule shows in two items the compensation for the haul over its own line to its station, and that exacted for the transfer from its station to the place of delivery, and delivery was to be made at the stockyards.³⁵

§ 5. Shipper's knowledge of defects in cars. — Where the owner of property to be transported makes his own selection of the vehicles, under circumstances which charge him with full knowledge of all their capabilities and defects, the carrier is not responsible for any injury which may result exclusively from such defects. It is required of the carrier, however, to see that the owner has such knowledge. The carrier need not point out such defects as are palpable, and which could not well be overlooked without some degree of negligence, but if the vehicles selected have defects which are not pointed out, it is incumbent upon the carrier to prove affirmatively that they were open, visible and apparent.³⁶

32. Myrick v. Michigan Cent. R. Co., 9 Biss. (U. S.) 44; Chesapeake, etc., R. Co. v. American Exch. Bank, 92 Va. 495; Cooke v. Kansas City, etc., R. Co., 57 Mo. App. 471; Moses v. Port Townsend Southern R. Co., 5 Wash. 595; Gulf, etc., R. Co. v. York, 2 Tex. App. Civ. Cas. § 812.

33. Covington Stock-Yards Co. v. Keith, *supra*.

34. Covington Stock-Yards Co. v. Keith, *supra*. See also Oregon Short Line, etc., R. Co. v. Ilwaco R., etc.,

Co., 51 Fed. 611, 50 Am. & Eng. R. Cas. 554.

35. Walker v. Keenan, 73 Fed. 755, 34 U. S. App. 691, 19 C. C. A. 668.

36. Harris v. Northern Indiana R. Co., 20 N. Y. 232, but the selection by the shipper of defective cars, by which the injury was caused, did not relieve the carrier from responsibility in the case of an improper detention: Illinois Cent. R. Co. v. Hall, 58 Ill. 409, hogs escaping owing to defects in the fastenings of cars of another

The shipper is not to be charged with knowledge of defects not patent and easily recognized.³⁷ He must not only have known of the defect causing the loss, but must have expressly agreed to assume the risk of loss therefrom, and mere acceptance of the cars is not a waiver of the defects;³⁸ nor the mere presence of the shipper while the stock were being loaded, he having no control over the train or the carrier's servants.³⁹ A provision in a contract of shipment or bill of lading that the shipper agrees to accept the cars furnished him, or that he had examined the cars and found them safe and suitable, does not estop the shipper to show that the cars were in fact unsafe, or relieve the carrier from liability for injuries caused by its negligence in supplying defective or insufficient cars. The carrier has the burden of proving that the cars were suitable where there is evidence on both sides of the question.⁴⁰ But an agreement in a bill of lading that, in consideration of a reduced rate of shipment, the shipper agrees to examine the cars and assume all risks of injuries through insecurity of or defects in the cars, will be binding on the shipper, if made in good faith and an opportunity is given to inspect the cars or make objection to them.⁴¹ A carrier is not bound to carry live stock in the same cars in which it received them from a connect-

company, selected by the shipper, after refusing to use the cars of the defendant carrier; Coupland v. Housatonic R. Co., 61 Conn. 531, 55 Am. & Eng. R. Cas. 380, shipper, informed of defects, offered more suitable cars at a higher and not unreasonable rate, which he refused; Betts v. Farmers' L. & T. Co., 21 Wis. 80, 91 Am. Dec. 460, shipper recognizing defects and attempting to repair them without advising the carrier; Chicago, etc., R. Co. v. Van Dresar, 22 Wis. 511; Miltimore v. Chicago, etc., R. Co., 37 Wis. 190; Great Western R. Co. v. Hawkins, 18 Mich. 427.

37. Union Pac. R. Co. v. Rainey, 19 Colo. 225, 61 Am. & Eng. R. Cas. 302; Haynes v. Wabash R. Co., 54 Mo. App. 582.

38. Ogdensburg, etc., R. Co. v. Pratt, 22 Wall. (U. S.) 123, 49 How.

Pr. (U. S.) 84, 102 Mass. 557; Wallingford v. Columbia, etc., R. Co., 26 S. C. 258; Kansas City, etc., R. Co. v. Holland, 68 Miss. 351.

39. Peters v. New Orleans, etc., R. Co., 16 La. Ann. 222, 79 Am. Dec. 578.

40. Western R. Co. v. Harwell, 91 Ala. 340; Gulf, etc., R. Co. v. Wilhelm, 3 Tex. App. Civ. Cas. § 457.

41. Squire v. New York Cent. R. Co., 98 Mass. 239. See Welsh v. Pittsburgh, etc., R. Co., 10 Ohio St. 65, 75 Am. Dec. 490, holding that it is not competent for a carrier to provide by special contract that it will not be responsible for its neglect, or the unsafe condition of the doors of its cattle cars; Gregory v. West Midland R. Co., 2 H. & C. 944, 19 Cent. L. J. 165.

ing line, and the fact that the cars used belonged to and were furnished to the shipper by another company will not relieve a carrier from liability caused by defects in such cars.⁴²

§ 6. Duty to provide food, water, and rest for stock.—In the absence of a special contract of shipment providing otherwise, a carrier transporting live stock must afford proper facilities and reasonable opportunities for feeding, watering, and resting the stock during the transportation, and supply food, water, and rest, at proper intervals along the route, and, if necessary, to unload them for that purpose.⁴³ But it is not required to supply food, water, and unload for rest on the mere request of the shipper, without regard to the reasonableness of the demand.⁴⁴ The carrier having control of the train is responsible for an injury to stock from their not being watered at a place where they are detained by a collision, and the shipper is not obliged to persist in attempting to water the stock until forcibly resisted, nor to make an actual demand that the train should proceed.⁴⁵ It is the duty of the carrier to furnish suitable water for the stock, and it is not relieved from liability by showing that unwholesome water furnished was the water afforded by that section, where water for the people at that place was hauled there, so that it was not impossible by reasonable effort to have furnished wholesome water for the stock.⁴⁶ In some States statutes provide that the carrier shall feed

42. Pennsylvania Co. v. Roy, 102 U. S. 452; St. Louis, etc., R. Co. v. Henderson, 57 Ark. 402; McAlister v. Chicago, etc., R. Co., 74 Mo. 351; Wallingford v. Columbia, etc., R. Co., 26 S. C. 258; Louisville, etc., R. Co. v. Dies, 91 Tenn. 177; Combe v. London, etc., R. Co., 31 L. T. N. S. 631.

43. Harris v. Northern Indiana R. Co., 20 N. Y. 233; Toledo, etc., R. Co. v. Hamilton, 76 Ill. 393; Toledo, etc., R. Co. v. Thompson, 71 Ill. 434, and it is no excuse that a pump at its station was accidentally out of order unless it was not due to its negligence and there were no other means of watering the stock; Illinois Cent. R. Co. v. Adams, 42 Ill. 474, 92 Am. Dec. 85; Dunn v. Han-

nibal, etc., R. Co., 68 Mo. 268, and to unload, feed and water them at the journey's end, if there be delay in making delivery, and the health of the animals requires it; Taylor, etc., R. Co. v. Montgomery, 4 Tex. App. Civ. Cas. § 237, 16 S. W. 178; Gulf, etc., R. Co. v. Wilhelm (Tex. App.), 16 S. W. 109; Abrams v. Milwaukee, etc., R. Co., 87 Wis. 485; Taff Vale R. Co. v. Giles, 23 L. J. Q. B. 43; Allday v. Great Western R. Co., 5 B. & S. 903, 11 E. C. L. 903.

44. Missouri, etc., Ry. Co. v. Clark (Tex. Civ. App.), 79 S. W. 827.

45. Harris v. Northern Indiana R. Co., 20 N. Y. 233.

46. Chicago, etc., Ry. Co. v. Mitchell (Tex. Civ. App.), 85 S. W. 286.

and water cattle being transported over its road, and in case of default shall be liable for all damages resulting therefrom, and also for a fixed penalty.⁴⁷

§ 7. Where shipper assumes duty of caring for stock.—Where, by the contract for carrying the stock, the shipper agrees to feed and water it, there can be no recovery of damages against the carrier arising from failure to care for, feed, and water.⁴⁸ A contract between a carrier of live stock and the shipper that shipper shall take care of and feed and water the cattle, whether delayed in transit or otherwise, is valid, and the carrier is not liable for injuries by failing to feed and water.⁴⁹ But under a contract of shipment, providing that the shipper shall take care of, feed, water, and tend the stock during transportation, and his agent goes along with them, the carrier must furnish reasonable facilities for feeding and watering, but has no duty to feed and water.⁵⁰

It is *prima facie* negligence for a carrier of live stock to give the stock alkaline water injurious in its effect, and it does not devolve on the shipper to show that the carrier did not know that the cattle were not accustomed to such water, where the carrier, from the contract of shipment, must have known that the stock came from a place outside of the alkaline region. *Id.*

47. *Gulf, etc., R. Co. v. Gray*, 87 Tex. 312; *Galveston, etc., R. Co. v. Thompson* (Tex. Civ. App.), 23 S. W. 930; *Good v. Galveston, etc., R. Co.* (Tex.), 11 S. W. 854; *Missouri Pac. R. Co. v. Texas, etc., R. Co.*, 41 Fed. 913.

48. *Paul v. Pennsylvania R. Co.* (N. J. Sup.), 57 Atl. 139; *Western R. Co. v. Harwell*, 91 Ala. 340; *South, etc., Alabama R. Co. v. Henlein*, 52 Ala. 606; *Central, etc., R. Co. v. Bryant*, 73 Ga. 722; *Duvenick v. Missouri Pac. R. Co.*, 57 Mo. App. 550; *Mobile, etc., R. Co. v. Mullins*, 70 Miss. 730, it is a question for the jury whether the shipper was guilty

of contributory negligence where the evidence is conflicting as to whether he was prevented from feeding and watering the stock by the acts of the carrier's servants.

The shipper is not relieved from duty by delay. *Fort Worth, etc., R. Co. v. Daggett*, 87 Tex. 322. Nor by the fact that his agent, in charge of the cattle, left his employ and became an employe of the carrier. *Id.*

49. *Cragin v. New York Cent. R. Co.*, 51 N. Y. 61, 10 Am. Rep. 559; *Heineman v. Grand Trunk R. Co.*, 31 How. Pr. (N. Y.) 430; *Lewis v. Pennsylvania R. Co.* (N. J. Sup.), 56 Atl. 128, 59 Atl. 1117; *Seaboard, etc., R. Co. v. Cauthen*, 115 Ga. 422, 41 S. E. 653; *Georgia R., etc., Co. v. Reid*, 91 Ga. 377; *Boaz v. Central R. Co.*, 87 Ga. 463; *Louisville, etc., R. Co. v. Trent*, 11 Lea. (Tenn.) 82.

50. *Texas, etc., R. Co. v. Byers Bros.* (Tex. Civ. App.), 73 S. W. 427; *Louisville, etc., R. Co. v. Martin*, 8 Ky. L. Rep. 432; *Duvenick v. Missouri Pac. R. Co.*, 57 Mo. App. 550. The carrier is liable for damage from

Upon being requested by the owner, the carrier is bound to place the cars in a convenient and accessible place, if practicable, so that the owner can unload and take care of the cattle and reload, and it is responsible for resultant damages from its failure or refusal to do so.⁵¹ Whether the shipper assumed the duty of caring for the stock must be determined from the written contract or from the circumstances attending the shipment, and where there is a conflict of evidence as to the facts the question is one for the jury.⁵² The mere proof of a custom,⁵³ or the fact of the shipper's accompanying the stock,⁵⁴ is not conclusive proof that he was to attend to their safety during the journey. A carrier cannot transfer to the shipper the duty to feed and water stock during transportation by a custom requiring him to go along on the same train with the stock to feed and water them at his own risk and expense, since a custom not to receive for transportation any live stock unless under conditions modifying its common law liability would be contrary to law and public policy.⁵⁵ Though a contract of shipment of cattle provided that the shipper should at his own risk feed and water his stock while en route, where the carrier undertook to perform that duty against the protest of plaintiff, it was liable for damages resulting from a negligent performance thereof.⁵⁶ Where a carrier transporting live stock had

failure to furnish proper facilities for feeding and watering. Wabash, etc., R. Co. v. Pratt, 15 Ill. App. 177; Illinois Cent. R. Co. v. Eblen, 24 Ky. L. Rep. 1609, 71 S. W. 919; Smith v. Michigan Cent. R. Co., 100 Mich. 148, 58 N. W. 651; Fort Worth, etc., R. Co. v. Daggett, 87 Tex. 322, 28 S. W. 525; Comer v. Stewart, 97 Ga. 403; Bryant v. North Western R. Co., 68 Ga. 805; Feinberg v. Delaware, etc., R. Co., 52 N. J. L. 451; Black v. Chicago, etc., R. Co., 30 Neb. 197; Lowenstein v. Wabash R. Co., 63 Mo. App. 68; Galveston, etc., R. Co. v. Ivey (Tex. Civ. App.), 23 S. W. 321; Comer v. Columbia, etc., R. Co., 52 S. C. 36; Chesapeake, etc., R. Co. v. The American Exchange Bank, 92 Va. 495.

51. Bills v. New York Cent. R.

Co., 84 N. Y. 5, 3 Am. & Eng. R. Cas. 318; Nashville, etc., R. Co. v. Heggie, 86 Ga. 210; Texas, etc., R. Co. v. Stribling (Tex. Civ. App.), 34 S. W. 1002; Norfolk, etc., R. Co. v. Sutherland, 89 Va. 703.

52. Cincinnati, etc., R. Co. v. Disbrow, 76 Ga. 253.

53. Evansville, etc., R. Co. v. Young, 28 Ind. 516.

54. Clarke v. Rochester, etc., R. Co., 14 N. Y. 573, 67 Am. Dec. 205; Richmond, etc., R. Co. v. Truesdale, 99 Ala. 389.

55. Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, 13 Am. St. Rep. 776, 35 Am. & Eng. R. Cas. 666.

56. 101 Live Stock Co. v. Kansas City, etc., R. Co., 100 Mo. App. 674, 75 S. W. 782. A shipper of cattle whose contract provided that he as-

not contracted to feed and water the stock, and it was accompanied by a care taker, the carrier was not chargeable with neglect to afford an opportunity to feed and water them until it was requested by the care taker to do so and had refused.⁵⁷

§ 8. Other duties in respect to transportation.—A railroad company undertaking to transport live stock is liable for the negligence of its agents and servants, but not as insurer.⁵⁸ It is bound to exercise reasonable care for their safe transportation and to take such precautions against injury as reasonable prudence would suggest. Its duty of general supervision over the stock committed to its charge requires it to keep a reasonably careful watch to prevent their injuring each other during the journey by crowding, or "piling up,"⁵⁹ or from being injured by suffocation,⁶⁰ or strangulation.⁶¹ It must seasonably cause water to be poured on hogs in danger of becoming overheated during the transportation.⁶² Where stock in course of transportation are in danger of becoming injured or killed by further transportation, because of fright, suffering, need of rest, or an unsafe manner of loading, it is the carrier's duty to side-track and lay off the car and unload it, or in order that it may be unloaded by the shipper.⁶³ Such un-

sumed all risks and expenses of feeding and watering them while in cars or pens, cannot recover for damages to them from want of water while at the station from which they were shipped, where they were in pens from the forenoon till they were loaded during the night, though the carrier's agent, when asked about watering them, told the shipper there was no water in the pens; the shipper not testifying that he asked for water to be furnished him, and stating that he made no effort to water them there because he did not think they were suffering. *St. Louis Southwestern Ry. Co. v. Hun* (Tex. Civ. App.), 81 S. W. 322.

57. *McKenzie v. Michigan Cent. R. Co.* (Mich.), 100 N. W. 260, 11 Det. L. N. 214.

58. *Louisville, etc., R. Co. v. Harned*, 23 Ky. L. Rep. 1651, 66 S.

W. 25. Where hogs were delivered to a railroad company, as directed by its agent, just prior to the schedule time for arrival of the train upon which they were shipped, the duty of moving them without unreasonable delay was imposed upon defendant. *McCrary v. Missouri, etc., Ry. Co.* 99 Mo. App. 518, 74 S. W. 2.

59. *Kinnick v. Chicago, etc., R. Co.*, 69 Iowa, 665.

60. *Sturgeon v. St. Louis, etc., R. Co.*, 65 Mo. 569.

61. *Harrison v. Missouri Pac. R. Co.*, 74 Mo. 364; *Heller v. Chicago, etc., R. Co.* (Mich.), 66 N. W. 667.

62. *Toledo, etc., R. Co. v. Hamilton*, 76 Ill. 393; *Toledo, etc., R. Co. v. Thompson*, 71 Ill. 434; *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474; *Missouri Pac. R. Co. v. Cornwall*, 70 Tex. 611.

63. *Coupland v. Housatonic R. Co.*,

loading, and the reloading of the cars by either the carrier or the shipper, are governed by the same rules as to negligence as apply to the original loading or the unloading at destination.⁶⁴ The carrier is liable for its negligence in the management of its trains causing injury or suffering to stock transported, as, for example, the jolting and bruising of animals by unnecessary switching,⁶⁵ or leaving them exposed to the inclemency of the weather.⁶⁶ Notwithstanding provisions in the bill of lading that the shipper assumes the risk from fire, or releasing the carrier from injury caused by the burning of hay, straw, or other material used for feeding said animals or otherwise, the carrier cannot escape liability for a loss caused by such material catching fire through its negligence.⁶⁷

§ 9. Statutes limiting confinement of cattle.—Under the United States statute, a railroad company transporting live stock from one State to another, which keeps its stock upon the cars for more than twenty-eight consecutive hours, is guilty of negligence *per se*, and is liable not only for the penalty prescribed, but also for any damages or injury thereby sustained by the owner of the stock; and the failure of the agent in charge of the stock to insist upon performance of the carrier's duty does not excuse the latter.⁶⁸ This statute has been held to be constitutional,⁶⁹ but to

61 Conn. 531; Johnson v. Alabama, etc., R. Co., 69 Miss. 191; Illinois Cent. R. Co. v. Peterson, 68 Miss. 454; Gulf, etc., R. Co. v. Kemp (Tex. Civ. App.), 30 S. W. 714.

64. Feinberg v. Delaware, etc., R. Co., 52 N. J. L. 451; Alabama, etc., R. Co. v. Sparks, 71 Miss. 757; International, etc., R. Co. v. McRae, 82 Tex. 614. Notwithstanding stipulation in bill of lading that the shipper shall unload the stock, the carrier undertaking to do this without notice to the shipper is liable for negligence therein. Normile v. Oregon R. & Nav. Co., 41 Or. 177, 69 Pac. 928.

65. Atchison, etc., R. Co. v. Dittmars, 3 Kan. App. 459.

66. Corbett v. Chicago, etc., R. Co., 86 Wis. 82.

67. Holsapple v. Rome, etc., R. Co., 86 N. Y. 275, 3 Am. & Eng. R. Cas. 487; McFadden v. Missouri Pac. R. Co., 92 Mo. 343, 1 Am. St. Rep. 721; Powell v. Pennsylvania R. Co., 32 Pa. St. 414, 75 Am. Dec. 564.

68. Nashville, etc., R. Co. v. Heggie, 86 Ga. 210, 12 S. E. 363, 22 Am. St. Rep. 453, nor will the fact that its stock yards at an intermediate point were on fire when the train arrived excuse the carrier in such a case. See also Missouri Pac. R. Co. v. Texas, etc., R. Co., 41 Fed. 913; Chesapeake, etc., R. Co. v. American Exchange Bank, 92 Va. 495; Galveston, etc., R. Co. v. Warnken (Tex. Civ. App.), 35 S. W. 72.

69. United States v. Boston, etc., R. Co., 15 Fed. 209.

apply only to interstate shipments,⁷⁰ and with its enforcement State courts are in no way concerned.⁷¹ Under this statute a railroad company is guilty of a violation of the statute if it fails to give animals rest, feed, and water when the period of 28 hours from the time they were last fed expires, although they were in the possession of a connecting carrier during part of that period.⁷² The statute does not relieve the carrier from any negligence in so confining the stock for a less period of time, but such questions are still left as at common law.⁷³ Under this statute the carrier is not liable where it is prevented from unloading the cattle by storm or other accidental causes,⁷⁴ or where they have proper food, water, space, or opportunity to rest in the cars. In an action under the statute the plaintiff must, therefore, allege and the proof show a case not within the exceptions of the statute.⁷⁵

§ 10. Liability for loss or injury.—The general rule maintained by all the authorities is that carriers of live stock are liable absolutely for loss of or injury to stock intrusted to them for transportation, like other common carriers, unless the loss or injuries were occasioned by the act of God, or the public enemy, or the negligence of the shipper, except that they are not liable for loss or injury caused by the "proper vice" or natural propensities of the animals themselves, and not by any negligence on the part of the carriers.⁷⁶ A bale of goods or other inanimate chattel may be so stored as that absolute safety may be attained, except in

70. United States v. East Tennessee, etc., R. Co., 13 Fed. 642.

71. Illinois Cent. R. Co. v. Peterson, 68 Miss. 454.

72. Cincinnati, etc., R. Co. v. Gregg, 25 Ky. L. Rep. 2329, 80 S. W. 512; United States v. Louisville, etc., R. Co., 18 Fed. 480.

73. Missouri Pac. R. Co. v. Ivy, 79 Tex. 444.

74. Newport News, etc., R. Co. v. United States, 61 Fed. 488, an accident to the train caused by the carrier's negligence is not an "accidental cause." See also The Olympia, 61 Fed. 120. See Chesapeake, etc., R. Co. v. American Exch. Bank, 92 Va. 495, as to delay by storm.

75. Hale v. Missouri Pac. R. Co., 36 Neb. 266.

76. Covington Stock-Yards Co. v. Keith, 139 U. S. 128, 49 Am. & Eng. R. Cas. 154; North Pennsylvania R. Co. v. Commercial Bank, 123 U. S. 727, 35 Am. & Eng. R. Cas. 556; Myrick v. Michigan Cent. R. Co., 107 U. S. 102, 9 Am. & Eng. R. Cas. 25.

N. Y.—Holsapple v. Rome, etc., R. Co., 86 N. Y. 275, 3 Am. & Eng. R. Cas. 487; Mynard v. Syracuse, etc., R. Co., 71 N. Y. 180, 27 Am. Rep. 28; Cragin v. New York Cent. R. Co., 51 N. Y. 61, 10 Am. Rep. 559; Heyman v. Philadelphia, etc., R. Co., 54 N. Y. Super. Ct. 158; Kaplan v. Midland R. Terminal Co., 88 N. Y. Supp. 945.

transportation by water, where the carrier usually excepts the perils of navigation, and except in cases of inevitable accident. The rule, established from motives of policy, which charges the carrier in almost all cases, is not, therefore, unreasonable in its application to such property. But the carrier of animals by a

Ala.—Richmond, etc., R. Co. v. Trousdale, 99 Ala. 389; Western R. Co. v. Harwell, 91 Ala. 340; East Tennessee, etc., R. Co. v. Johnston, 75 Ala. 596; South, etc., Alabama R. Co. v. Henlein, 52 Ala. 606.

Cal.—Agnew v. Steamer Contra Costa, 27 Cal. 425.

Colo.—Union Pac. R. Co. v. Rainey, 19 Colo. 225.

Conn.—Coupland v. Housatonic R. Co., 61 Conn. 531.

Ga.—Mitchell v. Georgia R. Co., 68 Ga. 644; Georgia R. Co. v. Spears, 66 Ga. 489.

Ill.—McCollom v. Indianapolis, etc., R. Co., 94 Ill. 534; St. Louis, etc., R. Co. v. Dorman, 72 Ill. 504; Illinois Cent. R. Co. v. Brelsford, 13 Ill. App. 251; Chicago, etc., R. Co. v. Harmon, 12 Ill. App. 54; Illinois Cent. R. Co. v. Morrison, 19 Ill. 136.

Ind.—Lake Shore, etc., R. Co. v. Bennett, 89 Ind. 457.

Iowa.—McCoy v. Keokuk, etc., R. Co., 44 Iowa, 424; German v. Chicago, etc., R. Co., 38 Iowa, 127.

Kan.—St. Louis, etc., R. Co. v. Clark, 48 Kan. 321; St. Louis, etc., R. Co. v. Piper, 13 Kan. 510.

Ky.—Louisville, etc., R. Co. v. Hedger, 9 Bush (Ky.), 645.

La.—Peters v. New Orleans, etc., R. Co., 16 La. Ann. 222.

Me.—Dow v. Portland Steam Packet Co., 84 Me. 490.

Mass.—Evans v. Fitchburg R. Co., 11 Mass. 142; Squire v. New York Cent. R. Co., 98 Mass. 239.

Mich.—Heller v. Chicago, etc., R. Co. (Mich.), 66 N. W. 667, carriers

of live stock liable only for negligence.

Minn.—Boehl v. Chicago, etc., R. Co., 44 Minn. 191; Lindsley v. Chicago, etc., R. Co., 36 Minn. 539.

Miss.—Illinois Cent. R. Co. v. Scruggs, 69 Miss. 418.

Mo.—St. Louis, etc., R. Co. v. Cleary, 77 Mo. 634; Dawson v. St. Louis, etc., R. Co., 76 Mo. 514; Hance v. Pacific Express Co., 48 Mo. App. 179; Clark v. St. Louis, etc., R. Co., 64 Mo. 440.

Neb.—Black v. Chicago, etc., R. Co., 30 Neb. 197.

N. H.—Rixford v. Smith, 52 N. H. 355.

N. C.—Lee v. Raleigh, etc., R. Co., 72 N. C. 236.

Ohio.—Welsh v. Pittsburg, etc., R. Co., 10 Ohio St. 65.

Pa.—Powell v. Pennsylvania R. Co., 32 Pa. St. 414.

S. C.—Bamberg v. South Carolina R. Co., 9 S. C. 61.

Tenn.—Louisville, etc., R. Co. v. Wynn, 88 Tenn. 230.

Tex.—Missouri Pac. R. Co. v. Fagan (Tex. Civ. App.) 27 S. W. 887, 29 S. W. 1110.

Vt.—Kimball v. Rutland, etc., R. Co., 26 Vt. 247.

Va.—Virginia, etc., R. Co. v. Sayers, 26 Gratt. (Va.) 328.

W. Va.—Maslin v. Baltimore, etc., R. Co., 14 W. Va. 180.

Wis.—Morrison v. Phillips, etc., Constr. Co., 44 Wis. 405.

Eng.—Kendall v. London, etc., R. Co., L. R. 7 Exch. 373, 20 W. R. 886.

mode of conveyance opposed to their habits and instincts has no such means of securing absolute safety. They may die of fright or by refusing to eat, or they may, notwithstanding every precaution, destroy themselves in attempting to break away from the fastenings by which they are secured in the vehicle used to transport them, or they may kill each other. In such cases, supposing all proper care and foresight to have been exercised by the carrier, it would be unreasonable in a high degree to charge him with the loss.⁷⁷ But the carrier is bound to exercise reasonable care to prevent loss or injury from these causes, and it is not excusable from liability for loss or injuries so resulting which might have been prevented by it by the exercise of ordinary care. In order to relieve it from liability, it must appear that the vice or natural propensities of the animal was the sole proximate cause of the loss or injury.⁷⁸ Unless it so appears, the carrier is liable as an insurer, even in cases where no negligence on its part is shown.⁷⁹ A common carrier of chattels does not insure them against their own fault or the fault of their owner, nor against damages caused by an inherent defect in the chattels carried, or by want of care which the owner was bound to exercise.⁸⁰ Loss or injury due to a want of inherent vitality, irrespective of any fault of the carrier's servants, will not render the carrier liable.⁸¹ The carrier is not an insurer against loss or injury due to the negligence of the shipper or his servants, where the shipper undertakes to take charge of and care for his own stock.⁸²

77. Clarke v. Rochester, etc., R. Co., 14 N. Y. 570, 67 Am. Dec. 205. See also Evans v. Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19; Michigan Southern, etc., R. Co. v. McDonough, 21 Mich. 165, 4 Am. Rep. 466.

78. Cragin v. New York Cent. R. Co., 51 N. Y. 61; Penn. v. Buffalo, etc., R. Co., 49 N. Y. 204; Giblin v. National Steamship Co., 8 Misc. Rep. (N. Y.) 22, 28 N. Y. Supp. 69; Conger v. Hudson River R. Co., 6 Duer (N. Y.), 375; Toledo, etc., R. Co. v. Thompson, 71 Ill. 434; Illinois Cent. R. Co. v. Adams, 42 Ill. 474; Rhodes v. Louisville, etc., R. Co., 9 Bush (Ky.), 688; Evans v. Fitchburg R.

Co., 111 Mass. 142; Crow v. Chicago, etc., R. Co., 57 Mo. App. 135; Moore v. Great Northern R. Co., L. R. 10 Ir. 95; Gill v. Manchester, etc., R. Co., L. R. 8 Q. B. 186, 42 L. J. Q. B. 89.

79. Kinnick v. Chicago, etc., R. Co., 69 Iowa, 665, 27 Am. & Eng. R. Cac. 58; Nugent v. Smith, 1 C. P. Div. 423, 45 L. J. C. P. Div. 697; Kendell v. London, etc., R. Co., L. R. 7 Exch. 373, 41 L. J. Exch. 184.

80. Rixford v. Smith, 52 N. H. 355, 13 Am. Rep. 42.

81. Chicago, etc., R. Co. v. Harmon, 12 Ill. App. 54.

82. Hart v. Chicago, etc., R. Co., 69 Iowa, 485.

§ 11. Commencement and termination of liability.—The liability of the carrier for stock to be transported over its line commences when the animals are placed in the usual place for receiving them for shipment to await shipment.⁸³ A carrier is not relieved from liability for injury to cattle placed in its pens awaiting transportation, under agreement with its agents that they were to be placed therein on a certain day, by the mere fact that the carrier did not have actual notice of the cattle having been placed in the pens on the day agreed upon, where the cattle were put in the pens on that day, and injured therein because of negligence of the carrier.⁸⁴ The mere fact that cattle shipped died after their delivery at the point of destination is not sufficient to relieve the carrier of liability on the ground that the damage is too remote, if the death of the cattle resulted solely from the injuries received by reason of the carrier's negligence while transporting them.⁸⁵

§ 12. Liability for delay in transportation or delivery.—The general rule which applies to carriers of goods applies to carriers of live stock and a carrier receiving live stock for shipment is bound to use reasonable diligence to transport them to their destination and deliver them within a reasonable time.⁸⁶ What is a reasonable time in a given case must be determined from all the circumstances of the particular case.⁸⁷ A railroad transporting live stock is bound only to transport with reasonable dispatch, and the shipper assumes the risk of unavoidable accidents and delays.⁸⁸ Where an obstruction to traffic occurs from a cause for which the carrier is not responsible it is bound only to use reas-

83. Lackland v. Chicago, etc., Ry. Co. (Mo. App.), 74 S. W. 505; Norfolk, etc., R. Co. v. Harman, 91 Va. 601; Galveston, etc., R. Co. v. Jackson (Tex. Civ. App.), 37 S. W. 255; Moffatt v. Great Western R. Co., 15 L. T. N. S. 630.

84. Ft. Worth, etc., R. Co. v. Waggoner Nat. Bank (Tex. Civ. App.), 81 S. W. 1050.

85. Missouri Pac. R. Co. v. Edwards, 78 Tex. 307, 14 S. W. 607; Missouri Pac. R. Co. v. Heath (Tex.),

18 S. W. 477. See also *Delivery by Carrier*, § 14, *post*.

86. Glasscock v. Chicago, etc., R. Co., 86 Mo. App. 114; Gulf, etc., R. Co. v. Porter (Tex. Civ. App.), 61 S. W. 343; International, etc., R. Co. v. Young (Tex. Civ. App.), 72 S. W. 68. See also *Carriers of goods*.

87. Cincinnati, etc., R. Co. v. Case, 122 Ind. 310, 42 Am. & Eng. R. Cas. 537.

88. McKenzie v. Michigan Cent. R. Co. (Mich.), 100 N. W. 260, 11 Det. Leg. N. 214.

onable diligence to procure the further transportation of the stock.⁸⁹ A railroad company cannot be exonerated from unreasonable delay in the transportation of stock on the ground that its regular trains did not connect in time to avoid delay;⁹⁰ nor on the ground that a heavy dew rendered the track slippery and impeded the progress of the train; such an occurrence being an ordinary one, against the effect of which it was the duty of the company to provide.⁹¹ Where a written contract for the shipment of live stock, as expressed in the bill of lading, contains no stipulation as to the time within which the stock is to be delivered, the law implies a reasonable time, and the undertaking is broken if unusual delay occurs, unless the carrier shows that the delay was caused by something beyond its control, or was unavoidable, or was a necessary incident to the prudent and proper management of its business.⁹² Delays incident to ordinary transportation of stock are the same as reasonable delays.⁹³ A common carrier receiving property for transportation with knowledge of the existence of an obstruction on its road, and without informing the shipper, cannot offer the obstruction as an excuse for not making a prompt delivery thereof, though the obstruction is the act of God; and it is bound to take notice of the signs of approaching danger liable to create obstructions, if any are known to it.⁹⁴ The refusal of a shipper of live stock to comply with the provisions of the contract of shipment requiring that some one accompany the stock to care for them, and that they shall be loaded and unloaded, watered, and fed by the shipper's agent, will not excuse the carrier from transporting the stock to their destination without unreasonable delay, caring for them at the shipper's expense.⁹⁵ The refusal of a railway company to perform its admitted duty to place a car of horses in position to unload promptly on arrival at their destination is negligence.⁹⁶ In an action against a carrier for

89. St. Louis, etc., R. Co. v. Jones (Tex. Civ. App.), 29 S. W. 695.

90. Gulf, etc., R. Co. v. Porter (Tex. Civ. App.), 61 S. W. 343.

91. Missouri, etc., R. Co. v. Truskett, 186 U. S. 479, 46 L. Ed. 1259, 22 S. Ct. 943, 104 Fed. 728, 44 C. C. A. 179.

92. Southern Ry. Co. v. Railey Bros., 26 Ky. 53, 80 S. W. 786.

93. Southern Pac. Co. v. Arnett (Utah), 126 Fed. 75.

94. Nelson v. Great Northern R. Co., 28 Mont. 297, 72 Pac. 642; Gulf, etc., R. Co. v. McCorquodale, 71 Tex. 41.

95. Spalding v. Chicago, etc., R. Co. (Mo. App.), 73 S. W. 274.

96. Toledo, etc., R. Co. v. Berry, 31 Ind. App. 556, 68 N. E. 702.

injuries to stock, evidence that defendants stopped at stations for unnecessary lengths of time, and left the cars in which the cattle were loaded where they could not have the advantage of the breeze, whereby some of them died from heat, and that the train was delayed by standing on the track six hours in a distance of 200 miles, was sufficient to sustain a verdict in favor of plaintiff.⁹⁷ But a delay of 12 hours in transportation of live stock, caused by holding the cattle on account of the sickness and death of one, does not constitute negligence, where the remaining cattle are sent forward by the next train.⁹⁸ A shipper of live stock cannot recover damages for delay in delivery of the stock where it is consigned in the name of the shipper and he was not present to demand delivery, and delivery was made to his employes immediately on the carrier's ascertaining their authority to receive it.⁹⁹ An agent of a connecting carrier of live stock had no authority to assure a shipper that his check would be accepted at the other end of the line, and the carrier was not liable for delay in getting the stock from its cars, occasioned by refusal of the company there to accept the check.¹ In order to recover for delay in shipment of live stock, it is necessary to show the length of time ordinarily required for the transportation, and that a longer time was actually consumed than was necessary for the purpose.² In an action for injuries to beef cattle from delay in transportation the time necessarily lost in stopping the cattle for food and rest under a Federal statute should not be included in the jury's computation of negligent delay.³ If the proximate cause of a loss is negligent delay in transportation, although the loss is partly due to the inherent propensities of the animals, the carrier will be liable.⁴ And a stipulation in the contract of shipment will not relieve the carrier when the delay was due to its negligence.⁵ The carrier is absolutely liable, under a special contract fixing the time within which delivery is to be made, for a failure to deliver within the

97. Minter v. Chicago, etc., R. Co., 82 Mo. App. 130.

98. Lewis v. Pennsylvania R. Co. (N. J.), 59 Atl. 117, 56 Atl. 128, 70 N. J. L. 132.

99. Moore v. Baltimore, etc., R. Co., 103 Va. 189, 48 S. E. 887.

1. Louisville, etc., R. Co. v. Bennett & Morgan, 25 Ky. L. Rep. 834, 76 S. W. 408.

2. Johnson v. Chicago, etc., R. Co. (Neb.), 97 N. W. 479.

3. St. Louis, etc., R. Co. v. Carlisle (Tex. Civ. App.), 78 S. W. 553.

4. Galveston, etc., R. Co. v. Herring (Tex. Civ. App.), 36 S. W. 129; Missouri Pac. R. Co. v. Paine, 1 Tex. Civ. App. 621.

5. Ball v. Wabash, etc., R. Co., 33 Mo. 574.

time, unless the failure was due to the shipper's negligence.⁶ Carriers of live stock are held to a stricter rule than carriers of goods in the determination of what is a reasonable time for the transportation and delivery, owing to the character of the property and the greater injury liable to result from a delay in its transportation and delivery.⁷ But, in the absence of a special contract fixing the time, a delay resulting without fault on the part of the carrier will not render it liable.⁸

6. Galveston, etc., R. Co. v. Rutledge (Tex. Civ. App.), 37 S. W. 176; Galveston, etc., R. Co. v. Jackson (Tex. Civ. App.), 37 S. W. 255.

7. U. S.—Myrick v. Michigan Cent. R. Co., 107 U. S. 102; The Caledonia, 50 Fed. 567; Goldsmith v. Tower Hill Steamship Co., 37 Fed. 806.

N. Y.—Michaels v. New York Cent. R. Co., 30 N. Y. 564; Hastings v. New York, etc., R. Co., 6 N. Y. Supp. 836.

Ala.—Richmond, etc., R. Co. v. Trousdale, 99 Ala. 389.

Ind.—Pennsylvania R. Co. v. Clark, 2 Ind. App. 146; Louisville, etc., R. Co. v. Godman, 104 Ind. 490.

Ill.—Wabash, etc., R. Co. v. McCasland, 11 Ill. App. 491; Illinois Cent. R. Co. v. Waters, 41 Ill. 73; Ohio, etc., R. Co. v. Dunbar, 20 Ill. 623.

Iowa.—Kinnick v. Chicago, etc., R. Co., 69 Iowa, 665; Frazier v. Kansas City, etc., R. Co., 48 Iowa, 571.

Kan.—Atchison, etc., R. Co. v. Dittmars, 3 Kan. App. 459.

Ky.—Louisville, etc., R. Co. v. Brinley (Ky.), 29 S. W. 305; Louisville, etc., R. Co. v. Robinson (Ky.), 36 S. W. 6.

Md.—Philadelphia, etc., R. Co. v. Lehman, 56 Md. 209.

Mich.—Michigan Southern, etc., R. Co. v. McDonough, 21 Mich. 165; Cleveland, etc., R. Co. v. Perkins, 17

Mich. 296; Sisson v. Cleveland, etc., R. Co., 14 Mich. 489.

Miss.—Alabama, etc., R. Co. v. Sparks, 71 Miss. 757; Illinois Cent. R. Co. v. Haynes, 64 Miss. 604.

Mo.—Guinn v. Wabash, etc., R. Co., 20 Mo. App. 453; Sturgeon v. St. Louis, etc., R. Co., 65 Mo. 569; Tucker v. Pacific R. Co., 50 Mo. 385; Douglass v. Hannibal, etc., R. Co., 53 Mo. App. 473.

N. C.—McAbsher v. Richmond, etc., R. Co., 108 N. C. 344; Hamilton v. Western North Carolina R. Co., 96 N. C. 398.

Tenn.—Adams Express Co. v. Jackson, 92 Tenn. 326; East Tennessee, etc., R. Co. v. Hale, 85 Tenn. 69.

Tex.—San Antonio, etc., R. Co. v. Pratt (Tex. Civ. App.), 32 S. W. 705; International, etc., R. Co. v. Hynes, 3 Tex. Civ. App. 20; Gulf, etc., R. Co. v. Ellison, 70 Tex. 491.

W. Va.—Maslin v. Baltimore, etc., R. Co., 14 W. Va. 180.

Wis.—Abrams v. Milwaukee, etc., R. Co., 87 Wis. 485; Ayres v. Chicago, etc., R. Co., 75 Wis. 215.

Eng.—Briddon v. Great Northern R. Co., 32 L. T. 94, 28 L. J. Exch. 51.

8. Delay due to snow storms.

—Pruitt v. Hannibal, etc., R. Co., 62 Mo. 527; Ballentine v. North Missouri R. Co., 40 Mo. 491; Black v. Chicago, etc., R. Co., 30 Neb. 197.

Telegraph line down.—International, etc., R. Co. v. Hynes, 3 Tex. Civ. App. 20.

§ 13. Delivery to carrier.—Delivery of live stock to a railroad company is complete and its liability as a carrier attaches when the stock are received in its pens for transportation, and there has been a change of possession of the stock from the shipper to the carrier, the shipper reserving no right of control. It then becomes bound to carry them promptly and is liable for a loss or injury to them.⁹ Actual transportation need not have been commenced.¹⁰ But a mere permission to the shipper to use stock pens does not amount to a change of possession.¹¹ When the shipper specially contracts to take charge of his stock over the entire route, there is no complete delivery, and the carrier is not liable except for defects in the cars furnished or in the management of its trains.¹² Actual loading upon the cars,¹³ or the giving of a bill of lading,¹⁴ if there has been a change of possession, is not necessary to complete the delivery and render the carrier liable for the stock. But delivery must be made to an authorized agent of the carrier and at a proper place in order to bind the carrier.¹⁵

§ 14. Delivery by carrier.—The general rules governing delivery by a carrier of goods stated elsewhere¹⁶ apply to delivery by carriers of animals. But what constitutes a sufficient delivery must largely be determined by the facts of each particular case.¹⁷ For example, where a railroad company contracts to deliver cattle

Unusual press of business.—International, etc., R. Co. v. Lewis (Tex. Civ. App.), 23 S. W. 323.

9. Pruitt v. Hannibal, etc., R. Co., 62 Mo. 527; Louisville, etc., R. Co. v. Godman, 104 Ind. 490; Gulf, etc., R. Co. v. Trawick, 80 Tex. 270. See Carriers of Goods. Commencement of Liability. Also § 11, *ante*.

10. Mason v. Missouri Pac. R. Co., 25 Mo. App. 473.

11. Fort Worth, etc., R. Co. v. Riley (Tex. App.), 1 S. W. 446, 27 Am. & Eng. R. Cas. 49.

12. Illinois Cent. R. Co. v. Morrison, 19 Ill. 136.

13. Bowie v. Baltimore, etc., R. Co., 1 MacArthur (S. C.), 609.

14. See Carriers of Goods.

15. Slim v. Great Northern R. Co.,

14 C. B. 647, 78 E. C. L. 647. See Carriers of Goods.

16. See Carriers of Goods. Where animals are killed by accident while being transported the carrier is not liable for not delivering the carcasses. Lee v. Marsh, 43 Barb. (N. Y.) 102, 28 How. Pr. (N. Y.) 275.

17. Gulf, etc., R. Co. v. Eddins, 7 Tex. Civ. App. 116, carrier responsible for cattle escaping from a stockyards company to which it had delivered them at an intermediate station where a connecting line was to receive them; Cleveland, etc., R. Co. v. Sargent, 19 Ohio St. 438, where the consignor and consignee found the animals shipped in a stable at the place of destination and directed the owner of the stables to keep them

to a consignee at the public stock yards, and receives the through freight, it cannot claim that it only undertook to deliver them at its station, and its liability continued until the cattle were delivered at their destination.¹⁸ Where a shipper of live stock agrees with the company's agent that on reaching its destination the car shall be backed down to the cattle chute, which is in fact done, for the purpose of delivery, it constitutes a delivery, though there is no formal turning over of the car by the conductor to the shipper.¹⁹ The carrier is required to unload the stock and place them in stock-pens from which they may be removed by the consignee, unless there is a special contract providing otherwise.²⁰ Where by the terms of a special contract the carrier is bound to unload the stock, its duty in this respect will not be affected by a local usage or general regulation of the carrier requiring consignee to unload live stock.²¹ Where the shipper, under a special contract, is bound to unload his stock, he is responsible for all injuries occurring during the unloading, except where the carrier has failed to provide proper facilities, in which case the carrier is responsible.²² It is the duty of the carrier to unload stock promptly upon their arrival at their destination and it is liable for injuries resulting from failure so to do. This duty is important owing to the danger

until they returned later, and the animals in the meantime were destroyed, there was held to be a sufficient delivery to discharge the carrier.

Under Texas statute a railroad is required to have at each place of unloading freight suitable buildings and inclosures to protect the same from damage. The evidence showed that plaintiff's cattle reached their destination at midnight, and were then offered him upon payment of the freight. He did not have the money with him, and refused to receive the cattle that night, whereupon they were unloaded, and put in the company's pens. The weather was cold and wet, and the plaintiff, who was a stranger in the city, did not know where to take his cattle. Held, that the evidence supported the finding

that the plaintiff was not obliged to receive the cattle when tendered under such circumstances, and accordingly the company's liability as a carrier did not cease upon the unloading of the cattle. Houston, etc., Ry. Co. v. Trammell (Tex. Civ. App.), 68 S. W. 716.

18. Jones v. St. Louis, etc., R. Co., 89 Mo. App. 653.

19. Brown v. Pontiac, etc., R. Co. (Mich.), 94 N. W. 1050, 10 Det. Leg. N. 173.

20. Benson v. Gray, 154 Mass. 391; Gill v. Manchester, etc., R. Co., L. R. 8 Q. B. 186, 21 W. R. 525.

21. Myrick v. Michigan Cent. R. Co., 9 Biss. (U. S.) 44; Benson v. Gray, 154 Mass. 391.

22. Owen v. Louisville, etc., R. Co., 87 Ky. 626, 35 Am. & Eng. R. Cas. 687.

to which animals crowded in a car while the car is at rest are subjected.²³ The carrier is also required to promptly deliver the stock, after they are unloaded, to the consignee,²⁴ or to a connecting carrier,²⁵ and is liable for any delay or wrongful detention. It is held in some cases that no notice to the consignee of the arrival of the stock is necessary;²⁶ but other cases hold to the contrary.²⁷ Where a railroad company has, by building stock yards, or by contract with a stock yard company, made adequate provision for the discharge of its duty as a common carrier with respect to live stock shipped over its line to a city, it is not required by the common law to make delivery of stock consigned to such city to connecting roads for delivery at other stock yards therein.²⁸

§ 15. Contributory negligence of owner.—Where the contributory negligence of the owner is the proximate cause of the loss, whether such negligence arises from his failure to discharge the duties which he has assumed by contract, or those which are imposed upon him by law, it is a good defense, either in an action for breach of contract or *ex delicto*, and will prevent recovery.²⁹ Where the owner of live stock was at fault in loading too many

23. Lake Erie, etc., R. Co. v. Rosenberg, 31 Ill. App. 47.

24. San Antonio, etc., R. Co. v. Pratt (Tex. Civ. App.), 32 S. W. 705; St. Louis Southwestern R. Co. v. Williams (Tex. Civ. App.), 32 S. W. 225; Corbett v. Chicago, etc., R. Co., 86 Wis. 82; Gordon v. Great Western R. Co., 8 Q. B. Div. 44, 3 Am. & Eng. R. Cas. 619.

25. Rock Island, etc., R. Co. v. Potter, 36 Ill. App. 590.

26. Chicago, etc., R. Co. v. Pratt, 13 Ill. App. 477.

27. See Carriers of Goods. Where a chattel mortgagee consigned a shipment of cattle to a commission firm to protect the payment of his mortgage debt, and on payment thereof directed the delivery of the shipment to the firm designated by the mortgagor, no action will lie against the carrier for non-delivery to the party designated by the mortgagor. John-

ston v. Chicago, etc., R. Co. (Neb.), 97 N. W. 479.

28. Central Stock Yards Co. v. Louisville, etc., R. Co., 118 Fed. 113, 55 C. C. A. 63.

29. Hart v. Chicago, etc., R. Co., 69 Iowa, 485, where stock was burned by fire started in the bedding through negligence of shipper's agent; Myers v. Wabash, etc., R. Co., 90 Mo. 98, stock injured through failure of shipper to care for stock after being unloaded at their destination, under special contract; Pratt v. Ogdensburg, etc., R. Co., 102 Mass. 557, shipper's wrongful conduct in putting combustible material in the cars without the knowledge of the carrier; Hutchinson v. Chicago, etc., R. Co., 37 Minn. 524, shipper negligently leaving car door open after putting horse in car. Compare Root v. New York, etc., R. Co., 83 Hun (N. Y.), 111, 31 N. Y. Supp. 357; Newby

animals into a car by reason of which they were injured by over-crowding,³⁰ where he failed to comply with his special contract to accompany the stock and water, feed and attend it and damage resulted,³¹ where he placed cattle in the pens some hours before the train agreed upon with the carrier for their shipment,³² where, under a special contract to load and unload it at his own risk, he undertook to unload the cattle before daylight, without notice to the carrier, and in so doing used a chute which he knew to be defective,³³ he was guilty of contributory negligence and could not recover. But failure on the part of the shipper to unload and properly feed and water cattle merely precludes him from recovering such damages as resulted therefrom, but does not bar a recovery for damages that were proximately caused by the negligence of the carrier.³⁴ And where want of care prior to transportation is set up as a defense, it must be shown that the shipper's prior treatment of the stock proximately caused, or contributed to cause, the injuries complained of, in order to preclude recovery.³⁵ But a shipper of live stock is not guilty of contributory negligence in putting them in the pens furnished by the carrier therefor till they are loaded for transportation, unless they are so obviously unsafe as to make it reasonably certain that injury to the animals must inevitably result.³⁶ Shippers having a contract for a certain rate for carrying cattle are not, by refusing, for a time, to pay a higher rate demanded at their destination, prevented from recovering damages for injuries to the cattle from ill treatment while they are being detained till such rate shall be paid.³⁷ Failure of a shipper to notify a railroad company to stop a train, so that he can water, feed, and rest the cattle before they

v. Chicago, etc., R. Co., 19 Mo. App. 391; Powell v. Pennsylvania, etc., R. Co., 32 Pa. St. 414; Paddock v. Missouri Pac. R. Co., 60 Mo. App. 328; Chesapeake, etc., R. Co. v. American Exch. Bank, 92 Va. 495.

30. Texas & P. Ry. Co. v. Edins, (Tex. Civ. App.), 83 S. W. 253.

31. Central of Ga. Ry. Co. v. James, 117 Ga. 832, 45 S. E. 223; Central of Ga. Ry. Co. v. Rogers, 111 Ga. 865, 36 S. E. 946; Chicago, etc., R. Co. v. Schuld (Neb.), 92 N. W. 162.

32. International, etc., R. Co. v. Earnest & Bost, (Tex. Civ. App.), 77 S. W. 29.

33. Candee v. New York, etc., R. Co., 73 Conn. 667, 49 Atl. 17.

34. Missouri, etc., R. Co. v. Chittin (Tex. Civ. App.), 60 S. W. 284.

35. Fort Worth, etc., R. Co. v. Alexander (Tex. Civ. App.), 81 S. W. 1015.

36. Lackland v. Chicago, etc., R. Co. (Mo. App.), 74 S. W. 505.

37. Gulf, etc., R. Co. v. Leatherwood (Tex. Civ. App.), 69 S. W. 119.

have been confined on the cars more than 28 hours, in violation of the statute, is not necessarily fatal to his right to recover for damages caused by the negligent delay and confinement of the cattle, if he has not consented thereto.³⁸

§ 16. Measure of damages.—The rules as to the measure of damages stated in reference to carriers of goods generally apply to carriers of live stock.³⁹ The measure of damages to a shipment of cattle resulting from negligence of the carrier in transportation is the difference in their market value at the place of destination in the condition in which they should have been delivered, and the condition in which they were delivered,⁴⁰ and not necessarily the difference in net value at destination immediately before and after the injury.⁴¹ The measure of damages recoverable against connecting carriers for improper treatment of cattle shipped over their lines is the difference between their market value at their final destination and what it would have been but for the improper treatment, and the fact that each carrier limited its liability to its own line, and that none of them carried the cattle to the place of final destination, is immaterial.⁴² The measure of damages for failing to deliver cattle within a reasonable time is the difference between the market price at the place of destination when they should have arrived, and the price received at the sale made on the first available market,⁴³ or between their market value in the condition in which they were delivered and their market price if seasonably delivered, disregarding any depreciation in value necessarily resulting from the transportation.⁴⁴ It

38. Southern Pac. Co. v. Arnett, 126 Fed. 75.

39. See Carriers of Goods. Measure of Damages.

40. Gulf, etc., R. Co. v. Butler (Tex. Civ. App.), 63 S. W. 650; Texas, etc., R. Co. v. Murtishaw (Tex. Civ. App.), 78 S. W. 953; Cleveland, etc., R. Co. v. Patton, 203 Ill. 376, 67 N. E. 804; International, etc., R. Co. v. Young (Tex. Civ. App.), 72 S. W. 68; San Antonio, etc., R. Co. v. Dolan (Tex. Civ. App.), 85 S. W. 302; Gulf, etc., R. Co. v. Ware & Walker (Tex. Civ. App.), 78 S. W. 961.

41. St. Louis, etc., R. Co. v. Burns (Tex. Civ. App.), 80 S. W. 104.

42. Gulf, etc., R. Co. v. Houghton (Tex. Civ. App.), 63 S. W. 718.

43. Perry v. Chicago, etc., R. Co., 89 Mo. App. 49; Sloop v. Wabash R. Co., 93 Mo. App. 605, 67 S. W. 956; Chicago, etc., R. Co. v. Halsell (Tex. Civ. App.), 61 S. W. 1241; Southern Kansas R. Co. v. Crump (Tex. Civ. App.), 74 S. W. 335. See also Helm v. Missouri Pac. R. Co. (Mo. App.), 72 S. W. 148.

44. Galveston, etc., R. Co. v. Botts (Tex. Civ. App.), 70 S. W. 113.

is not error to take as the basis for computation of damages the difference in the market price of the cattle in the market to which they were being shipped, where the destination was known to the defendant, although its contract covered their transportation only over its own line, and their delivery to a connecting carrier for the remainder of the shipment.⁴⁵ The measure of damages for cattle dying in transit through the negligence of a carrier is the reasonable net value of such cattle at their destination.⁴⁶ Where cattle were delivered by a carrier in a condition which rendered them unsalable for food, expenses incurred by plaintiff in restoring them so as to make them marketable, which redounded to the benefit of defendant by enhancing the price of the animals, were proper elements of plaintiff's damages.⁴⁷ The only damage shown being deterioration in the weight and condition of the cattle, an instruction that the measure of damages would be the difference between the market value when the cattle should have arrived, and when they did arrive, and such damages as they might have sustained by the negligent delay in furnishing the cars, was erroneous, as authorizing double damages.⁴⁸ In an action against a railroad company for delay in shipping cattle, plaintiff was entitled to recover what he paid for extra feed because of the delay, and the difference between the value of the cattle in the condition they were in when delivered, and the condition they would have been in had the delay not occurred.⁴⁹ It is the duty of the carrier

See also *Glasscock v. Chicago, etc., R. Co.*, 86 Mo. App. 114.

45. *Missouri, etc., R. Co. v. Truskett*, 186 U. S. 479, 22 S. Ct. 943, 46 L. Ed. 1259. A shipper of cattle damaged in transit may put them on the market for sale at their place of destination, and is not required to seek some other market. *St. Louis, etc., Ry. Co. v. Honea* (Tex. Civ. App.), 84 S. W. 267.

A shipper of cattle for sale need not hold and feed them, to obviate the effect of a carrier's negligence, but may dispose of them at once in the market, and sue for the difference between their market value then and there, and what it would have been with proper transportation.

St. Louis S. W. Ry. Co. v. Hunt (Tex. Civ. App.), 81 S. W. 322.

46. *St. Louis, etc., R. Co. v. Burns* (Tex. Civ. App.), 80 S. W. 104; *Gulf, etc., R. Co. v. Butler* (Tex. Civ. App.), 73 S. W. 84, where an owner of cattle, which died from injuries in transit, sold the same at the point of destination, the amount received therefor should be deducted from damages recovered against the carrier for injuries to the cattle.

47. *Chicago, etc., R. Co. v. Woodward* (Ind.), 72 N. E. 558.

48. *St. Louis S. W. R. Co. v. Muisick* (Tex. Civ. App.), 80 S. W. 673; *Nelson v. Great Northern R. Co.*, 28 Mont. 297, 72 Pac. 642.

49. *Hendrix v. Wabash, etc., R.*

to inquire of the shipper whether an animal possesses any special value, and the shipper is entitled to recover its full value, although the carrier was not informed of it, in the absence of misrepresentations inducing the carrier to give a lower freight rate or to exercise less care.⁵⁰ The carrier is likewise bound to examine into the condition of cattle, and it is not relieved of liability because it was not informed, in the absence of misrepresentation, or the actual condition of the animal not being apparent, as that a cow was pregnant, or a mare with foal.⁵¹

§ 17. Limitation of liability.—The general rules by which limitation of the carrier's liability is governed as discussed in carriers of goods apply as well to carriers of live stock.⁵² Where written contracts for the transportation of cattle, executed en route, limited the carrier's liability to its own lines, but did not purport to cover shipments beyond, by virtue of an oral agreement made at the instance of the carrier's agent to conceal the real destination of the cattle, such carrier was estopped to contend that its liability was limited to injuries occurring on its own line.⁵³ Where at the time of a parol contract between a shipper of live stock and the carrier, the shipper expected to sign a written contract, and he subsequently did so, he was not in position to avoid the force of provisions in the written contract limiting the liabil-

Co. (Mo. App.), 80 S. W. 970. See Kansas City, etc., R. Co. v. Barnett, 69 Ark. 150, 61 S. W. 919, as to recovery of reasonable expenses of collecting cattle which had escaped and holding them for shipment; Texas, etc., R. Co. v. Powell (Tex. Civ. App.), 79 S. W. 86, expenses for pasture, feeding, and care of cattle reasonably necessary, where there was a negligent delay to furnish cars, are recoverable.

Where two connecting carriers were sued for injuries to cattle carried over both roads, and a verdict for the full amount of damages demanded was rendered against one road, the verdict is excessive, the evidence tending to show both roads negligent. Gulf, etc., Ry. Co. v. Lee (Tex. Civ. App.), 65 S. W. 54.

In an action against a railroad company for failure to deliver certain live stock alleged to have been received by defendant as carrier, plaintiff could not recover freight charges, in the absence of any evidence that such charges had been paid. Johnson v. Alabama Great Southern R. Co., (Ala.) 37 So. 226.

50. Chicago, etc., R. Co. v. Harmon, 12 Ill. App. 54; Melendy v. Bour, 78 Va. 544.

51. New York, etc., R. Co. v. Estill, 147 U. S. 591; McCune v. Burlington, etc., R. Co., 52 Iowa, 600; Missouri Pac. R. Co. v. Fagan (Tex. Civ. App.), 27 S. W. 887.

52. See Carriers of Goods; Limitation of Liability.

53. Chicago, etc., R. Co. v. Carroll (Tex. Civ. App.), 81 S. W. 1020.

ity of the carrier to damages occurring on its own line.⁵⁴ Where plaintiffs had been engaged in shipping cattle over other lines for years, and had been executing limited liability contracts therefor, they were bound by the legal provisions of a similar contract entered into with defendants for the shipment in question.⁵⁵ The granting of rates specified in a schedule filed with the Interstate Commerce Commission is not a consideration for a contract limiting the railroad company's liability for delay in the transportation of live stock, though the company had a schedule of other and higher rates which was not filed with the commission.⁵⁶ Where a shipper of live stock signed a special contract, in consideration of the reduced freight rate, that the defendant should be liable only as a private carrier for hire, in an action for damages to live stock, it was error to charge that the railroad company was bound to exercise extraordinary diligence.⁵⁷

§ 18. Stipulations that shipper will accompany stock, load and unload.—A common carrier has a right to limit its liability by a special contract that the shipper or his representative shall accompany, take care of in transit, prevent the escape of, and feed and water live stock transported by it, proper facilities being supplied by the carrier, and thus relieve itself of these duties. Under such a contract the shipper is liable for any loss or damage resulting from his failure to comply with these provisions.⁵⁸ The carrier may also contract for nonliability for loss or injury in loading, unloading and reloading of the stock, and impose these

54. Chicago, etc., R. Co. v. Halsell (Tex. Civ. App.), 81 S. W. 1243.

55. Texas & P. Ry Co. v. Byers Bros. (Tex. Civ. App.), 84 S. W. 1087.

56. Summers v. Wabash R. Co. (Mo. App.), 79 S. W. 481.

57. Central of Ga. Ry. Co. v. Glascock & Warfield, 117 Ga. 938, 43 S. E. 981.

58. Baltimore, etc., R. Co. v. Fox, 113 Ill. App. 180; Ormsby v. Union Pac. R. Co., 4 Fed. 706, 2 McCrary (U. S.), 48; Chicago, etc., R. Co. v. Schuldt (Neb.), 92 N. W. 162; St. Louis, etc., R. Co. v. Weakly, 50 Ark.

397; Georgia R., etc., Co. v. Reid, 91 Ga. 377; Betts v. Farmers' L. & T. Co., 21 Wis. 80; Gannell v. Ford, 5 L. T. N. S. 604; Harrison v. London, etc., R. Co., 2 B. & S. 122, 110 E. C. L. 122.

Under a statute prohibiting common carriers from contracting for relief from any liability imposed on them by law, provisions in a bill of lading for stock that the shipper should feed, water, and attend to the stock at his own risk while in transit do not relieve the carrier of its duty to look after the stock. Cincinnati, etc., Ry. Co. v. Sanders & Russell, 25 Ky. Law Rep. 2333, 80 S. W. 488.

duties upon the shipper, in which event the latter will be liable for all injuries except such as result from the carrier's own negligence in failing to provide proper facilities.⁵⁹ But such a provision does not apply where the carrier itself assumes control of such matters.⁶⁰

§ 19. Injuries caused by viciousness of animals or defects in cars.—A shipper can by special contract, in consideration of special freight rates, assume, and relieve the carrier from, all liability for injuries, loss or damage which live stock transported may sustain as a result of their viciousness or inherent propensities.⁶¹ But such a stipulation will not protect the carrier from liability for a loss caused by its own negligence,⁶² or where the carrier's negligence was the proximate cause, although the injuries resulted from the viciousness of the animals.⁶³ The shipper may likewise relieve the carrier from liability for injuries to stock caused by defects in the cars which have been examined by him,⁶⁴ unless the carrier knew the cars to be unsafe, and the shipper failed to discover the unsoundness by reason of the defect being hidden. Proof of these facts would charge the carrier with damages accruing

59. Candee v. New York, etc., R. Co., 73 Conn. 667, 49 Atl. 17, where the shipper had entered into a uniform live stock contract, which allowed a lower rate in consideration of his loading and unloading at his own risk, he could not recover for injuries to cattle while being unloaded, by reason of a defective chute; Morse v. Canadian Pac. R. Co., 97 Me. 77, 53 Atl. 874; Robert C. White Live Stock, etc., Co. v. Chicago, etc., R. Co., 87 Mo. App. 330; Myers v. Wabash, etc., R. Co., 90 Mo. 98; Terre Haute, etc., R. Co. v. Sherwood, 132 Ind. 129; Illinois Cent. R. Co. v. Peterson, 68 Miss. 454; Texas & P. R. Co. v. Edins, (Tex. Civ. App.) 83 S. W. 253. See also Central R., etc., Co. v. Smitha, 85 Ala. 47; Atchison, etc., R. Co. v. Mason, 4 Kan. App. 391; Chicago, etc., R. Co. v. Van Dresar, 22 Wis. 511.

60. San Antonio, etc., R. Co. v.

Dolan (Tex. Civ. App.), 85 S. W. 302.

61. Ragsdale, Harper & Weathers v. Southern Ry. Co., 119 Ga. 627, 46 S. E. 832; Illinois Cent. R. Co. v. Morrison, 19 Ill. 139; Central R., etc., Co. v. Smitha, 85 Ala. 47; Lake Shore, etc., R. Co. v. Bennett, 89 Ind. 457; Grand Trunk R. Co. v. Vogel, 11 Can. Sup. Ct. 612, 27 Am. & Eng. R. Cas. 18.

62. Texas, etc., R. Co. v. Davis, 2 Tex. App. Civ. Cas. § 190. In New York it will, if specially provided, protect from the negligence of the carrier's servants. Wilson v. New York Cent., etc., R. Co., 97 N. Y. 87.

63. Loeser v. Chicago, etc., R. Co. (Wis.), 69 N. W. 372.

64. Lake Erie, etc., R. Co. v. Holland, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948; Ragsdale, Harper & Weathers v. Southern Ry. Co., 119 Ga. 627.

therefrom, notwithstanding a special contract released it from liability.⁶⁵ A provision that the shipper accepts the cars tendered, and agrees that they are satisfactory, does not relieve the carrier from liability for defects therein.⁶⁶ In New York a contract releasing the carrier from liability occasioned by the insecurity of its cars, or by the negligence of its servants, is valid, and will prevent the shipper recovering for injuries thus occasioned.⁶⁷

§ 20. Stipulations as to claims for damages.—A provision in a contract for the shipment of live stock that any claim for injury or damages shall be made by the owner or consignee before the stock is removed from the station at the place of destination, has been held in some jurisdictions to be reasonable and valid,⁶⁸ while in other jurisdictions it has been held to be unreasonable and invalid.⁶⁹ Where the carrier has no agent at the place of destination, or he cannot be found,⁷⁰ or the circumstances of the case

65. Lake Erie, etc., R. Co. v. Holland, *supra*, and the shipper's failure to send an attendant with the stock shipped would not relieve the carrier from liability.

66. San Antonio, etc., R. Co. v. Dolan (Tex. Civ. App.), 85 S. W. 302. See also Potts v. Railway Co., 17 Mo. App. 394; Welsh v. Railroad Co., 10 Ohio St. 65, 75 Am. Dec. 490.

67. Wilson v. New York Cent., etc., R. Co., 97 N. Y. 87.

68. Ark.—Kansas, etc., R. Co. v. Ayers (Ark.), 38 S. W. 516. See also St. Louis, etc., R. Co. v. Jacobs, 70 Ark. 401.

Ga.—Southern Ry. Co. v. Adams, 115 Ga. 705, 42 S. E. 35.

Kan.—Missouri, etc., R. Co. v. Kirkham (Kan.), 65 Pac. 261; Atchison, etc., R. Co. v. Dill, 48 Kan. 210; Wichita, etc., R. Co. v. Koch, 47 Kan. 753; Sprague v. Missouri Pac. R. Co., 34 Kan. 347; Goggin v. Kansas Pac. R. Co., 12 Kan. 416.

Mo.—Rice v. Kansas Pac. R. Co., 63 Mo. 314; St. Louis, etc., R. Co. v. Cleary, 77 Mo. 634.

N. C.—Selby v. Wilmington, etc., R. Co., 113 N. C. 588.

Tex.—Galveston, etc., R. Co. v. Harman, 2 Tex. App. Civ. Cas. § 135; Texas Cent. R. Co. v. Morris, 1 Tex. App. Civ. Cas. § 373.

69. Ill.—Coles v. Louisville, etc., R. Co., 41 Ill. App. 608. Compare Black v. Wabash, etc., R. Co., 111 Ill. 351.

Ky.—Ohio, etc., R. Co. v. Tabor, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18. Compare Owen v. Louisville, etc., R. Co., 87 Ky. 626.

Minn.—Engesether v. Great Northern R. Co., 65 Minn. 168, 68 N. W. 4.

Tenn.—Louisville, etc., R. Co. v. Wynn, 88 Tenn. 320; Smitha v. Louisville, etc., R. Co., 86 Tenn. 198.

Tex.—Railroad Co. v. Stanley, 89 Tex. 42, 33 S. W. 109; Gulf, etc., R. Co. v. Yates (Tex. Civ. App.), 32 S. W. 355.

70. Carpenter v. Eastern R. Co. (Minn.), 69 N. W. 720; Engesether v. Great Northern R. Co., 65 Minn. 168.

were such that it was not possible to discover the damage or its extent for some time,⁷¹ such a stipulation is unreasonable, and failure to give the required notice or present the claim will not defeat the shipper's right of action. In Texas the carrier must allege and prove the reasonableness of such a stipulation.⁷² In other jurisdictions the shipper having assented to the stipulation must prove that the stipulation is unreasonable.⁷³ A reasonable and substantial compliance with the stipulation is all that is required.⁷⁴ Notice of injury to stock, required by a contract of shipment to be given by the shipper as a condition precedent to his right to damages for such injury, was waived by the carrier, where it, on receiving a partial and incomplete notice, refused to investigate the shipper's claim and denied liability.⁷⁵ A stipulation limiting the time in which claims for damages may be presented is binding on the shipper, when voluntarily and understandingly entered into by him, as the manifest object of such a provision is to force those claiming to be damaged by the carrier's negligence to promptly present their claims for adjustment, while the facts and circumstances on which they are based are fresh in the memories of the parties and witnesses, and to prevent the company from being harrassed or imposed upon by dishonest claimants.⁷⁶ A provision that the carrier shall not be liable for damages on account of injury or damage to the property shipped, unless a claim therefor, verified by affidavit, shall be presented to it or its agent within 30 days after the property is delivered, is reasonable and valid; and the presentation of such claim thereunder is a condition precedent to the right of the shipper to maintain an action, and must be alleged in his complaint.⁷⁷ But it has been held that a special contract with a carrier for transportation of

71. Ormsby v. Union Pac. R. Co.,
2 McCrary (U. S.), 48; Louisville,
etc., R. Co. v. Steele, 6 Ind. App.
183; Oxley v. St. Louis, etc., R. Co.,
65 Mo. 629; Gulf, etc., R. Co. v.
Stanley (Tex.), 33 S. W. 110.

72. Fort Worth, etc., R. Co. v.
Greathouse, 82 Tex. 104, 49 Am. &
Eng. R. Cas. 165.

73. Louisville, etc., R. Co. v.
Sowell, 90 Tenn. 17. See Carriers of
Goods.

74. Nelson v. Great Northern R.

Co., 28 Mont. 297, 72 Pac. 642; Western R. Co. v. Harwell, 97 Ala. 341; Atchison, etc., R. Co. v. Temple, 47 Kan. 7; Rice v. Kansas Pac. R. Co., 63 Mo. 314; Gulf, etc., R. Co. v. York, 2 Tex. App. Civ. Cas. § 812.

75. 101 Live Stock Co. v. Kansas City, etc., R. Co., 100 Mo. App. 674.

76. Baltimore, etc., R. Co. v. Ross, 105 Ill. App. 54.

77. Metropolitan Trust Co. v. Toledo, etc., R. Co., 107 Fed. 628; Harms v. Hunt. Id.

live stock, reciting that no claim for damages shall be allowed unless a claim is made and delivered to its agent within five days after removal of the stock from the car, is void as against public policy; such provision being a limitation on the carrier's liability.⁷⁸ So, of a provision fixing a limit of ten days.⁷⁹ And a limit for one day has been held invalid under the Texas Statute.⁸⁰

§ 21. Limitation of liability to a specified amount.—The rules governing the validity of stipulations fixing a specified amount beyond which the carrier shall not, in any event, be liable, are the same with respect to carriers of live stock as in respect to carriers of goods.⁸¹ Such contracts are common in the transportation of live stock, and their reasonableness is held to be specially demonstrated when applied to this class of property, because the agents of common carriers are not expected to be, and usually are not, experts as to the special or peculiar value of particular animals, and ordinarily must rely on the shipper's statement, such value not being usually apparent from mere inspection.⁸² Where such a contract is fairly and freely entered into, in consideration of a reduced freight rate, the shipper is bound thereby, and the measure of the liability of the carrier for damages resulting from a breach of its duties is the amount of the actual damages, not exceeding the amount stipulated in the contract as the true value of the stock.⁸³ Where there is no evidence of a reduction in the

78. Baltimore, etc., R. Co. v. Hubbard, 25 Ohio Cir. Ct. R. 477.

79. Illinois Cent. R. Co. v. Radford, 23 Ky. L. Rep. 886, 64 S. W. 511.

80. Chicago, etc., R. Co. v. Mitchell (Tex. Civ. App.), 85 S. W. 286.

Waiver of provision.—A shipper sought to recover damages arising from defendant's neglect in the transportation of a carload of hogs. The way-bill provided that no claim for damages should be made, unless filed within five days and verified by the affidavit of the shipper or his agent. Plaintiff's claim was filed one day late, but was returned to him to have the bill attached, which was done, whereon the defendant de-

clined to settle, but not on the ground that the claim was filed too late. Held sufficient to show a waiver of the provision as to time of filing the claim. Wallace v. Lake Shore, etc., Ry. Co., 10 Detroit Leg. N. 331 (Mich.), 95 N. W. 750.

81. See Carriers of Goods.

82. Alair v. Northern Pac. R. Co., 53 Minn. 160, 39 Am. St. Rep. 588, 55 Am. & Eng. R. Cas. 360; Duntley v. Boston, etc., R. Co., 66 N. H. 263; Johnstone v. Richmond, etc., R. Co., 39 S. C. 55; Loeser v. Chicago, etc., R. Co., (Wis.) 69 N. W. 372; Melendy v. Barbour, 78 Va. 544.

83. Metropolitan Trust Co. v. Toledo, etc., R. Co., 117 Fed. 628; Jennings v. Smith, 160 Fed. 139, 45

rate charged for a shipment of live stock, there was no consideration for the limitation of the carrier's liability in the contract, and such limitation is no defense.⁸⁴ But a stipulation that in case of loss the value should be fixed as at the time and place of shipment, is valid, though there is nothing to show that the transportation was at a reduced rate.⁸⁵ Where a shipper executed a contract of shipment of live stock, containing a stipulation limiting its value, it will be presumed, in the absence of fraud, mistake, imposition, or incapacity, and no protest having been made by him, that he knew and consented to its terms.⁸⁶ Evidence of custom of a carrier in issuing contracts for the transportation of live stock is inadmissible to impose a limitation of the carrier's liability not provided for in the contract of shipment.⁸⁷ A recital in a contract to carry live stock, that the rate is a reduced rate, is *prima facie* evidence of such fact, and such reduced rate is a sufficient consideration for a release of liability in excess of the declared value.⁸⁸

C. C. A. 249; O'Malley v. Great Northern R. Co., 86 Minn. 580, 90 N. W. 974, whether the limitation as to value was honestly made as a basis for the carrier's compensation was a question for the jury; Normile v. Oregon R. & Nav. Co., 41 Or. 177, 69 Pac. 928; Nelson v. Great Northern R. Co., 28 Mont. 297, 72 Pac. 642; Hart v. Pennsylvania R. Co., 112 U. S. 331; Starnes v. Railroad Co., 91 Tenn. 516; Louisville, etc., R. Co. v. Frazee, 24 Ky. L. Rep. 1273, 71 S. W. 437, the shipper is not limited to the stipulated amount, where there was no agreement that the amount so stated should be treated as the value of the animals; Chicago, etc., R. Co. v. Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095, but shipper is not bound by a stipulation unless he assented thereto. *Contra*: Illinois Cent. R. Co. v. Radford, 23 Ky. L. Rep. 886, 64 S. W. 511.

84. Sloop v. Wabash R. Co., (Mo. App.) 84 S. W. 111; Rice v. Wabash R. Co., (Mo. App.) 80 S. W. 976.

85. 101 Live Stock Co. v. Kansas City, etc., R. Co., 100 Mo. App. 674, 75 S. W. 782.

86. Evansville, etc., R. Co. v. Kevekordes, (Ind. App.) 69 N. E. 1022.

87. McMillan v. American Express Co., (Iowa) 98 N. W. 629.

88. Bowring v. Wabash R. Co., 90 Mo. App. 324.

Shippers entitled to proportional recovery.—Where a contract between a shipper of horses and the carrier provided that the latter should be liable only to the extent of actual damage, which should in no case exceed the valuation of the shipment declared by the shipper, and there was a partial loss, but the horses thereafter brought the full declared value, the carrier was not exempt from liability, but the shipper was entitled to recover such a proportion of the actual loss as the declared value of the shipper bore to the actual value. United States Ex-

§ 22. Loss or injury due to carrier's negligence.—In New York, where a carrier is permitted to contract against liability for negligence on the part of its servants, agents, and employes, a stipulation specifically and in express terms exempting the carrier from liability, although due to the carrier's negligence, is valid and binding.⁸⁹ This is also the English rule.⁹⁰ The rule generally maintained elsewhere is that a carrier of live stock cannot, by any stipulation in a contract, exempt itself from liability in cases where it appears that the proximate cause of the loss or injury was the negligence of the carrier.⁹¹ It cannot stipulate that

press Co. v. Joyce, (Ind.) 72 N. E. 865.

Where value stated is greatly below true value.—Where the bill of lading contains a stipulation that, in consideration of reduced rates, liability of the carrier shall be limited to the value expressed therein, such stipulation is void as against public policy in case the value so stated is greatly below the true value, whether the carrier is informed of the true value or not. Southern Ry. Co. v. Jones, (Ala.) 31 So. 501; Nashville, etc., R. Co. v. Stone & Haslett (Tenn.) 79 S. W. 1031.

Conflict of laws.—Where a contract for the carriage of a dog, made in Ohio, limiting the carrier's common law liability, would have been invalid in Kentucky, under Const. § 196, forbidding carriers to contract away their common law liability, the carrier should show, in order to protect itself under such contract, not only that the contract was valid under the law of Ohio, but that the loss of the dog, constituting the non-performance of the contract, also occurred there, Adams Exp. Co. v. Walker, 26 Ky. Law Rep. 1025, 83 S. W. 106, 67 L. R. A. 412.

89. Holsapple v. Rome, etc., R. Co., 86 N. Y. 275, 3 Am. & Eng. R. Cas. 487; Cragin v. New York Cent. R.

Co., 51 N. Y. 61, 10 Am. Rep. 559, 4 Am. Ry. Rep. 418; Heineman v. Grand Trunk R. Co., 1 Sheld. (N. Y.) 95, 31 How. Pr. (N. Y.) 430. In the former case a stipulation exempting the carrier from loss by heat, although due to the carrier's negligence in not watering and cooling the hogs, was held valid, as any other construction would render the contract meaningless in that it would not affect the carrier's liability, as that would exist in the absence of any contract. See Carriers of Goods.—New York rule.

90. Farr v. Great Western R. Co., 35 U. C. Q. B. 534; Hood v. Grand Trunk R. Co., 20 U. C. C. P. 361.

91. Kentucky Bank v. Adams Express Co., 93 U. S. 174; Welch v. Boston, etc., R. Co., 41 Conn. 333; Nicoll v. East Tennessee, etc., R. Co., 89 Ga. 260; Chicago, etc., R. Co. v. Calumet Stock Farm, 96 Ill. App. 337, 61 N. E. 1095, carrier cannot exempt itself from its gross negligence; Wabash R. Co. v. Brown, 152 Ill. 484; United States Express Co. v. Joyce, (Ind. App.) 69 N. E. 1015; Anderson v. Lake Shore, etc., R. Co., (Ind. App.) 59 N. E. 396; Indianapolis, etc., R. Co. v. Allen, 31 Ind. 394; Rhodes v. Louisville, etc., R. Co., 9 Bush (Ky.) 688; Louisville, etc., R. Co. v. Owen, 93 Ky. 201; Sisson v.

it shall be liable only for losses or injuries due to its gross negligence.⁹² The carrier has been guilty of gross negligence, under the circumstances of the case, in certain cases where the validity of such a stipulation was not passed upon.⁹³ In the construction of such contracts, it will be presumed that the parties intended to make a legal contract, and a provision will not be construed as exempting the carrier from liability for negligence unless the intention is clearly expressed.⁹⁴

§ 23. Stipulation requiring shipper to report condition of stock.—A stipulation has been held to be unreasonable and, therefore, invalid, which requires the shipper to furnish to each conductor into whose charge his stock may come a statement showing their condition, and providing that a failure to furnish such report shall be conclusive evidence that the stock were in good order at the time such report should have been made. Such a stipulation if enforceable would, in effect, act as an estoppel to a meritorious claim, when the failure to make such report might not, in any wise, mislead the carrier or place it in any worse con-

Cleveland, etc., R. Co., 14 Mich. 489; Moulton v. St. Paul, etc., R. Co., 31 Minn. 85; Christenson v. American Express Co., 15 Minn. 270; Baltimore, etc., R. Co. v. Hubbard, 25 Ohio, C. C. R. 477; Welch v. Pittsburgh, etc., R. Co., 10 Ohio St. 65; Armstrong v. United States Express Co., 159 Pa. St. 640; Trace v. Pennsylvania R. Co., 26 Pa. Super Ct. 466; Minter v. Chicago, etc., R. Co., 82 Mo. App. 130; Ball v. Wabash, etc., R. Co., 83 Mo. 574; Botts v. Wabash R. Co., (Mo. App.) 80 S. W. 976; Johnstone v. Richmond, etc., R. Co., 39 S. C. 55; Normile v. Oregon R. Nav. Co., 41 Or. 177, 69 Pac. 928; Gulf, etc., R. Co. v. Duman, (Tex. Civ. App.) 81 S. W. 789; Chicago, etc., R. Co. v. Mitchell, (Tex. Civ. App.) 85 S. W. 286; Missouri Pac. R. Co. v. Smith, (Tex.) 16 S. W. 803; Loeser v. Chicago, etc., R. Co., (Wis.) 69 N. W. 372; Bosley

v. Baltimore, etc., R. Co., (W. Va.) 46 S. E. 613. But see Coup v. Wabash, etc., R. Co., 56 Mich. 111, wherein a stipulation that the carrier should not be liable for injuries to a menagerie caused by a want of care was upheld, where the carrier moved the menagerie in the latter's own cars controlled by its own agents, and though operated by the carrier's employes, run upon a time schedule to suit the menagerie.

92. Alabama, etc., R. Co. v. Thomas, 83 Ala. 343; Moulton v. St. Paul, etc., R. Co., 31 Minn. 85; Missouri Pac. R. Co. v. Cornwall, 70 Tex. 611; Missouri Pac. R. Co. v. Harris, 67 Tex. 166.

93. Bryan v. Southwestern R. Co., 68 Ga. 805; Indianapolis, etc., R. Co. v. Adams, 36 Ill. App. 629.

94. Powell v. Pennsylvania R. Co., 32 Pa. St. 414; Virginia, etc., R. Co. v. Sayers, 26 Gratt. (Va.) 328.

dition than it would occupy if the condition was complied with.⁹⁵ Receipts and written statements signed by a shipper without reading, showing that the articles shipped arrived in good condition at intermediate points along the route, have also been held to amount to no more than an admission of the facts stated, and not to be conclusive if untrue.⁹⁶

§ 24. Limitations rendered inoperative.—Limitations in a contract of shipment upon the liability of the carrier are rendered inoperative and the carrier is subject to its full common law liability as an insurer, where it deviates from the contract by carrying the property by freight, instead of complying with a provision that it shall be carried by passenger train service,⁹⁷ or violates a provision of the contract that the shipper shall be entitled to ride free on the train carrying his stock, by a refusal to carry the shipper.⁹⁸

§ 25. Presumptions and burden of proof.—Where it is shown that live stock were delivered to a carrier for shipment in good condition, and that the loss or injury was not due to the neglect of any duty owing by the shipper or assumed by him, and the stock are not accounted for by the carrier,⁹⁹ or an unreasonable delay in the transportation is shown,¹ or loss resulting from an injurious accident by reason of that which the carrier provides for the transportation,² negligence or a want of that care which the law

95. Missouri, etc., R. Co. v. Carter, 9 Tex. Civ. App. 677.

96. Missouri Pac. R. Co. v. Ivy, 79 Tex. 444, 15 S. W. 692; Missouri Pac. R. Co. v. Fennell, 79 Tex. 448, 15 S. W. 693; St. Louis, etc., R. Co. v. Turner, 1 Tex. Civ. App. 625.

97. Pavitt v. Lehigh Valley R. Co., 153 Pa. St. 302, 32 W. N. C. 65, 25 Atl. 1107, but a provision of such a contract of shipment for notice by the shipper to the carrier of any claim for damages thereunder within five days from the time the property is unloaded, is not rendered inoperative by such deviation.

98. Texas, etc., R. Co. v. Davis, 2 Tex. App. Civ. Cas., § 190.

99. Missouri Pac. R. Co. v. Texas, etc., R. Co., 41 Fed. 913; Adams Express Co. v. Walker, 26 Ky. L. Rep. 1025, 83 S. W. 106, 67 L. R. A. 412; Chapin v. Chicago, etc., R. Co., 79 Iowa, 582.

1. McCrary v. Chicago, etc., R. Co., 109 Mo. App. 567, 83 S. W. 82; Nashville, etc., R. Co. v. Stone & Haslett, (Tenn.) 79 S. W. 1031; Anderson v. Atchison, etc., R. Co., 93 Mo. App. 677, 67 S. W. 707; Wallace v. Lake Shore, etc., R. Co., (Mich.) 10 Det. Leg. N. 331, 95 N. W. 750, as to presumption as between conencting carriers; Bosley v. Baltimore, etc., R. Co., (W. Va.) 46 S. E. 613.

2. Trace v. Pennsylvania R. Co., 25

imposes upon it will be presumed on the part of the carrier, and the burden placed upon it of relieving itself from that presumption. Where injuries to live stock in transit are such that they are as likely to have been caused by the nature of the animals as by the negligence of the carrier, the court cannot assume that the injuries were due to the latter cause.³ Where there is a conflict of evidence, or more than one conclusion can fairly be drawn from the facts, the question as to how the loss or injury was caused is properly one for the jury to determine from all the facts and circumstances of the case.⁴ Proof of delivery to the carrier of stock, in good condition, and injury or death while in the custody of the carrier, makes a *prima facie* case against it, which may be rebutted by evidence that it provided all suitable means of transportation, and exercised that degree of care which the nature of the property required.⁵ Where cattle were delivered to a carrier without any limitation of its common-law liability, and without the shipper assuming any of the hazards of shipment, or being required or permitted to accompany and care for the cattle, and it is shown that the cattle were delivered at their destination in an injured condition, the burden is on the carrier to prove that the cause of injury was one for which it is not liable.⁶ Though the contract under which animals were carried by a railroad excepted fire when not caused by the carrier's negligence from the risk assumed, the burden of proof was on the carrier in an action for damages from fire to show that the injury done was not due to its negligence.⁷ As a general rule, where loss or injury has been

Pa. Super. Ct. 466, if a railroad company employed in the transportation of live stock permits straw or other combustible material to be used on the cars and a fire originates therefrom by which the animals are injured, a presumption of negligence arises against the company, which it must rebut in order to relieve itself of liability for the loss; Schaeffer v. Philadelphia, etc., R. Co., 168 Pa. St. 209; Crow v. Chicago, etc., R. Co., 57 Mo. App. 135.

3. Lewis v. Pennsylvania R. Co., 70 N. J. L. 132, 56 Atl. 128, affd. 59 Atl. 1117.

4. Estill v. New York, etc., R. Co.,

147 U. S. 591, 41 Fed. 849; St. Louis, etc., R. Co. v. Weakly, 50 Ark. 397; Missouri Pac. R. Co. v. Texas, etc., R. Co., 41 Fed. 913; Indiana, etc., R. Co. v. James, 18 Ill. App. 655; Ball v. Wabash, etc., R. Co., 83 Mo. 574; Good v. Galveston, etc., R. Co., (Tex.) 11 S. W. 854; Galveston, etc., R. Co. v. Stovall, 3 Tex. App. Civ. Cas., § 250.

5. Baltimore, etc., R. Co. v. Fox, 113 Ill. App. 180; Keyes-Marshall Bros. Livery Co. v. St. Louis, etc., R. Co., (Mo. App.) 80 S. W. 53.

6. Chicago, etc., R. Co. v. Woodward, (Ind.) 72 N. E. 558.

7. Texas & P. Ry. Co. v. Dishman

shown while in the custody of the carrier, the burden of proof is on the carrier to show that loss or injury was due either to the proper vice or inherent propensities of the stock,⁸ or to the negligence of the shipper in failing to discharge some duty which he had assumed, or to some cause other than its own negligence.⁹ In New York and some other States the carrier, in addition to showing that the injury arose from the viciousness of the animals, must show that it has not been guilty of any negligence itself.¹⁰ Where the shipper has undertaken to care for the stock, and to load or unload it, or has assumed any other duty in respect to it, the burden is on him to show that the negligence of the carrier was the proximate cause of the loss or injury.¹¹ But the burden

& Tribble, (Tex. Civ. App.) 85 S. W. 319.

8. Richmond, etc., R. Co. v. Trousdale, 99 Ala. 389; Western R. Co. v. Harwell, 91 Ala. 340; Toledo, etc., R. Co. v. Durkin, 76 Ill. 395; McCoy v. Keokuk, etc., R. Co., 44 Iowa, 424; Dow v. Portland Steam-Packet Co., 84 Me. 490; Evans v. Fitchburg R. Co., 111 Mass. 142; Lindslev v. Chicago, etc., R. Co., 36 Minn. 539; Hull v. Chicago, etc., R. Co., 41 Minn. 510; Doan v. St. Louis, etc., R. Co., 38 Mo. App. 408; Wallingford v. Columbia, etc., R. Co., 26 S. C. 258; Louisville, etc., R. Co. v. Wynn, 88 Tenn. 320. See Cash v. Wabash R. Co., 81 Mo. App. 109.

9. Nelson v. Great Northern R. Co., 28 Mont. 297, 72 Pac. 642.

10. Cragin v. New York Cent. R. Co., 51 N. Y. 61; Penn. v. Buffalo, etc., R. Co., 49 N. Y. 204, 10 Am. Rep. 355; Giblin v. National Steamship Co., 8 Misc. Rep. (N. Y.) 22, 28 N. Y. Supp. 69; Evans v. Fitchburg R. Co., 111 Mass. 142; Adams Express Co. v. Bratton, 106 Ill. App. 563, where the carrier has the sole custody of animals, the burden of proof is on it to show that it has exercised ordinary care in the carriage of the freight; in other words, that it is

free from negligence which, as a sufficient contributing cause, brought about the damage.

11. Louisville, etc., R. Co. v. Harned, 23 Ky. L. Rep. 1651, 66 S. W. 25; Needy v. Western Maryland R. Co., 22 Pa. Super. Ct. 489; Chicago, etc., R. Co. v. Carey, 115 Ill. 115; Cleveland, etc., R. Co. v. Crawford, 24 Ohio St. 631; Boehl v. Chicago, etc., R. Co., 44 Minn. 191; Peterson v. Chicago, etc., R. Co., (S. D.) 102 N. W. 595. The burden of proof is on the shipper, suing for injuries to live stock, to show that a valuation placed on the property in the contract of shipment, on which the rates of transportation were based, was invalid and not binding on him. United States Exp. Co. v. Joyce, (Ind. App.) 69 N. E. 1015. The burden of establishing the absence of consideration for a contract limiting the value of live stock shipped rested on the shipper, where he alleged absence of such consideration in his complaint. Evansville, etc., R. Co. v. Kevekordes, (Ind. App.) 69 N. E. 1022. Where a contract of shipment provides that the shipper shall make any claim for injuries to stock within a certain time, the burden of showing performance of such condition rests on the

is on the carrier to show that the terms of a contract of carriage, relied on in defense to an action for injury to live stock, were assented to by the consignor.¹² The carrier is relieved from responsibility upon proof that it has provided suitable means of transportation and exercised the degree of care which the nature of the property requires, as the presumption then arises that the stock were injured through their inherent vice.¹³ Where this is not shown, and the defense is merely that the injury resulted from the proper vice of the animals, such defense must be proven affirmatively.¹⁴ Where the carrier is by special contract relieved from liability for loss occasioned otherwise than by negligence, the fact of loss raises no presumption of negligence, and the burden is upon the shipper to prove negligence.¹⁵ Where the shipper assumes to take care of the stock during transportation he has the burden of proving that the loss was occasioned by the carrier's negligence, whether in failing to furnish proper care or in the transportation.¹⁶

§ 26. Liability of connecting carriers.—A connecting line is ordinarily relieved from all liability after it has delivered live stock in transit to the next succeeding line in good order.¹⁷ But

shipper. *Kalina & Cizek v. Union Pac. R. Co.*, (Kan.) 76 Pac. 438. The burden of showing that a defect in a car accepted by him as sufficient was not patent when he examined the car is on the shipper. *Williams v. Central of Ga. R. Co.*, 117 Ga. 830, 43 S. E. 980; *Nevises v. Chicago, etc., R. Co.*, (Wis.) 102 N. W. 489.

12. *Cleveland, etc., R. Co. v. Patton*, 203 Ill. 376, 67 N. E. 804.

13. *Hayman v. Philadelphia, etc., R. Co.*, 8 St. Rep. (N. Y.) 86; *Heyman v. Philadelphia, etc., R. Co.*, 54 N. Y. Super. Ct. 158; *Chicago, etc., R. Co. v. Abels*, 60 Miss. 1017; *Louisville, etc., R. Co. v. Bigger*, 66 Miss. 319; *Illinois Cent. R. Co. v. Team*, (Miss.) 20 So. 706.

14. *Fort Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

15. *Pennsylvania R. Co. v. Raiordan*, 119 Pa. St. 577; *Hussey v. Saragossa*, 3 Woods (U. S.) 380; *International, etc., R. Co. v. Smith*, 1 Tex. App. Civ. Cas., § 844; *Harris v. Midland R. Co.*, 25 W. R. 63. See *East Tennessee, etc., R. Co. v. Johnson*, 75 Ala. 596; *Lindsay v. Chicago, etc., R. Co.*, 36 Minn. 539.

16. *Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129; *St. Louis, etc., R. Co. v. Piper*, 13 Kan. 510; *Louisville, etc., R. Co. v. Hedger*, 9 Bush (Ky.) 645; *Bankard v. Baltimore, etc., R. Co.*, 34 Md. 197; *McBeath v. Wabash, etc., R. Co.*, 20 Mo. App. 445.

17. See *Connecting Carriers*. *Nashville, etc., R. Co. v. Stone & Haslett*, (Tenn.) 79 S. W. 1031.

a common carrier may make either express or implied contracts for the delivery beyond its own lines and become liable for injury on the connecting line.¹⁸ Where stock is shipped over connecting lines under a through contract of shipment, both carriers are liable for the damages occasioned by either.¹⁹ Where the contract of carriage limits the carrier's liability to damages occurring on its own line, it is not liable for damage resulting from delays on connecting lines.²⁰ But it is liable for delay in not furnishing cars within a reasonable time,²¹ and for unreasonable delay in delivering them to a connecting carrier;²² and for delay caused by defects in a car accepted from a connecting line,²³ and for injuries due to failure to properly bed the cars, although the injuries did not develop until after the cattle were in the hands of a connecting carrier.²⁴ An initial line is liable for a loss resulting from a defect in a car furnished by it, although the loss occur on a connecting line. The shipper in such case may hold either line liable.²⁵ Where a connecting carrier refuses to accept cattle ten-

18. Missouri, etc., R. Co. v. Wells, (Tex. Civ. App.) 58 S. W. 842; Texas, etc., R. Co. v. McCarty, (Tex. Civ. App.) 69 S. W. 229; Texas Mexican Ry. Co. v. Gallagher, (Tex. Civ. App.) 64 S. W. 809; San Antonio, etc., R. Co. v. Barnett, (Tex. Civ. App.) 66 S. W. 474, verbal agreements are merged in written contract.

Where a carrier contracted to ship beyond its own line on a connecting line, it is not liable to the consignor for stock loaded at a point beyond its terminus, and for which the consignor accepted a bill of lading from the carrier operating it at such place. *Hartley v. St. Louis, etc., R. Co.*, (Iowa), 89 N. W. 88. See also *Robert C. White Live Stock, etc., Co. v. Chicago, etc., R. Co.*, 87 Mo. App. 330.

19. Texas, etc., R. Co. v. Andrews, (Tex. Civ. App.) 80 S. W. 390; Texas, etc., R. Co. v. Randle, 18 Tex. Civ. App. 351, 44 S. W. 603. See *Texas Cent. R. Co. v. Cauble*, (Tex. Civ. App.) 81 S. W. 1022; Texas, etc., R.

Co. v. Byers Bros., (Tex. Civ. App.) 73 S. W. 427; Texas, etc., R. Co. v. Cushny, (Tex. Civ. App.) 64 S. W. 795. By statute in some states the last carrier which receives the shipment "in good order" is liable. *Susong v. Florida Cent. R. Co.*, 115 Ga. 361, 41 S. E. 566; Galveston, etc., R. Co. v. Botts, (Tex. Civ. App.) 70 S. W. 113.

20. International, etc., R. Co. v. Earnest & Bost, (Tex. Civ. App.) 77 S. W. 29; International, etc., R. Co. v. Startz, (Tex.) 77 S. W. 1.

21. Texas, etc., R. Co. v. Smith & White, (Tex. Civ. App.) 79 S. W. 614.

22. Felton v. McCreary, etc., Live Stock Co., 22 Ky. L. Rep. 1058, 50 S. W. 744.

23. St. Louis, etc., R. Co. v. Carlisle, (Tex. Civ. App.) 78 S. W. 553.

24. Tex. Cent. R. Co. v. O'Loughlin, (Tex. Civ. App.) 84 S. W. 1104.

25. Indianapolis, etc., R. Co. v. Strain, 81 Ill. 504; Potts v. Wabash,

tered by the initial carrier, because unaccompanied by a proper way-bill, the initial carrier is liable.²⁶ Where a connecting carrier, over whose line a shipment of live stock was routed, refused to accept the same, it was the duty of the initial carrier to notify the consignor of such fact, and obtain further directions, unless the property was of such a perishable nature that the delay would be calculated to injure or destroy it.²⁷ A contract to carry by connecting lines, the carrier making the contract not contracting for itself beyond its lines, but acting as agent only for the contracting carrier, and the freight charges for each line being distinct, is a separable contract.²⁸ Where cattle are shipped on a through bill of lading, a connecting carrier is not required to furnish immediate transportation for the same on receiving it, but is only bound to forward the shipment with reasonable diligence.²⁹ In an action for damages caused by delay in the shipment of cattle, connecting carriers are not liable for damages resulting from the fact that the shipment was improperly routed.³⁰

§ 27. Liability for improper loading or unloading.—It is the carrier's duty, in the absence of special contract, to load on the cars live stock tendered to it for transportation, and it is liable for injuries received by them while being loaded or resulting from improper loading or overloading.³¹ But where the shipper specially contracts to load his stock,³² or where he voluntarily undertakes to load them although there is no special contract,³³ he alone

etc., R. Co., 17 Mo. App. 394; Missouri Pac. R. Co. v. Kingsbury, (Tex. Civ. App.) 25 S. W. 323; Alabama G. S. R. Co. v. Thomas, 89 Ala. 297.

26. 101 Live Stock Co. v. Kansas City, etc., R. Co., (Mo. App.) 75 S. W. 782; Missouri, etc., R. Co. v. Dilworth, (Tex.) 67 S. W. 88.

27. Louisville, etc., R. Co. v. Duncan & Orr, 137 Ala. 446, 34 So. 988. See Ft. Worth, etc., R. Co. v. Masterson, (Tex.) 66 S. W. 833, existence of void state quarantine line will not justify a refusal to accept cattle.

28. Hughes v. Pennsylvania Co., 202 Pa. 222. 51 Atl. 990.

29. Chicago, etc., R. Co. v. Kapp, (Tex. Civ. App.) 83 S. W. 233.

30. Houston, etc., R. Co. v. Buchanan, (Tex. Civ. App.) 84 S. W. 1037; Gulf, etc., R. Co. v. Harris, (Tex. Civ. App.) 72 S. W. 71.

31. See Carriers of Goods.

32. Fordyce v. McFlynn, 56 Ark. 424; St. Louis, etc., R. Co. v. Weakly, 50 Ark. 397; Fort Worth, etc., R. Co. v. Wood, (Tex. Civ. App.) 32 S. W. 14; Texas, etc., R. Co. v. Klepper, (Tex. Civ. App.) 24 S. W. 567; Missouri Pac. R. Co. v. Edwards, 78 Tex. 307.

33. Bowie v. Baltimore, etc., R. Co., 1 MacArthur (D. C.) 94; Hous-

is liable for any injuries resulting from overloading or improper loading, and he cannot hold the carrier liable therefor, although there is a general duty resting upon the carrier's agent to examine trains under his control and see that the cars are properly loaded. It has been held, however, in some cases that the shipper may recover although he has improperly loaded the stock, where, notwithstanding his negligence, it clearly appears that the carrier knew, or ought to have known, the condition of the cars as to their loading when received by it.³⁴ So where the carrier's servants in fact do the loading and unloading, although the shipper may have expressly agreed to do so.³⁵ Where the shipper undertakes to furnish the cars for the shipment of his stock and to load them, the carrier is not responsible either for defects in the cars or for injuries resulting from improper loading.³⁶ The carrier is responsible for injuries to stock occurring while they are being unloaded due to insufficient or improper facilities or means for unloading them.³⁷

§ 28. Liability for animals escaping.—It is the duty of the carrier to see that animals being transported are properly and securely fastened in the car so that they cannot escape, and it is liable for the loss of animals by escaping from the cars, whether the loss results from defects in the cars provided for the purpose,³⁸ or from a failure to properly secure the animals therein,³⁹ or to

ton, etc., R. Co. v. Hester, (Tex.) 7 S. W. 776; Griffin v. Great Western R. Co., 15 U. C. Q. B. 507; Richardson v. North Eastern R. Co., L. R. 7 C. P. 75, 20 W. R. 461.

34. Kinnick v. Chicago, etc., R. Co., 69 Iowa, 665; Doan v. St. Louis, etc., R. Co., 38 Mo. App. 408.

35. Missouri Pac. R. Co. v. Kingsbury, (Tex. Civ. App.) 25 S. W. 322; Norfolk, etc., R. Co. v. Sutherland, 89 Va. 703.

36. Fordyce v. McFlynn, 56 Ark. 424. A shipper is not at fault for failure to furnish cars where it has tendered such cars in a way not objected to by the carrier and the latter fails to accept them and make the

shipment as agreed. Lawrence v. Milwaukee, etc., R. Co., 84 Wis. 427.

37. East Tennessee, etc., R. Co. v. Herrman, 92 Ga. 384; Owen v. Louisville, etc., R. Co., 87 Ky. 626; Chesapeake, etc., R. Co. v. American Exch. Bank, 92 Va. 495; Willoughby v. Horridge, 12 C. B. 742, 74 E. C. L. 742; Combe v. London, etc., R. Co., 31 L. T. N. S. 613. See Chicago, etc., R. Co. v. Owen, 21 Ill. App. 339, where the injury was held properly attributable to the proper vice of the animal and the carrier not liable.

38. See § 3, *ante*.

39. Porterfield v. Humphreys, 8 Humph. (Tenn.) 497; Stuart v. Crawley, 2 Stark. 323, 3 E. C. L. 428.

keep the doors and windows properly closed,⁴⁰ or from a failure to provide safe and suitable stock yards or pens at the point of shipment or destination.⁴¹ The contributory negligence of the shipper is, however, a good defense in such cases,⁴² as where the carrier's agent was prevented by the shipper from locking the door of a car,⁴³ or the shipper, who loaded the car, allowed it to start before the doors were closed,⁴⁴ or knowing of a defect in the door, failed to make it known to the carrier.⁴⁵

40. Indianapolis, etc., R. Co. v. Allen, 31 Ind. 394; Oxley v. St. Louis,

etc., R. Co., 65 Mo. 629. See North Missouri R. Co. v. Akers, 4 Kan. 453, where mules escaped while being driven to water it was held to be a question whether the carrier was liable as a carrier or only as a warehouseman.

41. Chapin v. Chicago, etc., R. Co.,

79 Iowa, 582. 42 Am. & Eng. R. Cas. 543.

42. Hutchinson v. Chicago, etc., R. Co., 37 Minn. 524.

43. Lee v. Raleigh, etc., R. Co. 72 N. C. 236.

44. Newby v. Chicago, etc., R. Co., 19 Mo. App. 391.

45. Betts v. Farmers' L. & T. Co., 21 Wis. 80, 91 Am. Dec. 460.

CHAPTER XIX.

CARRIERS OF PASSENGERS.

- SECTION** 1. Definition and nature of carriers of passengers.
2. Relation between carrier and passenger.
3. Who are passengers.
4. Commencement of relation.
5. Purchase of ticket.
6. Entry in vehicle of carrier.
7. Payment of fare.
8. Termination of relation.
9. Leaving the vehicle of carrier.
10. After leaving vehicle of carrier.
11. Stop-overs on continuous passage tickets.
12. Who are not passengers.
13. Limited and unlimited tickets.
14. Nontransferable tickets.
15. Persons riding gratuitously.
16. Persons riding on passes.
17. Persons riding on drover's pass.
18. Persons riding on trains not generally used for passengers.
19. Persons riding on engine.
20. Persons riding on hand cars.
21. Employes of others carried under contract.—Mail clerks.
22. Employes of others carried under contract.—Express messengers.
23. Persons riding on freight trains.
24. Persons accompanying passengers.
25. Employes of carrier as passengers.
26. Rules and regulations of the carrier.

§ 1. **Definition and nature of carriers of passengers.**—Carriers of passengers are those who undertake either gratuitously or for hire, to carry persons from place to place.¹ Common carriers of passengers are those who undertake to carry all persons indifferently who apply for passage, so long as there is room and there is no legal excuse for refusing.² To constitute one a common car-

1. A carrier, who undertakes the transportation of prisoners of war, is a carrier of passengers as to the necessary guards. *Truax v. Erie R. Co.*, 4 *Lans.* (N. Y.) 98.

2. *Verner v. Sweitzer*, 32 Pa. St.

208; *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 29 Am. Rep. 827; *Nashville, etc., R. Co. v. Messino*, 1 *Snead* (Tenn.) 220; *Bouv. L. Dict.*, tit. "Common carrier of passengers."

rier of passengers it is necessary that he hold himself out to the public as such.³ The distance to be traveled by the passenger, or his destination, do not affect the question as to whether the carrier is or is not a common carrier of passengers.⁴ A corporation may be liable as a common carrier of passengers, although its contracts for such carriage were *ultra vires*.⁵ Common carriers of passengers include railroads;⁶ street railroads, whether horse,⁷ dummy,⁸ electric,⁹ or cable;¹⁰ city omnibus lines;¹¹ proprietors of stage coaches;¹² hackmen;¹³ steamboat companies;¹⁴ ferrymen;¹⁵ sleeping car companies;¹⁶ and owners of elevators.¹⁷

3. Nashville, etc., R. Co. v. Messino, *supra*.

4. Parmelee v. Lowitz, 74 Ill. 116, 24 Am. Rep. 276; Parmelee v. McNulty, 19 Ill. 556; Lemon v. Chancellor, 68 Mo. 340, 30 Am. Rep. 799; Bennett v. Peninsular, etc., Steamboat Co., 6 C. B. 785, 60 E. C. L. 785.

5. Albion Lumber Co. v. De Nobra, 44 U. S. App. 347; Baltimore, etc., R. Co. v. Rambo, 16 U. S. App. 277; Caldwell v. Richmond, etc., R. Co., 89 Ga. 550.

6. Davis v. Button, 78 Cal. 247; Gilenwater v. Madison, etc., R. Co., 5 Ind. 342, 61 Am. Dec. 101; Caldwell v. Richmond, etc., R. Co., 89 Ga. 550; Murch v. Concord R. Corp., 29 N. H. 28, 61 Am. Dec. 631, a railroad is a common carrier of passengers in a caboose attached to a freight train where it is was the usual custom of the company to so carry passengers.

7. Holly v. Atlanta St. R. Co., (Ga.) 7 Rep. 460.

8. Spellman v. Lincoln Rapid Trans. Co., 36 Neb. 890, 38 Am. St. Rep. 753.

9. Richmond R., etc., Co. v. Bowles, 6 Am. Electl. Cas. 449, 92 Va. 738.

10. Watson v. St. Paul City R. Co., 42 Minn. 46.

11. Parmelee v. Lowitz, *supra*.

12. Frenk v. Coe, 4 Greene (Iowa)

555, 61 Am. Dec. 141; Bennett v. Dutton, 10 N. H. 481; Lovett v. Hobbs, 2 Show. 127.

13. Lemon v. Chanslor, *supra*. See Siegrist v. Arnot, 86 Mo. 200, 10 Mo. App. 197, 56 Am. Rep. 425.

14. The Pacific, 1 Blatchf. (U. S.) 569; The Zenobia, 1 Abb. Adm. 48; The Aberfoyle, 1 Blatchf. (U. S.) 360; Jencks v. Coleman, 2 Sumn. (U. S.) 221; McCleneghan v. Brock, 5 Rich L. (S. C.) 17.

15. Le Barron v. East Boston Ferry Co., 11 Allen (Mass.) 312, 87 Am. Dec. 717; Whitmore v. Bowman, 4 Greene (Iowa) 148; Slimmer v. Merry, 23 Iowa, 90; Blakely v. Le Duc, 19 Minn. 187.

16. Welch v. Pullman Palace Car Co., 1 Sheld. (N. Y.) 457; Nevin v. Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688; Pullman's Palace Car Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89; Pullman's Palace Car Co. v. Fielding, 62 Ill. App. 577.

Liability of railroad company drawing sleeping cars.—The public interest and due protection of the rights of passengers require that the railroad company, which is exercising the franchise of operating the road for the carriage of passengers, should be charged with and responsible for the management of the train, and that all persons employed thereon should, as to passengers, be

§ 2. Relation between carrier and passenger.—The relation between carrier and passenger can only be created by contract, express or implied. Where there is no express contract which determines the liability of the carrier for personal injuries sustained by the passenger, the liability of the carrier must depend solely on the duty raised by the law.¹⁸ There is a radical distinction between the liability of a carrier with respect to the transportation of goods and the carrying of persons, which arises from the intelligence and power of locomotion of the latter. The former have neither power of volition, nor of motion, and are affected by physical causes only; while the latter have intelligence, judgment and discretion, are operated upon by moral causes, and the carrier has not, and cannot have, even in the case of human beings in whose persons another has a property interest, the same absolute control over them, as it has over inanimate matter. The doctrine of the law of common carriers that the carrier is responsible for every loss of or injury to goods carried which is not produced by inevitable accident, and which has been pressed by con-

deemed to be servants of the corporation. The railroad company is, therefore, liable for an assault by the porter of a sleeping car on a passenger. *Thorpe v. New York Cent., etc., R. Co.*, 76 N. Y. 402, 32 Am. Rep. 325; *Dwinelle v. New York Cent., etc., R. Co.*, 120 N. Y. 117. It is also liable for defects in a sleeping car, especially when the passenger is not aware that the car is under the management of the sleeping car company. *Pennsylvania Co. v. Roy*, 102 U. S. 457; *Kingsley v. Lake Shore, etc., R. Co.*, 125 Mass. 54, 28 Am. Rep. 200; *Iron R. Co. v. Mowery*, 36 Ohio St. 418, 38 Am. Rep. 597; *Cleveland, etc., R. Co. v. Walrath*, 38 Ohio St. 461, 4 So. 85.

17. *Springer v. Ford*, 189 Ill. 430, 52 L. R. A. 930, 59 N. E. 953. But see *Seaver v. Bradley*, (Mass.) 69 N. E. 795. See also *Owners of Passenger Elevators*, chap. 2, § 42.

18. *Farley v. Cincinnati, etc., R. Co.*, 108 Fed. 14, 47 C. C. A. 156;

Illinois Cent. R. Co. v. O'Keefe, 168 Ill. 115, 48 N. E. 294; *Schepers v. Union Depot R. Co.*, 126 Mo. 665, 5 Am. Electl. Cas. 398, 29 S. W. 712, 2 Am. & Eng. R. Cas. N. S. 9; *Schaefer v. St. Louis, etc., R. Co.*, 128 Mo. 64, 30 S. W. 331; *Spannagle v. Chicago, etc., R. Co.*, 31 Ill. App. 460; *Gardner v. New Haven, etc., R. Co.*, 51 Conn. 143, 50 Am. Rep. 12, 18 Am. & Eng. R. Cas. 170; *Hoar v. Maine Cent. R. Co.*, 70 Me. 65; *Pennsylvania R. Co. v. Price*, 96 Pa. St. 267, 1 Am. & Eng. R. Cas. 234; *Fremont, etc., R. Co. v. French*, 48 Neb. 638, 4 Am. & Eng. R. Cas. N. S. 365; *Higley v. Gilmer*, 3 Mont. 90, 35 Am. Rep. 450; *North Chicago St. R. Co. v. Williams*, 140 Ill. 275, 52 Am. & Eng. R. Cas. 522; *Baltimore, etc., R. Co. v. Breinig*, 25 Md. 378.

The contract may be made between the respective agents of the carrier and passenger. *Russ v. Steamboat War Eagle*, 14 Iowa, 363; *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371.

siderations of policy beyond the general principles which govern the law of bailment, which a carriage of goods is, is not, therefore, applicable to the carriage of passengers. The rights, privileges and protection attaching to the relation of a passenger are imposed upon common carriers upon considerations of public policy, independent of contract, and arise from the nature of their public employment. Carriers of passengers are answerable for any injury sustained by their passengers in consequence of their negligence or want of skill, or that of their agents or servants, but they are not insurers of the safety of their passengers, like common carriers of goods. Their duties are measured in degree by the dangers which attend their method of carriage, and the highest degree of care and prudence, the utmost skill and foresight, which can be exercised under all the circumstances as to possible dangers and guarding against them, are the only limits which a decent regard to the safety of men, and a conformity to the established principles of law, allow to be fixed to their responsibility.¹⁹ Where the carrier acts as the carrier of passengers and also of their baggage its responsibility as to passengers is that already stated, while as to their baggage it incurs the ordinary responsibility of a common carrier, nothing excusing it for loss of or injury to it but inevitable accident or the act of the public enemy.²⁰ The

19. Coddington v. Brooklyn, etc., R. Co., 102 N. Y. 66; Palmer v. Delaware, etc., Canal Co., 120 N. Y. 170, 17 Am. St. Rep. 629; Maverick v. Eighth Ave. R. Co., 36 N. Y. 378; Deyo v. New York Cent. R. Co., 34 N. Y. 9, 83 Am. Dec. 418; Bowen v. New York Cent. R. Co., 18 N. Y. 408; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Hegeman v. Western R. Co., 13 N. Y. 9, 64 Am. Dec. 517; Boyce v. Anderson, 2 Pet. (U. S.) 155; Philadelphia, etc., R. Co. v. Derby, 14 How. (U. S.) 468; Nolton v. Western R. Corp., 15 N. Y. 444, 69 Am. Dec. 623; Clark v. McDonald, 4 McCord L. (S. C.) 223; McClenaghan v. Brock, 5 Rich L. (S. C.) 17; McNeill v. Durham, etc., R. Co., 135 N. C. 682, 47 S. E. 765; Ansell v. Waterhouse, 2 Chit. Rep. 1,

18 E. C. L. 227; Tattan v. Great Western R. Co., 2 El. & El. 844, 105 E. C. L. 844; Collett v. London, etc., R. Co., 6 Eng. L. & Eq. 305; Bretherton v. Wood, 3 Brod. & B. 54, 7 E. C. L. 345.

20. Camden, etc., R. Co. v. Burke, 13 Wend. (N. Y.) 611; Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Cole v. Goodwin, 19 Wend. (N. Y.) 251; Powell v. Myers, 20 Wend. (N. Y.) 591; Caldwell v. Murphy, 1 Duer (N. Y.) 233; Chicago, etc., R. Co. v. Carroll, 5 Ill. App. 201; Bennett v. Dutton, 10 N. H. 481; Pittsburgh, etc., R. Co. v. Hinds, 53 Pa. St. 512, 91 Am. Dec. 224; Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321; East Tennessee, etc., R. Co. v. Mitchell, 11 Heisk. (Tenn.) 400; Gillingham v. Ohio River R. Co., 35

relation of carrier and passenger being entered upon, the carrier is answerable for all consequences to the passenger of the wilful misconduct or negligence of the persons employed by it in the execution of the contract which it has undertaken toward the passenger. This is a reasonable and necessary rule which has been upheld by the courts in many cases.²¹

§ 3. Who are passengers.—The general rule is that any person whom a common carrier has contracted, expressly or impliedly, to convey from one place to another, in consideration of the payment of fare, or its equivalent, and who, in the course of the performance of such contract has been received by the carrier under its care, either upon the means of conveyance, or at the point of departure of that conveyance, is a passenger.²² When a railroad company admits passengers to a freight train, and takes the customary fare, it incurs the same liability for their safety as if they were on the regular passenger trains.²³ Railroad companies are also liable for injuries resulting from negligence in carrying passengers over their roads whether with or without compensation, but the action in the latter case is not to be maintained upon the basis of a contract, express or implied, but upon the neglect of the duty which the law imposes, and such companies owe to all whom they voluntarily undertake to carry the duty to exercise a

W. Va. 595, 29 Am. St. Rep. 827; *Stoker v. Saltonstall*, 13 Pet. (U. S.) 191; *Crofts v. Waterhouse*, 11 Moore 133; *Christie v. Griggs*, 2 Campb. 79.

21. *Palmeri v. Manhattan R. Co.*, 133 N. Y. 261, 30 N. E. 1001; *Dwinelle v. New York Cent. R. Co.*, 120 N. Y. 117, 17 Am. St. Rep. 611, 8 L. R. A. 224; *Stewart v. Brooklyn, etc., R. Co.*, 90 N. Y. 588, 43 Am. Rep. 185; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Weed v. Panama R. Co.*, 17 N. Y. 362, 72 Am. Dec. 474; *Steamboat Co. v. Brockett*, 121 U. S. 637, 30 L. Ed. 1039; *Baltimore, etc., R. Co. v. Barger*, 80 Md. 31, 45 Am. St. Rep. 322, 30 Atl. 561, 26 L. R. A. 222; *Haver v. Central R. Co.*, 62 N. J. L. 286, 41 Atl. 917, 43 L. R. A. 85; *Norfolk, etc., R. Co. v. An-*

derson

90 Va. 6, 44 Am. St. Rep. 886, 17 S. E. 759.

22. *Kane v. Cicero, etc., R. Co.*, 100 Ill. App. 181; *Altemeier v. Cincinnati, etc., R. Co.*, 4 Ohio N. P. 224, 4 Ohio L. N. 300; *Pennsylvania R. Co. v. Price*, 96 Pa. St. 267, 1 Am. & Eng. R. Cas. 234; *Higley v. Gilmer*, 3 Mont. 90, 35 Am. Rep. 450.

A passenger is one who enters the vehicle of a carrier with the intention of paying in money the usual fare for his transportation, or who is supplied with a ticket or pass entitling him to ride to a given point. *Holt v. Hannibal, etc., R. Co.*, 87 Mo. App. 203.

23. *Edgerton v. New York, etc., R. Co.*, 39 N. Y. 227.

proper degree of care and skill in the performance of what they have undertaken. This duty does not result alone from the consideration paid for the service, but is imposed by law even when the service is gratuitous, and where there is no actual contract to carry, it is properly said that the liability in an action founded upon the public duty is co-extensive with the liability on the contract.²⁴ It is this duty to carry safely, which arises out of contract express or implied, between the carrier and its passenger, or which exists, independently of contract, and although there is no contract in a legal sense between the parties, which distinguishes the relation between the carrier and its passengers from that which it sustains toward licensees,²⁵ or trespassers,²⁶ its own employes,²⁷ or the employes of sleeping car companies,²⁸ or of railroad contractors,²⁹ or of shippers of goods, when transported by consent or permission without payment of fare,³⁰ to whom the carrier owes no

24. Carroll v. Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221; Nolton v. The Western Railroad Corp., 15 N. Y. 444, 69 Am. Dec. 623; Philadelphia, etc., R. Co. v. Derby, 14 How. (U. S.) 483; Allen v. Sewall, 2 Wend. (N. Y.) 338; Steamboat v. King, 16 How. (U. S.) 474; Gillenwater v. Madison, etc., R. Co., 5 Ind. 339; Farwell v. Boston R. Co., 4 Metc. (Mass.) 49, 38 Am. Dec. 339; Wilton v. Middlesex R. Co., 107 Mass. 108; Waterbury v. New York Cent., etc., R. Co., 17 Fed. 671; Prince v. International, etc., R. Co., 64 Tex. 144, 21 Am. & Eng. R. Cas. 152; Bretherton v. Wood, 5 Brod. & B. 54, 7 E. C. L. 345.

25. Lake Shore, etc., R. Co. v. Bodemer, 139 Ill. 596, 54 Am. & Eng. R. Cas. 177; Shelby v. Cincinnati, etc., R. Co., 85 Ky. 224; Benson v. Baltimore Traction Co., 77 Md. 535; Blackmore v. Toronto St. R. Co., 38 U. C. Q. B. 172.

26. Morris v. Brown, 111 N. Y. 318, 7 Am. St. Rep. 751; Schurr v. Houston, 10 St. Rep. (N. Y.) 262; Lygo v. Newbold, 9 Exch. 302.

27. Yeomans v. Contra Costa Steam Nav. Co., 44 Cal. 71.

28. Hudson v. Richmond, etc., R. Co., 2 App. Cas. (D. C.) 98. But *contra*, see Jones v. St. Louis Southwestern R. Co., 125 Mo. 666.

29. McCauley v. Tennessee, etc., Coal Co., 93 Ala. 356, 47 Am. & Eng. R. Cas. 580; Sherman v. Toronto, etc., R. Co., 34 U. C. Q. B. 451; Graham v. Toronto, etc., R. Co., 23 U. C. C. P. 541. But see Torpy v. Grand Trunk R. Co., 20 U. C. Q. B. 446, where a contract existed.

30. Gradin v. St. Paul, etc., R. Co., 30 Minn. 217, an employe of a lumber company, whose lumber was being loaded and carried by the railroad company riding in an empty car merely by consent and permission of the conductor, was not a passenger, though not a trespasser.

But where, by an arrangement between a lumber company and the carrier, the latter agreed to carry the former's employes to and from work, an employe riding to work on a logging train was entitled to the rights of a passenger. Trinity Val.

such duty. Every person being carried upon a public conveyance usually employed in the carriage of passengers, and not employed by or connected with the carrier, is presumed to be lawfully upon it as a passenger, and the burden is on the carrier to show that he is a trespasser.³¹ But this presumption may be rebutted.³² And a person upon a car, as a freight car, not designed for passengers, is presumed by law not to be a passenger, and it requires special circumstances to rebut this presumption.³³

§ 4. Commencement of relation.—The relation of carrier and passenger is a contract relation, which commences when the passenger has put himself into the care of the carrier with a *bona fide* intention of being transported, and the carrier has expressly or impliedly received and accepted him as a passenger.³⁴ Where one has made a contract for passage upon a vehicle of a common carrier, and has presented himself at the proper place to be transported, his right to care and protection begins.³⁵ So, one taking

R. Co. v. Stewart (Tex. Civ. App.),
62 S. W. 1085.

31. Bryant v. Chicago, etc., R. Co., 53 Fed. 997, 58 Am. & Eng. R. Cas. 15; Pennsylvania R. Co., v. Books, 57 Pa. St. 339; Atchison, etc., R. Co. v. Headland, 18 Colo. 447, 58 Am. & Eng. R. Cas. 4; Louisville, etc., R. Co. v. Thompson, 107 Ind. 442, 57 Am. Rep. 120, 27 Am. & Eng. R. Cas. 329; Creed v. Pennsylvania R. Co., 86 Pa. St. 139, 27 Am. Rep. 693; Gillingham v. Ohio River R. Co., 35 W. Va. 588, 51 Am. & Eng. R. Cas. 222.

32. People v. Douglass, 87 Cal. 281, and the presumption does not arise as to every one who goes on board a steamboat stopping at one of its usual stopping places. Keokuk Packet Co. v. Henry, 50 Ill. 264.

33. Eaton v. Delaware, etc., R. Co., 57 N. Y. 382, 15 Am. Rep. 513; Waterbury v. New York Cent., etc., R. Co., 21 Blatchf. (U. S.) 314, 17 Fed. 671; Atchison, etc., R. Co. v. Headland, *supra*. And if a person by

his own solicitation or consent is carried on a vehicle or conveyance which is not used for passenger carriage, and this be known to him, there can be no presumption that he is a passenger, although the owner may be a common carrier of passengers by other and different means of conveyance. Snyder v. Natchez, etc., R. Co., 42 La. Ann. 302, 44 Am. & Eng. R. Cas. 278.

34. O'Donnell v. Chicago, etc., R. Co., 106 Ill. App. 287; Haselton v. Portsmouth, etc., St. Ry., 71 N. H. 589, 53 Atl. 1016; Spannagle v. Chicago, etc., R. Co., 31 Ill. App. 460; Webster v. Fitchburg R. Co., 161 Mass. 298, 24 L. R. A. 521, 37 N. E. 165; Allender v. Chicago, etc., R. Co., 37 Iowa, 264. See also Bricker v. Campbell, 132 Pa. 1, 18 Atl. 983.

35. Davis v. Cayuga, etc., R. Co., 10 How. Pr. (N. Y.) 330; Wabash, etc., R. Co. v. Rector, 104 Ill. 296; Hannibal, etc., R. Co. v. Martin, 11 Ill. App. 386; Central R., etc., Co. v. Perry, 58 Ga. 461; Dodge v. Boston,

a seat in a railroad car, for transportation, becomes a passenger, entitled to full protection in his rights as such, from the starting of the car, although he has not purchased a ticket or paid his fare.³⁶ Formal announcement on the part of the passenger that he wishes or intends to become a passenger or formal delivery of his person into the care of the carrier, or formal acceptance of him as a passenger on the part of the carrier are not necessary to constitute the relation of carrier and passenger. Such relation is to be implied from all the circumstances surrounding the case, and these circumstances must fully justify the inference that the passenger has offered or presented himself as a passenger,³⁷ and that the carrier has accepted and received him as such.³⁸ Entering upon the carrier's premises, into the station, ticket office, or waiting room, with the intention in good faith of becoming a passenger, and while passing therefrom to a seat in the conveyance, ordinarily places one in the position of a passenger.³⁹ The relation of carrier and passenger arises when a street car stops at a usual place for passengers, or upon signal, and a person in the exercise of due care gets on the steps or platform of the car, for the purpose of taking passage;⁴⁰ when the conductor of an elevated railroad train

etc., Steamship Co., 148 Mass. 207, 12 Am. St. Rep. 541; Warren v. Fitchburg R. Co., 8 Allen (Mass.), 227, 85 Am. Dec. 700; Smith v. St. Paul City R. Co., 32 Minn. 1, 50 Am. Rep. 550, 16 Am. & Eng. R. Cas. 310.

A mere contract for future transportation does not of itself create the relation of carrier and passenger. Donovan v. Hartford St. R. Co., 65 Conn. 201.

36. Buffett v. Troy, etc., R. Co., 40 N. Y. 168, so held of a person who was riding in the stage used by a railroad company to carry passengers to and from its depot; Bissell v. Michigan Southern, etc., R. Co., 22 N. Y. 307; Nolton v. Western R. Corp., 15 N. Y. 444.

37. Buffett v. Troy, etc., R. Co., *supra*; Spannagle v. Chicago, etc., R. Co., *supra*; Higley v. Gilmer, 3 Mont. 90, 35 Am. Rep. 450; Finkeldey v. Omnibus Cable Co., 114 Cal. 28, 45

Pac. 996; White v. Atlanta St. R. Co., 92 Ga. 494, 17 S. E. 672.

38. Gardner v. New Haven, etc., R. Co., 51 Conn. 143, 50 Am. Rep. 12, 18 Am. & Eng. R. Cas. 170; Hoar v. Maine Cent. R. Co., 70 Me. 65; Lewis v. Houston Elec. R. Co. (Tex.), 88 S. W. 489; Missouri, etc., R. Co. v. Williams, 91 Tex. 255. See also Martin v. Southern Ry., 51 S. C. 150, 28 S. E. 303.

39. Chicago, etc., R. Co. v. Weeks, 99 Ill. App. 518, 64 N. E. 1039; Gordon v. Grand St., etc., R. Co., 40 Barb. (N. Y.) 546; McKernan v. Manhattan R. Co., 65 Conn. 201; Hansley v. Jamesville, etc., R. Co., 115 N. C. 602; Grimes v. Pennsylvania Co., 36 Fed. 72, although a ticket has not been purchased; Norfolk, etc., R. Co. v. Galliher, 89 Va. 639, or the agent refused to sell him a ticket; Atchison, etc., R. Co. v. Holloway (Kan.), 80 Pac. 31.

permits one to enter on the steps or platform of a car at one of the stations, with other passengers,⁴¹ where the carrier accepts a fare from a person on the front platform of a crowded car, although he is there in violation of a rule of the company;⁴² where a person announces his intention not to pay as he enters the car, but is allowed to enter and take a seat, and the fare is afterwards demanded in the usual manner.⁴³ So, if the company undertakes to carry him gratuitously.⁴⁴ Whether the relation of carrier and passenger exists is a question of fact for the jury, if the evidence be conflicting.⁴⁵ The driver of an omnibus or conductor of a street car by stopping to take on a person, on signal given, thereby accepts him as a passenger.⁴⁶ So a connecting carrier which

40. Ganiard v. Rochester City, etc., R. Co., 50 Hun (N. Y.), 22, 18 St. Rep. (N. Y.) 692, affd. 121 N. Y. 661; Wallace v. Third Ave. R. Co., 36 App. Div. (N. Y.) 57, 55 N. Y. Supp. 132; Drew v. Sixth Ave. R. Co., 26 N. Y. 49, 1 Abb. Ct. App. Dec. 556; Gaffney v. St. Paul City R. Co., 81 Minn. 459, 84 N. W. 304; Gordon v. West E. St. Ry. Co., 175 Mass. 181, 55 N. E. 990; McDonough v. Metropolitan R. Co., 137 Mass. 210; Davey v. Greenfield, etc., St. Ry., 177 Mass. 106, 58 N. E. 172.

Car stopping upon signal.— Carney v. Cincinnati St. R. Co., 8 Ohio S. & C. P. Dec. 587; West Chicago St. R. Co. v. Shiplett, 85 Ill. App. 683. But see Duchemin v. Boston El. Ry. Co., 186 Mass. 353, 71 N. E. 780; Donovan v. Hartford St. R. Co., 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297; Schaefer v. St. Louis S. R. Co., 128 Mo. 64, 30 S. W. 331; Birmingham Ry., etc., Co. v. Bynum, 3 St. Ry. Rep. 6, 139 Ala. 339, 36 So. 736; Citizens' St. Ry. Co. v. Jolly, 1 St. Ry. Rep. 157 (Ind.), 67 N. E. 935. See Kennedy v. North Jersey St. R. Co., 3 St. Ry. Rep. 608 (N. J. Sup.), 60 Atl. 40, as to pleading invitation to become a passenger.

41. O'Mara v. St. Louis Transit Co., 102 Mo. App. 202, 76 S. W. 680; Barth v. Kansas City Elev. R. Co., 142 Mo. 535, 10 Am. & Eng. R. Cas. N. S. 281, 44 S. W. 778; Smith v. St. Paul City R. Co., 32 Minn. 1, 50 Am. Rep. 550.

42. Hanna v. Nassau El. R. Co., 18 App. Div. (N. Y.) 137, 45 N. Y. Supp. 437.

43. Sanford v. Eighth Ave. R. Co., 23 N. Y. 343.

44. Perkins v. New York Cent. R. Co., 24 N. Y. 196; Rosenberg v. Third Ave. R. Co., 47 App. Div. (N. Y.) 323, 61 N. Y. Supp. 1052; Buck v. Peoples St. R., etc., Co., 108 Mo. 179, 52 Am. & Eng. R. Cas. 512, 18 S. W. 1090; North Chicago St. R. Co. v. Williams, 140 Ill. 275, 52 Am. & Eng. R. Cas. 522, 27 N. E. 672.

45. Buffet v. Troy, etc., R. Co., 40 N. Y. 168; Gordon v. Grand St., etc., R. Co., 40 Barb. (N. Y.) 546; Meyer v. Second Ave. R. Co., 21 N. Y. Super. Ct. 305; George v. Los Angeles R. Co., 126 Cal. 357, 46 L. R. A. 829, 58 Pac. 819.

46. Citizens St. R. Co. v. Merl, 26 Ind. App. 284, 59 N. E. 491; Brien v. Bennett, 8 C. & P. 724, 34 E. C. L. 603.

receives upon its track the passenger cars of another company for carriage over its own line assumes the relation of common carrier of passengers toward them when the cars are switched upon its track.⁴⁷

§ 5. Purchase of ticket.—The relation of passenger and carrier may exist, notwithstanding the person claiming to be a passenger has neither paid fare nor provided himself or herself with a ticket, since it cannot be presumed at law that a demand by the carrier for payment of fare would not be complied with. The purchase of a ticket is not essential to create the relation of passenger and carrier.⁴⁸ The purchase of a ticket, however, creates the relation of carrier and passenger, and subjects each party to all the duties and obligations imposed by law.⁴⁹ And this rule applies although the ticket was not actually paid for at the time,⁵⁰ and whether purchased from the carrier itself or a duly authorized agent,⁵¹ or a scalper or person who is not a regular dealer and is

47. Schopman v. Boston, etc., R. Corp., 9 Cush. (Mass.) 24; Chattanooga, etc., R. Co. v. Huggins, 89 Ga. 494, 52 Am. & Eng. R. Cas. 473. But see Vormus v. Tennessee, etc., R. Co., 97 Ala. 326, where an excursion train was permitted to pass over a railroad not used for passenger travel, without the authority of its officers.

48. Cleveland, etc., R. Co. v. Scott, 111 Ill. App. 234; Edgerton v. New York, etc., R. Co., 39 N. Y. 227; Schurr v. Houston, 10 St. Rep. (N. Y.) 262; Allender v. Chicago, etc., R. Co., 37 Iowa, 264, 8 Am. Ry. Rep. 115; Lake Erie, etc., R. Co. v. Mays, 4 Ind. App. 113; Cross v. Kansas City, etc., R. Co., 56 Mo. App. 664; Norfolk, etc., R. Co. v. Galliher, 89 Va. 639; Norfolk, etc., R. Co. v. Groseclose, 88 Va. 267; Jones v. Boston, etc., R. Co., 163 Mass. 245; The Wasco, 53 Fed. 546; Secord v. St. Paul, etc., R. Co., 5 McCrary (U. S.), 515, 18 Fed. 221; Prince v. International, etc., R. Co., 64 Tex. 144, 21

Am. & Eng. R. Cas. 152; Houston, etc., R. Co. v. Washington (Tex. Civ. App.), 30 S. W. 719; Nellis St. Rd. Acct. L., 40, and cases there cited.

49. Poucher v. New York Cent. R. Co., 49 N. Y. 263, 10 Am. Rep. 364; Wabash, etc., R. Co. v. Rector, 104 Ill. 296, 9 Am. & Eng. R. Cas. 264; Spannagle v. Chicago, etc., R. Co., 31 Ill. App. 460, but not as to any particular train; Chicago, etc., R. Co. v. Chisholm, 79 Ill. 584, and a family commutation ticket authorizes a son residing with his father, although he is of age, to travel thereon; Illinois Cent. R. Co. v. Treat, 179 Ill. 576, 54 N. E. 290.

Possession of a baggage check and proof of its issue in the customary way is sufficient evidence that the possessor was a passenger. Davis v. Cayuga, etc., R. Co., 10 How. Pr. (N. Y.) 330.

50. Ellsworth v. Chicago, etc., R. Co. (Iowa), 63 N. W. 584.

51. Skinner v. London, etc., R. Co., 5 Exch. 787.

forbidden by law to sell or deal in tickets.⁵² But the mere fact that a party has a ticket and intends to take a train does not create the relation of carrier and passenger, as he must be at some place which is under the control of the carrier and provided for passengers, so that it may exercise the high degree of care exacted of it.⁵³

§ 6. Entry in vehicle of carrier.—When one enters into or goes upon the conveyance of a carrier used for carrying passengers, in good faith, intending to take passage thereon, his rights are those of a passenger.⁵⁴ So, when he has been invited to enter, or enters in obedience to an announcement that it is ready to receive passengers;⁵⁵ or is in the act of entering for the purpose of taking passage, as upon the gangplank of a steamer;⁵⁶ or stepping on the platform of a street car which has stopped for him.⁵⁷ So, when he takes a train at a place which is not a depot but where passengers are permitted to board the train, and has reached in safety the inside of a passenger car;⁵⁸ or enters a car made up for its usual run and ready for the reception of passengers, but not drawn

52. Sleeper v. Pennsylvania R. Co., 100 Pa. St. 259, 45 Am. Rep. 380, 9 Am. & Eng. R. Cas. 291; State v. Clarke, 109 N. C. 739; State v. Ray, 109 N. C. 736.

53. O'Donnell v. Chicago, etc., R. Co., 106 Ill. App. 287; Vandegrift v. West Jersey & S. R. Co. (71 N. J. L.), 60 Atl. 184.

54. Cleveland v. New Jersey Steamboat Co., 68 N. Y. 306; Buffett v. Troy, etc., R. Co., 40 N. Y. 168; Lake Shore, etc., R. Co. v. Foster, 104 Ind. 307; Lake Erie, etc., R. Co. v. Mays, 4 Ind. App. 413; Union Pac. R. Co. v. Nichols, 8 Kans. 505, 12 Am. Rep. 475; Nashville, etc., R. Co. v. Messino, 1 Sneed' (Tenn.), 220; The Wasco, 53 Fed. 546; Brown v. Scarbora, 97 Ala. 316, 58 Am. & Eng. R. Cas. 364; Pittsburgh, etc., R. Co. v. Krouse, 30 Ohio St. 222, 15 Am. Ry. Rep. 298. And see Higley v. Gilmer, 3 Mont. 90, 35 Am. Rep.

450; Chicago, etc., R. Co. v. Bills, 104 Ind. 13; Coleman v. Georgia R., etc., Co., 84 Ga. 1, 40 Am. & Eng. R. Cas. 690; Texas, etc., R. Co. v. White, 4 Tex. Civ. App. Cas. § 451.

55. Hannibal, etc., R. Co. v. Martin, 11 Ill. App. 386.

56. Rogers v. Kennebec Steamboat Co., 86 Me. 261; Warren v. Fitchburg R. Co., 8 Allen (Mass.), 227, 85 Am. Dec. 700; Northwestern U. P. Co. v. Clough, 22 Wall. (U. S.) 528.

57. McDonough v. Metropolitan R. Co., 137 Mass. 210, 21 Am. & Eng. R. Cas. 354; Smith v. St. Paul City R. Co., 32 Minn. 1, 50 Am. Rep. 550, 16 Am. & Eng. R. Cas. 310; Brien v. Bennett, 8 C. & P. 724, 34 E. C. L. 603; Citizens' St. Ry. Co. v. Merl (Ind. App.), 59 N. E. 491.

58. Dewire v. Boston, etc., R. Co., 148 Mass. 343, 37 Am. & Eng. R. Cas. 57.

up to the station platform;⁵⁹ or when, seeking to board a train at night, finding no one to inform him how to reach the sleeping car attached to the train, he follows the direct route provided by the carrier, and is injured by reason of defective and insufficient lighting of the station approaches.⁶⁰ One who enters the carrier's vehicle or conveyance to ride therein to a certain point, at the invitation or by the consent or permission of the carrier's employes having charge of the means of transportation, is ordinarily held to be a passenger.⁶¹ But the invitation or consent must be by one having the right or authority, express or implied, to give it.⁶² But one boarding a train without the knowledge or permission of the conductor, if the conductor, after he knows of his presence, allows him to remain as such, is a passenger as much as if he had paid his fare.⁶³ A person who, by mistake, gets on a passenger train

59. Missouri, etc., R. Co. v. Simmons (Tex. Civ. App.), 33 S. W. 1096.

60. Moses v. Louisville, etc., R. Co., 39 La. Ann. 649, 30 Am. & Eng. R. Cas. 556.

61. Alabama, etc., R. Co. v. Yarbrough, 83 Ala. 238, 3 Am. St. Rep. 715, even though the train is not intended and operated for the carriage of passengers; Muehlhausen v. St. Louis R. Co., 91 Mo. 332, 28 Am. & Eng. R. Cas. 157, although he has paid no fare; Whitehead v. St. Louis, etc., R. Co., 99 Mo. 263, 39 Am. & Eng. R. Cas. 410; Atlanta, etc., R. Co. v. Fuller, 92 Ga. 482; Chicago, etc., R. Co. v. Field, 7 Ind. App. 172; Ecliff v. Wabash, etc., R. Co., 64 Mich. 196; Hurt v. Southern R. Co., 40 Miss. 391; Woolsey v. Chicago, etc., R. Co., 39 Neb. 798; Texas, etc., R. Co. v. Hayden, 6 Tex. Civ. App. 745; Prince v. International, etc., R. Co., 64 Tex. 144, 21 Am. & Eng. R. Cas. 152.

62. Snider v. Hannibal, etc., R. Co., 60 Mo. 413; Danbeck v. New Jersey Traction Co., 57 N. J. L. 463, such as a conductor; Wilton v. Mid-

dlesex R. Co., 107 Mass. 108, 9 Am. Rep. 11, a street-car driver; Thompson v. Yazoo, etc., R. Co., 47 La. Ann. 1107, or a general agent of the company; Chicago, etc., R. Co. v. Bryant, 65 Fed. 969; Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Satterlee v. Groat, 1 Wend. (N. Y.) 272; Lygo v. Newbold, 9 Exch. 306; Gradin v. St. Paul, etc., R. Co., 30 Minn. 217, 11 Am. & Eng. R. Cas. 644.

Ordinarily an engineer has no such authority, Chicago, etc., R. Co. v. Michie, 83 Ill. 428; Chicago, etc., R. Co. v. Casey, 9 Ill. App. 632; Ohio, etc., R. Co. v. Allender, 59 Ill. App. 620. Nor a baggage master, Reary v. Louisville, etc., R. Co., 40 La. Ann. 32, 34 Am. & Eng. R. Cas. 277, 8 Am. St. Rep. 497. Nor a superintendent of construction. Evansville, etc., R. Co. v. Barnes, 137 Ind. 306.

63. Muehlhausen v. St. Louis R. Co., *supra*; Sherman v. Hannibal, etc., R. Co., 72 Mo. 65, 37 Am. Rep. 423; Whitehead v. St. Louis, etc., R. Co., 99 Mo. 263, 39 Am. & Eng. R. Cas. 410.

other than the one upon which he intended to take passage,⁶⁴ or who takes passage on a train not provided for passengers, without being advised that he is not permitted to ride thereon;⁶⁵ or who boards a train not stopping at the station named in the ticket, and the conductor, after examining the ticket, punches it so that he cannot ride on another train,⁶⁶ is nevertheless a passenger upon the train upon which he is riding. But the relation of carrier and passenger may be created without actual entry into or upon the carrier's means of conveyance,⁶⁷ and one may become a passenger before he has entered the vehicle or conveyance,⁶⁸ and before transportation has been commenced, as while waiting for a train in the depot or waiting room, or at the ordinary point of departure,⁶⁹ or while passing from the ticket office or station to the train.⁷⁰

64. St. Louis Southwestern R. Co. v. Pruitt (Tex.), 80 S. W. 72, 79 S. W. 598; Cincinnati, etc., R. Co. v. Carper, 112 Ind. 26, 2 Am. St. Rep. 144, 31 Am. & Eng. R. Cas. 36; Columbus, etc., R. Co. v. Powell, 40 Ind. 37; Arnold v. Pennsylvania R. Co., 115 Pa. St. 135, 2 Am. St. Rep. 542, 28 Am. & Eng. R. Cas. 189; Lake Shore, etc., R. Co. v. Rosenzweig, 113 Pa. St. 519, 26 Am. & Eng. R. Cas. 489; International, etc., R. Co. v. Gilbert, 64 Tex. 536, 22 Am. & Eng. R. Cas. 405.

65. Washburn v. Nashville, etc., R. Co., 3 Head (Tenn.), 638, 75 Am. Dec. 784; Boggess v. Chesapeake, etc., R. Co., 37 W. Va. 297.

But the rule does not apply where he is informed to the contrary or had no reason to so believe. Toledo, etc., R. Co. v. Brooks, 81 Ill. 245; McVeety v. St. Paul, etc., R. Co., 45 Minn. 268, 22 Am. St. Rep. 728, 47 Am. & Eng. R. Cas. 471; Railroad Co. v. Meacham, 91 Tenn. 428; Trottlinger v. East Tennessee, etc., R. Co., 11 Lea. (Tenn.) 533, 13 Am. & Eng. R. Cas. 49; Houston, etc., R. Co. v. Moore, 49 Tex. 31, 30 Am. Rep. 98; Gulf, etc., R. Co. v. Campbell, 76 Tex. 174, 41 Am. & Eng. R. Cas. 100.

66. Schurr v. Houston, 10 St. Rep. (N. Y.) 262. But where he boards a train without inquiry, and refuses to pay his fare to the next station at which the train is to stop and refuses to leave the train at a proper place, he becomes a trespasser. Atchison, etc., R. Co. v. Gants, 38 Kan. 608, 5 Am. St. Rep. 780, 34 Am. & Eng. R. Cas. 290.

67. Gordon v. Grand St., etc., R. Co., 40 Barb. (N. Y.) 546; Baltimore, etc., R. Co. v. State, 63 Md. 135, 21 Am. & Eng. R. Cas. 202; Murphy v. St. Louis, etc., R. Co., 43 Mo. App. 342; Norfolk, etc., R. Co. v. Galliher, 89 Va. 639.

68. Allender v. Chicago, etc., R. Co., 37 Iowa, 264. See also cases cited in note 56 to this section.

69. Gordon v. Grand St., etc., R. Co., *supra*; Carpenter v. Boston, etc., R. Co., 97 N. Y. 494, 49 Am. Rep. 540, 21 Am. & Eng. R. Cas. 331; Central R., etc., Co. v. Perry, 58 Ga. 461; Shannon v. Boston, etc., R. Co., 78 Me. 52, 23 Am. & Eng. R. Cas. 511. And see Spannagle v. Chicago, etc., R. Co., 31 Ill. App. 460.

70. Northrup v. Railway Pass. Assur. Co., 43 N. Y. 516, 3 Am. Rep. 724; Chicago, etc., R. Co. v. Chan-

§ 7. Payment of fare.—The actual payment of fare is not essential to constitute one a passenger and create the relation of passenger and carrier, for, remaining on board the conveyance, he is liable for the payment of the passage money.⁷¹ But the payment and receipt of fare is unequivocal evidence that such a relation was entered into.⁷² But such payment must be made to an employe having real or apparent authority to collect fares.⁷³ It is immaterial at what time the fare is paid whether in advance, or at the office, or in the car or conveyance. It is sufficient that it is understood that it is to be paid, and that it is paid when demanded by the proper officer.⁷⁴ Carriers may, however, demand pre-payment of fare; and if they do not they must be presumed to rely upon their lien on the passengers' baggage, or the integrity and responsibility of the passengers.⁷⁵ Payment, when demanded, need not be made in coin; legal tender notes are sufficient and the

cellor, 60 Ill. App. 525; Baltimore, etc., R. Co. v. State, 63 Md. 135, 21 Am. & Eng. R. Cas. 202; Warren v. Fitchburg R. Co., 8 Allen (Mass.), 227, 85 Am. Dec. 700. But see Indiana Cent. R. Co. v. Hudelson, 13 Ind. 325, 74 Am. Dec. 254.

71. N. Y.—Cleveland v. New Jersey Steamboat Co., 68 N. Y. 306; Buffet v. Troy, etc., R. Co., 40 N. Y. 168; Gordon v. Grand St., etc., R. Co., 40 Barb. (N. Y.) 546; Doran v. East River Ferry Co., 3 Lans. (N. Y.) 105; Bartlett v. New York, etc., Ferry, etc., Co., 57 N. Y. Super. Ct. 348, affd. 130 N. Y. 659.

U. S.—The Wasco, 53 Fed. 546.

Fla.—Florida Southern R. Co. v. Hirst, 30 Fla. 1, 32 Am. St. Rep. 17, 52 Am. & Eng. R. Cas. 409.

Ill.—Ohio, etc., R. Co. v. Muhling, 30 Ill. 9, 81 Am. Dec. 336.

Iowa.—Rose v. Des Moines Valley R. Co., 39 Iowa, 246; Russ v. Steamboat War Eagle, 14 Iowa, 363.

Miss.—Hurt v. Southern R. Co., 40 Miss. 391.

Mo.—Muehlhausen v. St. Louis R.

Co., 91 Mo. 332, 28 Am. & Eng. R. Cas. 157; Sherman v. Hannibal, etc., R. Co., 72 Mo. 65, 17 Am. Rep. 423; Murphy v. St. Louis, etc., R. Co., 43 Mo. App. 342.

Tenn.—Nashville, etc., R. Co. v. Messino, 1 Snead (Tenn.), 220.

Tex.—Prince v. International, etc., R. Co., 64 Tex. 144, 21 Am. & Eng. R. Cas. 152; Gulf, etc., R. Co. v. Wilson, 79 Tex. 371.

Wash.—Cogswell v. West St., etc., Elec. R. Co., 5 Wash. 46, 52 Am. & Eng. R. Cas. 500.

See also Nellis Street Railroad Accident Law, page 40.

72. Carroll v. Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221.

73. McNamara v. Great Northern R. Co., 61 Minn. 296; Cleveland, etc., R. Co. v. Bartram, 11 Ohio St. 457.

74. Gordon v. Grand St., etc., R. Co., supra; Russ v. Steamship War Eagle, 14 Iowa, 363; The Wasco, 53 Fed. 546; Nashville, etc., R. Co. v. Messino, *supra*.

75. Hurt v. Southern R. Co., 40 Miss. 391.

carrier is bound to accept them.⁷⁶ Nor need the fare be actually paid in money; any valuable consideration moving from the passenger to the carrier makes him a passenger for hire.⁷⁷ And the fare need not be paid by the passenger himself in person.⁷⁸ The relation of carrier and passenger being based upon contract, express or implied, if a person proposes to become a passenger and yet refuses to pay his fare, whereupon the carrier refuses to undertake to carry him, there cannot be said to be a contract of carriage, and the passenger becomes a trespasser *ab initio*, as though his entry had been unlawful;⁷⁹ unless such refusal to pay fare was justifiable, because of the unlawful demand of extra fare by the carrier,⁸⁰ or the refusal of the carrier to provide him a seat as required by law.⁸¹ Where one fraudulently evades the payment of fare and thus induces the carrier to permit him to remain on the train, the relation of carrier and passenger is not established.⁸² But the fact that a person has not paid his fare on a railroad train

76. Lewis v. New York Cent. R. Co., 49 Barb. (N. Y.) 330; Tarbell v. Central Pac. R. Co., 34 Cal. 616.

77. Grand Trunk R. Co. v. Stevens, 93 U. S. 655; Ohio, etc., R. Co. v. Nickless, 71 Ind. 271; Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315; International, etc., R. Co. v. Gray, 65 Tex. 32, 27 Am. & Eng. R. Cas. 318; Pool v. Chicago, etc., R. Co., 53 Wis. 657, 3 Am. & Eng. R. Cas. 332, 56 Wis. 227, 8 Am. & Eng. R. Cas. 360. See also cases cited, *Riding on Dровер's Pass*, in note 74, § 17, *post*.

78. Marshall v. York, etc., R. Co., 111 C. B. 655, 73 E. C. L. 655.

79. People v. Jillson, 3 Park. Cr. Rep. (N. Y.) 234; Moore v. Columbia, etc., R. Co., 38 S. C. 1; Higley v. Gilmer, 3 Mont. 90, 35 Am. Rep. 450; Louisville, etc., R. Co. v. Johnson, 92 Ala. 204, 47 Am. & Eng. R. Cas. 611; Terre Haute, etc., R. Co. v. Fitzgerald, 47 Ind. 79, 8 Am. Ry. Rep. 282; Lake Erie, etc., R. Co. v. Mays, 4 Ind. App. 413; Lillis v. St. Louis, etc., R. Co., 64 Mo. 464, 27 Am. Rep. 255. Unless the carrier

consented to his remaining on the conveyance, Union Packet Co. v. Clough, 20 Wall. (U. S.) 528; Muehlhausen v. St. Louis, etc., R. Co., 91 Mo. 332, 28 Am. & Eng. R. Cas. 159.

Having refused to pay his fare, he does not become a passenger, by offering to pay his fare after he has caused the train to be stopped to put him off. People v. Jillson, 3 Park. Cr. Rep. (N. Y.) 234; Harrison v. Fink, 42 Fed. 787.

80. The Wasco, 53 Fed. 546; Ellsworth v. Chicago, etc., R. Co. (Iowa), 63 N. W. 584; Poole v. Northern Pac. R. Co., 16 Or. 261.

81. Hardenbergh v. St. Paul, etc., R. Co., 39 Minn. 3, 12 Am. St. Rep. 610, 34 Am. & Eng. R. Cas. 359.

A passenger on a street car who fails to pay a second fare, when the same has become due, ceases thereupon to be a passenger. Hudson v. Lynn & Boston R. Co., 3 St. Ry. Rep. 394, 185 Mass. 510, 71 N. E. 66.

82. Condran v. Chicago, etc., R. Co., 67 Fed. 522.

at the time of an accident in which he is injured, will not deprive him of his character as passenger, if the conductor has not asked for his fare.⁸³

§ 8. Termination of relation.—A person entitled to passage on a train or other conveyance between two points is entitled to the protection of a passenger from the starting point to the appropriate and usual stopping place at the final destination,⁸⁴ and until the passenger has been safely discharged or has safely alighted from the vehicle of carriage by the proper mode of egress,⁸⁵ and until he has left the carrier's depot, station or premises;⁸⁶ or has had reasonable time and opportunity to leave the carrier's premises at the place where his journey ends, and passengers are discharged.⁸⁷ But he may forfeit this right by such

83. Chicago, etc., R. Co. v. Lee, 92 Fed. 318, 34 C. C. A. 365, 14 Am. & Eng. R. Cas. 264, citing Philadelphia, etc., R. Co. v. Derby, 14 How. (U. S.) 468, 14 L. Ed. 502; The New World v. King, 16 How. (U. S.) 469, 14 L. Ed. 1019.

84. Gilhooly v. New York, etc., Steam Nav. Co., 1 Daly (N. Y.), 197; Hardin v. Fort Worth, etc., R. Co. (Tex. Civ. App.), 77 S. W. 431; Pearson v. Duane, 4 Wall. (U. S.) 605.

85. Timpson v. Manhattan R. Co., 52 Hun (N. Y.), 489; Burke v. Chicago, etc., R. Co., 108 Ill. App. 565; West Chicago St. R. Co. v. Walsh, 78 Ill. App. 595; Smith v. City, etc., R. Co., 29 Or. 539, 46 Pac. 136, 5 Am. & Eng. R. Cas. N. S. 163; Central R. Co. v. Whitehead, 74 Ga. 441; Pittsburgh, etc., R. Co. v. Martin, 3 Ohio Dec. 93; Texas, etc., R. Co. v. Miller, 79 Tex. 78; St. Louis, etc., R. Co. v. Finley, 79 Tex. 85; Rateree v. Galveston, etc., R. Co. (Tex. Civ. App.), 81 S. W. 566; Indianapolis St. Ry. Co. v. Tenner, 1 St. Ry. Rep. 178 (Ind. App.), 67 N. E. 1044.

86. Lake St. Elev. R. Co. v. Gorm-

ley, 108 Ill. App. 59; Houston, etc., R. Co. v. Batchler (Tex. Civ. App.), 73 S. W. 981; Hansley v. Jamesville, etc., R. Co., 115 N. C. 602, 44 Am. St. Rep. 474; Pittsburgh, etc., R. Co. v. Krouse, 30 Ohio St. 222.

Where a passenger is sleeping in a day coach when the train arrives at his destination, his failure to leave the train immediately does not terminate the relation of passenger and the carrier's duty to him as such. Bass v. Cleveland, etc., Ry. (Mich.), 105 N. W. 151.

87. Chicago, etc., R. Co. v. Tracey, 109 Ill. App. 563; Pittsburgh, etc., R. Co. v. Gray (Ind. App.), 59 N. E. 1000; Texas, etc., R. Co. v. Dick (Tex. Civ. App.), 63 S. W. 895; Chicago Ter. Trans. Co. v. Schmelling, 99 Ill. App. 577, 197 Ill. 619, 64 N. E. 714; Chicago, etc., R. Co. v. Barrett, 16 Ill. App. 17; Jeffersonville, etc., R. Co. v. Parmalee, 51 Ind. 44; Central R. Co. v. Whitehead, 74 Ga. 441; Imhoff v. Chicago, etc., R. Co., 20 Wis. 344; Chicago, etc., R. Co. v. Frazer, 55 Kan. 582; Prickett v. New Orleans Anchor Line, 13 Mo. App. 436; Chicago, etc., R. Co. v. Wood, 104 Fed. 663, 44 C. C. A. 118. See

misconduct on his part as will justify the carrier in rescinding the contract of carriage and in ejecting him,⁸⁸ as for a refusal to pay fare,⁸⁹ refusal to produce or failure to procure a ticket,⁹⁰ attempting to use an invalid ticket,⁹¹ detaching coupons from ticket,⁹² failure to have ticket properly stamped,⁹³ or refusing to comply with the reasonable rules and regulations of the carrier.⁹⁴

as to street railroads, Nellis St. Rd. Acct. Law, 45, 46, 47.

88. Chicago, etc., R. Co. v. Barrett, 16 Ill. App. 17; Louisville, etc., R. Co. v. Johnson, 92 Ala. 204, 47 Am. & Eng. R. Cas. 611.

Traveling on Sunday for pleasure, in violation of statute, does not affect the relation of carrier and passenger so as to relieve the carrier from liability for negligence. Carroll v. Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221; Bucher v. Fitchburg R. Co., 131 Mass. 156, 41 Am. Rep. 216; Smith v. New York, etc., R. Co., 46 N. J. L. 7, 18 Am. & Eng. R. Cas. 399; Illinois Cent. R. Co. v. Dick, 91 Ky. 434; Knowlton v. Milwaukee City R. Co., 59 Wis. 278.

89. Hoelljes v. Interurban St. Ry. Co., 43 Misc. Rep. (N. Y.) 350, 87 N. Y. Supp. 133; St. Louis, etc., R. Co. v. Carroll, 13 Ill. App. 585; Hurt v. Southern R. Co., 40 Miss. 391; Atwater v. Delaware, etc., R. Co., 48 N. J. L. 55, 57 Am. Rep. 543, 23 Am. & Eng. R. Cas. 470; Cresson v. Philadelphia, etc., R. Co., 11 Phila. (Pa.) 597; Atchison, etc., R. Co. v. Gants, 38 Kan. 608, 34 Am. & Eng. R. Cas. 290; Sherman v. Chicago, etc., R. Co., 40 Iowa, 45, 8 Am. Ry. Rep. 410; Johnson v. Philadelphia, etc., R. Co., 63 Md. 106, 18 Am. & Eng. R. Cas. 304. See also Arnold v. Pennsylvania R. Co., 115 Pa. St. 135, 28 Am. & Eng. R. Cas. 189.

90. Lynch v. Metropolitan Elev. R. Co., 90 N. Y. 77; Hibbard v. New York, etc., R. Co., 15 N. Y. 455; Brown v. Rapid Ry. Co., 10 Det. L.

N. 579, 96 N. W. 925; Crowley v. Fitchburg, etc., R. Co. 185 Mass. 279, 70 N. E. 56; Nutter v. Southern Ry., 25 Ky. Law Rep. 1700, 78 S. W. 470; Harp v. Southern Ry. Co., 119 Ga. 927, 47 S. E. 206; Chicago, etc., R. Co. v. Willard, 31 Ill. App. 435; Ripley v. New Jersey R., etc., Co., 31 N. J. L. 388; Crawford v. Cincinnati, etc., R. Co., 26 Ohio St. 580; Bennett v. Railroad Co., 7 Phila. (Pa.) 11; Downs v. New York, etc., R. Co., 36 Conn. 287, 4 Am. Rep. 77. See also Maples v. New York, etc., R. Co., 38 Conn. 557, 9 Am. Rep. 434; McKimble v. Boston, etc., R. Co., 141 Mass. 463, 3 Am. Neg. Cas. 831; State v. Campbell, 32 N. J. L. 309; Beaver v. Grand Trunk R. Co., 20 Ont. App. 476, 58 Am. & Eng. R. Cas. 42.

91. Godfrey v. Ohio, etc., R. Co., 116 Ind. 30, 37 Am. & Eng. R. Cas. 8; Wyman v. Northern Pac. R. Co., 34 Minn. 210, 22 Am. & Eng. R. Cas. 402.

92. Boston, etc., R. Co. v. Chapman, 146 Mass. 107, 4 Am. St. Rep. 293, 34 Am. & Eng. R. Cas. 336; Louisville, etc., R. Co. v. Harris, 9 Lea (Tenn.), 180, 16 Am. & Eng. R. Cas. 374; Norfolk, etc., R. Co. v. Wysor, 82 Va. 250, 26 Am. & Eng. R. Cas. 234; Houston, etc., R. Co. v. Ford, 53 Tex. 364.

93. Boylan v. Hot Springs R. Co., 132 U. S. 146, 40 Am. & Eng. R. Cas. 666; Cloud v. St. Louis, etc., R. Co., 14 Mo. App. 136.

94. Lake Erie, etc., R. Co. v. Mays,

§ 9. Leaving the vehicle of carrier.—Persons while rightfully in the act of getting off or alighting from a train or other vehicle of transportation, at a station or place at which it has stopped for receiving or discharging passengers, are deemed to be passengers.⁹⁵ But one who leaves a train while it is in motion, and has run by a station, ceases to be a passenger.⁹⁶ A carrier has the right to determine the routes by which passengers shall enter on and leave its trains, and where a safe and suitable egress in one direction is provided, and a passenger, instead of taking it, goes in another direction which is unsafe, he severs his relation with the company as a passenger.⁹⁷

§ 10. After leaving vehicle of carrier.—The liability of the carrier to provide for the safety of passengers continues, not only while the passenger is in the vehicle of transportation, but so long as he is still upon the premises of the company, while leaving the vehicle, at his point of destination, in a proper manner and by the usual route.⁹⁸ And a passenger does not necessarily terminate his relation as such by temporarily leaving the vehicle and then returning to it.⁹⁹ In the case of street surface railroads the rela-

4 Ind. App. 413; Manning v. Louisville, etc., R. Co., 95 Ala. 392, 36 Am. St. Rep. 225. But see Sharer v. Paxson, 171 Pa. St. 26, 37 W. N. C. (Pa.) 319, as to boarding a moving car.

95. Pittsburgh, etc., R. Co. v. Gray, 28 Ind. App. 588, 64 N. E. 39; McKimble v. Boston, etc., R. Co., 139 Mass. 542, 21 Am. & Eng. R. Cas. 213; Hrebrik v. Carr, 29 Fed. 298; Theobald v. Railway Pass. Assur. Co., 10 Exch. 45, 26 Eng. L. & Eq. 439.

96. Commonwealth v. Boston, etc., R. Co., 129 Mass. 500, 37 Am. Rep. 382, 1 Am. & Eng. R. Cas. 457.

97. Chicago, etc., R. Co. v. Harrison, 100 Ill. App. 211.

98. Keefe v. Boston, etc., R. Co., 142 Mass. 251; Gaynor v. Old Colony, etc., R. Co., 100 Mass. 208;

Pittsburgh, etc., R. Co. v. Martin, 3 Ohio Dec. 93; Burnham v. Wabash Western R. Co., 91 Mich. 523; Ormond v. Hayes, 60 Tex. 180, where the passenger was assisting the carrier's servants in removing his baggage; Wallace v. Wilmington, etc., R. Co., 8 Houst. (Del.) 529, where passenger left in utter darkness at a station at which he alighted, was injured while seeking to get to a place of safety. See also Allerton v. Boston, etc., R. Co., 146 Mass. 241, 34 Am. & Eng. R. Cas. 563; Rozwadosfskie v. International, etc., R. Co., 1 Tex. Civ. App. 487, as to intoxicated passenger.

99. Bellman v. New York Cent., etc., R. Co., 42 Hun (N. Y.), 130, affd. 122 N. Y. 671, 34 (St. Rep.) N. Y. 1015; Chicago, etc., R. Co. v.

tion of passenger and carrier ceases when the passenger safely alights from a car which has been stopped at a safe place for him to alight. When the passenger steps from the car to the street he is not upon the premises of the railroad company, but upon a public place, over which the company has no control, and where he has the same rights as every other occupier.¹ But when a person voluntarily leaves a train or other vehicle for some purpose not incident to the journey, at a place other than his place of destination and not designed for the discharge of passengers, he thereby terminates his relation as a passenger.² The passenger, however, does not lose his character as such by leaving his car or boat temporarily at a regular station, or landing, either by reason of business or curiosity, though he has not yet arrived at the end of his journey;³ for example, to get a meal at refreshment and eating stations,⁴ or to stand or walk on the station platforms while the train is so stopping,⁵ or where stops are made to allow other trains

Flexman, 103 Ill. 546, 8 Am. & Eng. R. Cas. 354; Dodge v. Boston, etc., Steamship Co., 148 Mass. 207, 12 Am. St. Rep. 541. But see Pittsburgh, etc., R. Co. v. Krouse, 30 Ohio St. 222.

A passenger rightfully ejected from a train is a trespasser, if he immediately get on again. North Chicago St. R. Co. v. Olds, 40 Ill. App. 421; State v. Campbell, 32 N. J. L. 309; People v. Jillson, 3 Park. Cr. Rep. (N. Y.) 234; Harrison v. Fink, 42 Fed. 787.

1. Platt v. Forty-Second St., etc., R. Co., 2 Hun (N. Y.), 124, 4 T. & C. (N. Y.) 406; West Chicago St. R. Co. v. Walsh, 78 Ill. App. 595; Smith v. City, etc., R. Co., 29 Or. 539, 5 Am. & Eng. R. Cas. N. S. 163, 46 Pac. 136; Creamer v. West End St. Ry. Co., 4 Am. Electl. Cas. 476, 156 Mass. 320, 16 L. R. A. 490, 31 N. E. 391, 52 Am. & Eng. R. Cas. 558.

2, Chicago, etc., R. Co. v. Sattler (Neb.), 90 N. W. 649, 57 L. R. A. 890; Buckley v. Old Colony R. Co., 161 Mass. 26; Central R. Co. v. Henderson, 69 Ga. 715; Cincinnati, etc.,

R. Co. v. Carper, 112 Ind. 26, 2 Am. St. Rep. 144, 31 Am. & Eng. R. Cas. 36; Finnegan v. Chicago, etc., R. Co., 48 Minn. 378. In the last two cases the passenger had taken the wrong train and had the same stopped and voluntarily left.

3. Parsons v. New York Cent., etc., R. Co., 113 N. Y. 355, affg. 48 Hun (N. Y.), 615, 15 St. Rep. (N. Y.) 1016; Chicago, etc., R. Co. v. Sattler (Neb.), 90 N. W. 649, 57 L. R. A. 890; State v. Grand Trunk R. Co., 58 Me. 176, 4 Am. Rep. 258, but he should not go out of reach of notice by the usual signal for all to repair on board; Dice v. Willamett Transp., etc., Co., 8 Or. 60, 34 Am. Rep. 575; Keokuk Northern Line Packet Co. v. True, 88 Ill. 608. But see DeKay v. Chicago, etc., R. Co., 41 Minn. 178, 39 Am. & Eng. R. Cas. 463; Missouri Pac. R. Co. v. Foreman, 73 Tex. 311.

4. Dodge v. Boston, etc., Steamship Co., 148 Mass. 207, 12 Am. St. Rep. 541, 37 Am. & Eng. R. Cas. 67; Atchison, etc., R. Co. v. Shean, 18 Colo. 368, 58 Am. & Eng. R. Cas. 360.

5. Jeffersonville, etc., R. Co. v.

to pass and he leaves the car without objection made or notice given.⁶

§ 11. Stop-overs on continuous passage tickets.—If a ticket is silent on the subject of the passenger's right to stop over before he reaches the point to which the ticket entitles him to ride, it has been held in California that a passenger who stops over at an intermediate point cannot resume his journey on that ticket.⁷ In Ohio it has been held that, in the absence of any agreement, or of a rule or regulation to the contrary, the obligation created by a sale of a ticket is for one continuous passage, and if the passenger voluntarily leaves the train at an intermediate station while the carrier is engaged in the performance of its contract, he thereby releases it from further performance, and has no right to demand such performance on another train, or at another time.⁸ In New York and generally in other jurisdictions, where the ticket of the passenger provides for "a single passage" or "one continuous passage only" between two points, it precludes the passenger's right to stop at any intermediate station and renew the journey on another train at a subsequent time, and by so leaving the train and stopping over he voluntarily terminates his contract with the carrier for carriage to the designated point.⁹ The same rule ap-

Riley, 39 Ind. 568, 10 Am. Ry. Rep. 325.

6. Wandell v. Corbin, 17 St. Rep. (N. Y.) 718, 1 N. Y. Supp. 795; State v. Grand Trunk R. Co., 58 Me. 176; DeKay v. Chicago, etc., R. Co., 41 Minn. 178, 39 Am. & Eng. R. Cas. 463.

7. Drew v. Central Pac. R. Co., 51 Cal. 425, 12 Am. Ry. Rep. 222.

8. Hatten v. Railroad Co., 39 Ohio St. 375, 13 Am. & Eng. R. Cas. 53; Cleveland, etc., R. Co. v. Bartram, 11 Ohio St. 457.

9. N. Y.—Hamilton v. New York Cent. R. Co., 51 N. Y. 100, 4 Am. Ry. Rep. 423; Dunphy v. Erie R. Co., 42

N. Y. Super. Ct. 128; Terry v. Flushing, etc., R. Co., 13 Hun (N. Y.), 359; Gale v. Delaware, etc., R. Co., 7 Hun (N. Y.), 670; Beebe v.

Ayres, 28 Barb. (N. Y.) 275; Barber v. Coflin, 31 Barb. (N. Y.) 556.

U. S.—Roberts v. Koehler, 30 Fed. 94.

Iowa.—Stone v. Chicago, etc., R. Co., 47 Iowa, 82, 17 Am. Ry. Rep. 461.

Md.—Johnson v. Philadelphia, etc., R. Co., 63 Md. 106, 18 Am. & Eng. R. Cas. 304.

Mass.—Johnson v. Boston, etc., R. Co., 125 Mass. 75, 3 Am. Neg. Cas. 791; Cheney v. Boston, etc., R. Co., 11 Metc. (Mass.) 121.

Minn.—Wyman v. Northern Pac. R. Co., 34 Minn. 210, 22 Am. & Eng. R. Cas. 402.

Mo.—Walker v. Wabash, etc., R. Co., 15 Mo. App. 333, 16 Am. & Eng. R. Cas. 380.

N. H.—Johnson v. Concord R.

plies in reference to stoppage at a way station where a passenger is being transported over connecting lines,¹⁰ but he may stop over at the end of one line, before resuming his ride on the next connecting line, since the contract with each road for a continuous passage is separate, and there is no joint contract for a continuous passage over the entire route.¹¹ The relation of passenger does not terminate where the continuous transit may be interrupted by a washout,¹² or a wreck,¹³ or by any accident, misfortune, fault of the carrier, or the misconduct of the employees of the carrier; in such cases he is entitled to resume his journey and be transported as though no interruption had occurred.¹⁴ Nor does the relation terminate when the passenger stops over under a contract permitting him to do so, whether by agreement with an authorized agent of the carrier,¹⁵ or under a ticket to that effect,¹⁶ nor where the passenger is required to change cars at transfer stations.¹⁷

Corp., 46 N. H. 213, 88 Am. Dec. 199.

N. J.—*Petrie v. Pennsylvania R. Co.*, 42 N. J. L. 449, 1 Am. & Eng. R. Cas. 258; *State v. Overton*, 24 N. J. L. 435, 61 Am. Dec. 671.

Pa.—*Van Kirk v. Pennsylvania R. Co.*, 76 Pa. St. 66, 18 Am. Rep. 404; *Oil Creek, etc., R. Co. v. Clark*, 72 Pa. St. 231; *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432, 3 Am. Ry. Rep. 435.

Tex.—*Gulf, etc., R. Co. v. Henry*, 84 Tex. 678, 52 Am. & Eng. R. Cas. 230; *Breen v. Texas, etc., R. Co.*, 50 Tex. 43.

Vt.—*Shedd v. Troy, etc., R. Co.*, 40 Vt. 88.

Can.—*Craig v. Great Western R. Co.*, 24 U. C. Q. B. 504; *Briggs v. Grand Trunk R. Co.*, 24 U. C. Q. B. 510.

10. *McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532; *State v. Overton*, 24 N. J. L. 435, 61 Am. Dec. 671.

11. *Auerbach v. New York Cent. etc., R. Co.*, 89 N. Y. 281, 42 Am. Rep. 290; *Nichols v. Southern Pac. R. Co.*, 23 Or. 123, 52 Am. & Eng. R.

Cas. 205; *Little Rock, etc., R. Co. v. Dean*, 43 Ark. 529, 51 Am. Rep. 584, 21 Am. & Eng. R. Cas. 279.

12. *Dwinnelle v. New York Cent., etc., R. Co.*, 120 N. Y. 117, 44 Am. & Eng. R. Cas. 384.

13. *Wilsey v. Louisville, etc., R. Co.*, 83 Ky. 511, 26 Am. & Eng. R. Cas. 258.

14. *Gulf, etc., R. Co. v. Henry*, 84 Tex. 678, 52 Am. & Eng. R. Cas. 230.

15. *Tarbell v. Northern Cent. R. Co.*, 24 Hun (N. Y.), 51; *Beebe v. Ayres*, 28 Barb. (N. Y.) 275; *New York, etc., R. Co. v. Winter*, 143 U. S. 60, 52 Am. & Eng. R. Cas. 328.

16. *Cherry v. Kansas City, etc., R. Co.*, 52 Mo. App. 499.

The fact that a conductor on one part of the route allowed a passenger a stop over on a through ticket, did not entitle him to it, by a different conductor on another part of the road. *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432, 3 Am. Ry. Rep. 435. And see *Yorton v. Milwaukee, etc., R. Co.*, 62 Wis. 367, 18 Am. & Eng. R. Cas. 332.

17. *Knight v. Portland, etc., R.*

§ 12. Who are not passengers.—A trespasser or “dead head” upon a train or other vehicle of transportation cannot be deemed a passenger.¹⁸ A trespasser stealing a ride or attempting to do so cannot be considered in any sense a passenger.¹⁹ A tramp, or person who clandestinely enters a box car of a freight train to beat his way over the road;²⁰ one riding by stealth upon the engine, without consent of any officer or agent of the company, and in violation of the rules of the company, known to him, although an engineer or engine driver gave him authority to do so;²¹ one who pays a brakeman on a passenger train money to be carried to a certain point, and is told to ride on the platform of the baggage car, get off the train at all stops and keep out of sight, and who follows such instructions,²² is a trespasser and not a passenger. One who, knowing that a conductor has no authority to grant free transportation, enters the train with the intention not to pay his fare, under an understanding with the conductor, commits a fraud on the railroad company, and is a mere trespasser, to whom the only duty of the company is to abstain from wilful or reckless injury.²³ So, if a ticket is procured by fraud,²⁴ or the conductor is induced by a tip or bribe or otherwise to permit him to travel contrary to the regulation of the company,²⁵ or in any way he

Co., 56 Me. 234; Baltimore, etc., R. Co. v. State, 60 Md. 449, 12 Am. & Eng. R. Cas. 149; St. Louis Southwestern R. Co. v. Griffith (Tex. Civ. App.) 35 S. W. 741.

18. Higley v. Gilmer, 3 Mont. 90, 35 Am. Rep. 450; Brown v. Missouri, etc., R. Co., 64 Mo. 536. See also § 3, note 26, *ante*.

Trespassers are not passengers within the meaning of statutes prohibiting the expulsion of passengers at places other than regular stations. Chicago, etc., R. Co. v. Peacock 48 Ill. 253; Hobbs v. Texas, etc., R. Co., 49 Ark. 357, 34 Am. & Eng. R. Cas. 268; Fulton v. Grand Trunk R. Co., 17 U. C. Q. B. 428.

19. Chicago, etc., R. Co. v. Mehl-sack, 131 Ill. 61, 19 Am. St. Rep. 17, 41 Am. & Eng. R. Cas. 60; Toledo, etc., R. Co. v. Brooks, 81 Ill. 245;

Chicago, etc., R. Co. v. Casey, 9 Ill. App. 632; Farber v. Missouri Pac. R. Co., 116 Mo. 81; Sherman v. Hannibal, etc., R. Co., 72 Mo. 62, 37 Am. Rep. 423; Rucker v. Missouri Pac. R. Co., 61 Tex. 499; State v. Baltimore, etc., R. Co., 24 Md. 84; Muehl-hausen v. St. Louis R. Co., 91 Mo. 332, 2 S. W. 315; Barry v. Union Ry. Co., 94 N. Y. Supp. 449.

20. Hendrix v. Kansas City, etc., R. Co., 45 Kan. 377.

21. See § 19, *post*.

22. Mendenhall v. Atchison, etc., R. Co., 66 Kan. 438, 61 L. R. A. 120, 71 Pac. 846.

23. Purple v. Union Pac. R. Co., 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700.

24. Brown v. Missouri, etc., R. Co., 64 Mo. 536.

25. Brevig v. Chicago, etc., R. Co.,

secures his conveyance by fraud or against the express orders of the carrier.²⁶ A person who gets upon a train after it has started does not become a passenger until he reaches a place of safety inside.²⁷ One who attempts to board a moving street car going at a rapid rate,²⁸ or when he has not indicated his intention to do so in time to enable the persons in charge of the car to stop it at a proper place,²⁹ does not become a passenger. One cannot be considered a passenger who, without having procured a ticket, was crossing a side track, in the night, to get upon a passenger train at its usual stopping place on the main track;³⁰ or who, having purchased no ticket and paid no fare, attempts to board the caboose attached to a freight train, at a place where the company is not accustomed to receive passengers, without the knowledge of those in charge of the train,³¹ or who, by signals, causes a passenger train to stop at night at a point not a stopping place, and, without the knowledge of the trainmen, endeavors to board the train;³² or who endeavors to get upon a car without the knowledge of the trainmen, when it has stopped at a station for the purpose of discharging passengers, but not receiving passengers, although

64 Minn. 168; Canadian Pac. R. Co. v. Johnson, 6 Montreal Q. B. 213; McVeety v. St. Paul, etc., R. Co., 45 Minn. 268, 47 Am. & Eng. R. Cas. 471.

26. Satterlee v. Groat, 1 Wend. (N. Y.) 272; Condran v. Railroad Co., 67 Fed. 522, 14 C. C. A. 506, 32 U. S. App. 182; Way v. Chicago, etc., R. Co., 64 Iowa, 48, 19 N. W. 828, 52 Am. Rep. 431, 73 Iowa, 463, 35 N. W. 525; Railway Co. v. Gants, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780; Prince v. Railway Co., 64 Tex. 146; O'Brien v. Boston, etc., R. Co., 15 Gray (Mass.), 20, 77 Am. Dec. 347; Toledo, etc., R. Co. v. Brooks, 81 Ill. 245; Great Northern R. Co. v. Harrison, 10 Exch. 376, 26 Eng. L. & Eq. 443.

27. Ohio, etc., R. Co. v. Allender, 59 Ill. App. 620; Merrill v. Eastern R. Co., 139 Mass. 238, 52 Am. Rep.

705. Yet one who does safely board a moving train, having a ticket, must be considered a passenger. Sharer v. Paxson, 171 Pa. St. 26. And one who, waiting at a flag station, attempts to board a moving train, on the invitation of the conductor, is a passenger. Murphy v. St. Louis, etc., R. Co., 43 Mo. App. 342.

28. Baltimore Tract Co. v. State, Ringgold, 78 Md. 409, 58 Am. & Eng. R. Cas. 200, 28 Atl. 397.

29. Schepers v. Union Depot R. Co., 5 Am. Electl. Cas. 398, 126 Mo. 665, 2 Am. & Eng. R. Cas. N. S. 9.

30. Indiana Central R. Co. v. Huddelson, 13 Ind. 325.

31. Haase v. Oregon, etc., R. Co., 19 Or. 354, 44 Am. & Eng. R. Cas. 360.

32. Georgia Pac. R. Co. v. Robinson, 68 Miss. 643.

he has a ticket.³³ One is not a passenger who attempts to enter a station by a route not meant for passengers;³⁴ or who is walking, or running, towards a station or car or train, with the intention of buying a ticket, or taking the car or train, before he reaches the station, car or train,³⁵ or who goes upon the premises of a railroad station from curiosity or for the transaction of business not connected with the company;³⁶ or who, having entered a railway station to take a certain train and finding it gone, waits there for a horse car;³⁷ or who has come to the carrier's station with the intention of taking passage at some indefinite time in the future.³⁸ One who rides on a train which he knows, or with diligence would know, is prohibited from carrying passengers, is a trespasser, and not a passenger.³⁹ So, one riding on a hand car, at the invitation of a section foreman on a railroad who is not an agent of the company for the purpose of carrying passengers on such a car.⁴⁰ A newsboy who has a license to pass on and off street cars or trains for the purpose of selling his newspapers, is only a licensee and not a passenger.⁴¹ Newsboys entering cars or trains to sell papers without permission of the carrier are not passengers or licensees, but trespassers;⁴² and one who boards a street car without signal-

33. Jones v. Boston, etc., R. Co., 163 Mass. 245.

34. Comly v. Pennsylvania R. Co. (Pa.), 12 Atl. 496; Wilby v. Midland R. Co., 35 L. T. N. S. 244; Walker v. Great Western R. Co., 8 U. C. C. P. 161.

35. Southern Ry. Co. v. Smith, 86 Fed. 292; Chicago, etc., R. Co. v. Jennings, 190 Ill. 478, 60 N. E. 818; Foster v. Seattle Electric Co., 35 Wash. 177, 76 Pac. 995; June v. Boston, etc., R. Co., 153 Mass. 79; Webster v. Fitchburg R. Co., 161 Mass. 298; Jones v. Boston, etc., R. Co., *supra*; Schepers v. Union Depot R. Co., *supra*.

36. Gillis v. Pennsylvania R. Co., 59 Pa. St. 129, 98 Am. Dec. 317; Diebold v. Pennsylvania R. Co., 50 N. J. L. 478; Pittsburgh, etc., R. Co. v. Bingham, 29 Ohio St. 364, 23 Am. Rep. 751; St. Louis, etc., R. Co. v.

Fairbairn, 48 Ark. 491; Kansas City, etc., R. Co. v. Kirksey, 48 Ark. 366.

37. Heinlein v. Boston, etc., R. Co., 147 Mass. 136, 9 Am. St. Rep. 676, 33 Am. & Eng. R. Cas. 500.

38. Harris v. Stevens, 31 Vt. 79, 73 Am. Dec. 337.

39. Purple v. Union Pac. R. Co. *supra*. See also Persons riding on freight trains, § 23, *post*.

40. See § 20, *post*.

41. Fleming v. Brooklyn City R. Co., 74 N. Y. 618, 1 Abb. N. C. (N. Y.) 433; Philadelphia Tract. Co. v. Orbann, 119 Pa. St. 37; Indianapolis St. Ry. Co. v. Hockett (Ind.), 1 St. Ry. Rep. 115 and notes, 67 N. E. 106; Blackmore v. Toronto St. R. Co., 38 U. C. Q. B. 172.

42. Barber v. Broadway, etc., R. Co., 10 Misc. Rep. (N. Y.) 109, 61 St. Rep. (N. Y.) 466, 30 N. Y. Supp. 931; Coll v. Toronto R. Co. (Can.), 25 Ont. App. 55.

ing it to stop, for the purpose of selling papers and jumping off again, is not a passenger, although he intended to pay fare if the conductor asked him.⁴³ It has been held that a servant of a sleeping car company who is given free transportation by a railroad company, under a contract between the two companies, is neither a fellow servant with those operating the engine and train, nor a passenger of the railroad company, in any such sense as to require of it the highest degree of skill and care in the construction and maintenance of its roadway and machinery, and in the operation of its road and the running of its trains, such as are required in the case of a passenger.⁴⁴ On the other hand it has been held that he is in no sense a fellow servant, but while being transported over the carrier's road under a contract, which is supported by a sufficient consideration, he is entitled to the rights of a passenger in respect to careful running and management of the train; that he does not differ materially from mail agents, express agents, and persons in like circumstances who are transported under contract of a similar nature.⁴⁵ One boarding a railroad train, knowing it was not a regular train, but a special excursion train, will not be presumed to have sustained to the company the relation of a passenger thereon.⁴⁶

§ 13. Limited and unlimited tickets.—In the absence of a stipulation to the contrary on a passenger's ticket, or notice to the buyer at the time of purchase, a ticket is good until used, the

43. Raming v. Metropolitan St. Ry. Co., 157 Mo. 477, 57 S. W. 268.

A pop corn vendor who pays a certain sum and supplies the passengers with ice water as a consideration for a contract to permit him to travel on the train and sell pop corn, is, however, a passenger while so traveling and not an employe. Commonwealth v. Vermont, etc., R. Co., 108 Mass. 7, 7 Am. Ry. Rep. 394. But see Yeomans v. Contra Costa Steam Nav. Co., 44 Cal. 71; Smallman v. Whilter, 87 Ill. 545, 27 Am. Rep. 76, as to persons carrying on a business on a carrier's vehicle.

44. Hughson v. Richmond, etc., R. Co., 2 App. Cas. (D. C.) 98.

45. Jones v. St. Louis Southwestern R. Co., 125 Mo. 666.

46. Fitzgibbon v. Chicago, etc., R. Co., 108 Iowa, 614, 79 N. W. 477, 14 Am. & Eng. R. Cas. N. S. 270. Citing Pennsylvania R. Co. v. Price, 96 Pa. 267; Louisville, etc., R. Co. v. Thompson, 107 Ind. 442, 57 Am. Rep. 120; Wagner v. Missouri Pac. R. Co., 97 Mo. 512, 3 L. R. A. 156; Atchison, etc., R. Co. v. Headland, 18 Colo. 477, 20 L. R. A. 822; Eaton v. Delaware, etc., R. Co., 57 N. Y. 382, 15 Am. Rep. 513; Texas, etc., R. Co. v. Black, 87 Tex. 160, 27 S. W. 118; People v. Douglas, 87 Cal. 281; Southwestern R. Co. v. Singleton, 66 Ga. 252; Rosenbaum v. St. Paul, etc.,

passenger not being bound by a regulation to the contrary, of which he is not informed.⁴⁷ The words "good this trip only," do not limit the undertaking of the company to any particular day, or any special train of cars; they do not relate to time, but to the journey.⁴⁸ But a railroad company or other carrier has a right to provide on its tickets and insist that its passenger tickets shall be used on the day when issued, or within a certain specified time; and where the ticket by its terms limits the time within which it is to be used, it does not exonerate the holder from the payment of fare, if he takes passage on the road after the expiration of the time, and the carrier may refuse to recognize him as a passenger unless he pays fare when demanded.⁴⁹ And the carrier has the

R. Co., 38 Minn. 173; Keating v. Michigan Cent. R. Co., 97 Mich. 154; Haase v. Oregon, etc., R. Co., 19 Or. 354.

47. Pennsylvania R. Co. v. Spicker, 105 Pa. St. 142, 23 Am. & Eng. R. Cas. 672; Brooke v. Grand Trunk R. Co., 15 Mich. 332. Unless his attention is called to limitations thereon, he has a right to ride on the ticket at any time. Dagnall v. Southern Ry. Co., 69 S. C. 110, 48 S. C. 97; Norman v. Southern Ry. Co., 65 S. C. 517, 44 S. E. 83. But see Daniels v. Florida Cent., etc., R. Co., 62 S. C. 1; Walker v. Price (Kan. App.), 59 Pac. 1102. But he is entitled to only a continuous passage and has no right to stop over at an intermediate station, and afterwards demand the completion of the contract on a later train. Louisville, etc., R. Co. v. Klyman (Tenn.), 67 S. W. 472, 56 L. R. A. 769.

48. Pier v. Finch, 24 Barb. (N. Y.) 514, 29 Barb. (N. Y.) 170. The words "good for this day only," however, limit the passenger's right to a passage upon the company's cars to the day of its date. Elmore v. Sands, 54 N. Y. 512; Boice v. Hudson River Co., 61 Barb. (N. Y.) 611.

49. N. Y.—Hill v. Syracuse, etc., R.

Co., 63 N. Y. 101; Elmore v. Sands, 54 N. Y. 512, 13 Am. Rep. 617; Barker v. Coffin, 31 Barb. (N. Y.) 556; Boice v. Hudson River R. Co., 61 Barb. (N. Y.) 611; Gale v. Delaware, etc., R. Co., 7 Hun (N. Y.) 670; Nelson v. Long Island R. Co., 7 Hun (N. Y.) 140; Wentz v. Erie R. Co., 3 Hun (N. Y.) 241.

Ga.—Boyd v. Spencer, 103 Ga. 828, 4 Am. Neg. Rep. 619, 11 Am. & Eng. R. Cas. 247. 30 S. E. 841, purchaser not bound where he had no notice; Southern Ry. Co. v. Watson, 110 Ga. 681, 36 S. E. 209.

Ind.—Callaway v. Mellett, (Ind. App.) 44 N. E. 198; Terre Haute, etc., R. Co. v. Fitzgerald, 47 Ind. 79.

Kan.—Rolfs v. Atchison, etc., R. Co., (Kan.) 71 Pac. 526.

La.—Rawitsky v. Louisville, etc., R. Co., 40 La. Ann. 47, 31 Am. & Eng. R. Cas. 129. A time limit of one day is not unreasonably short, and the purchaser must take notice of the limit printed on the ticket. Coburn v. Morgan's L. & T. R. Co., 105 La. 398, 29 So. 882.

Md.—Pennington v. Philadelphia, etc., R. Co., 62 Md. 95, 18 Am. & Eng. R. Cas. 310; McClure v. Philadelphia, etc., R. Co., 34 Md. 532, 6 Am. Rep. 345.

same right to make its ticket receivable on a particular train, and to refuse to accept it for any other train than the ticket provides that the passenger may travel on.⁵⁰ A passenger who applies for and accepts a second class ticket, is not entitled to ride on a train

Iowa.—Hanlon v. Illinois Cent. R. Co., 109 Iowa, 136, 80 N. W. 223.

Mass.—Boston, etc., R. Co. v. Proctor, 1 Allen (Mass.) 267, 79 Am. Dec. 729.

Mich.—Heffron v. Detroit City R. Co., 92 Mich. 406.

Miss.—Howard v. Chicago, etc., R. Co., 61 Miss. 194, 18 Am. & Eng. R. Cas. 313.

Mo.—Lillis v. St. Louis, etc., R. Co., 64 Mo. 464, 27 Am. Rep. 255, a 1,000 mile commutation ticket expressed upon its face to be "good for six months only," is not good after the expiration of that period.

N. H.—Johnson v. Concord R. Corp., 46 N. H. 213, 88 Am. Dec. 199.

N. J.—State v. Campbell, 32 N. J. L. 309.

N. C.—McRae v. Wilmington, etc., R. Co., 88 N. C. 526, 43 Am. Rep. 745, 18 Am. & Eng. R. Cas. 316.

Ohio.—Pennsylvania Co. v. Hine, 41 Ohio St. 276; Powell v. Pittsburg, etc., R. Co., 25 Ohio St. 70, 13 Am. Ry. Rep. 477, a 1,000 mile commutation ticket.

Pa.—McElroy v. Railroad Co., 7 Phila. (Pa.) 206.

Tenn.—Louisville, etc., R. Co. v. Turner, 100 Tenn. 213, 47 S. W. 223, but limitations not binding unless passenger's attention called to them and he assents thereto.

Tex.—Gulf, etc., R. Co. v. Henry, 84 Tex. 678, 52 Am. & Eng. R. Cas. 230; Gulf, etc., R. Co. v. Looney, 85 Tex. 158, 34 Am. St. Rep. 787, 52 Am. & Eng. R. Cas. 197; Texas, etc.,

R. Co. v. McDonald, 2 Tex. App. Civ. Cas., § 163.

Vt.—Shedd v. Troy, etc., R. Co., 40 Vt. 88.

Can.—Briggs v. Grand Trunk R. Co., 24 U. C. Q. B. 510; Farewell v. Grand Trunk R. Co., 15 U. C. C. P. 427.

50. Nolan v. New York, etc., R. Co., 41 N. Y. Super. Ct. 541; Gale v. Delaware, etc., R. Co., 7 Hun (N. Y.) 670, a ticket "good for this day and train only," dated on the day when issued, authorizes the passenger to select any train on that day, but not to stop over, and complete his journey on another train. See also McMahon v. Third Ave. R. Co., 15 J. & S. (N. Y.) 282.

An "excursion ticket" only entitles the holder to a continuous passage; he has not the right to stop over at an intermediate point. Terry v. Flushing, etc., R. Co., 13 Hun (N. Y.) 359 and where it provides that it is to be used on the excursion train only, the excursionist cannot return on a regular train, even at an earlier day than that advertised for the excursion train, McRae v. Wilmington, etc., R. Co., 88 N. C. 526, 43 Am. Rep. 745, 18 Am. & Eng. R. Cas. 316; and if it calls for a "continuous trip only" between two points, it is not valid for passage to an intermediate point on a train which does not make the whole trip, Johnson v. Philadelphia, etc., R. Co., 63 Md. 106, 18 Am. & Eng. R. Cas. 304. See also Claybrook v. Hannibal, etc., R. Co., (Tex. Civ. App.) 73 S. W. 24.

limited to the carriage of passengers having first class tickets.⁵¹ The time limit specified in such a ticket may be extended by a duly authorized agent of the carrier,⁵² but the representations of an unauthorized agent will not avail to entitle the passenger to transportation after the expiration of the time.⁵³ Neither will the fact that the passenger within and after that time had been permitted, with the permission of the conductor, to use the ticket to ride to intermediate stations or in violation of the condition, or had been permitted to ride on other expired tickets;⁵⁴ or the checking of the holder's baggage and the punching of the ticket by the baggageman of the company,⁵⁵ act as a waiver of the limitation,

51. New York, etc., R. Co. v. Bennett, 50 Fed. 496, 6 U. S. App. 95, 12 Ry. & Corp. L. J. 136. But where a passenger paid for first-class tickets for himself and family and received second-class tickets, he may recover damages for being compelled to ride in a second-class car. St. Louis, etc., R. Co. v. Mackie, 71 Tex. 491, 10 Am. St. Rep. 766, 37 Am. & Eng. R. Cas. 94.

52. Randall v. New Orleans, etc., R. Co., 45 La. Ann. 778; Spellman v. Richmond, etc., R. Co., 35 S. C. 475.

53. Boice v. Hudson R. Co., 61 Barb. (N. Y.) 611; McClure v. Philadelphia, etc., R. Co., 34 Md. 532, 6 Am. Rep. 345. But see Nelson v. Long Island R. Co., 7 Hun (N. Y.) 140.

54. Hill v. Syracuse, etc., R. Co., 63 N. Y. 101; Wakefield v. South Boston R. Co., 117 Mass. 544; Johnson v. Concord R. Corp., 46 N. H. 213, 88 Am. Dec. 199; Dietrich v. Pennsylvania R. Co., 71 Pa. St. 432, 10 Am. Rep. 711; Sherman v. Chicago, etc., R. Co., 40 Iowa, 45.

55. Wentz v. Erie R. Co., 3 Hun (N. Y.) 241.

Round-trip tickets, punctured for separation into two parts and marked "not good for passage if detached," are good where the parts

have become separated by accident, if both parts are in good faith presented to the conductor on the outward trip. Wightman v. Chicago, etc., R. Co., 73 Wis. 190. The wrong part of a round-trip ticket, returned to a passenger by the conductor by mistake, is good on the return trip, when presented by the passenger who had not before noticed the mistake but then explained it to the conductor. Kansas City, etc., R. Co. v. Riley, 68 Miss. 765, 47 Am. & Eng. R. Cas. 476. A round-trip ticket good for one day is good for a return trip on the only train returning that day, though such train is not scheduled to stop at the station of purchase. Illinois Cent. R. Co. v. Harris, (Miss.) 32 So. 309.

Conductor's checks.—A passenger having a through ticket has no right, without the carrier's consent, to stop at an intermediate station and demand by virtue of his ticket, or a conductor's check given in lieu thereof, a continuation of his passage on another train. State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671; Breen v. Texas, etc., R. Co., 50 Tex. 43. But where such a ticket has coupons for the different roads, and two coupons for different divisions of one of the roads, and the

or estop the company. A ticket conditioned not to be good for passage after a specified number of days from date of sale, or good for passage within a certain number of days only, does not require the passage to be completed within that time, and is good where the passenger enters upon his journey before midnight of the day of expiration,⁵⁶ notwithstanding the time limited expires while he is on the journey.⁵⁷ Where a railroad ticket over connecting lines is limited to a specified number of days, the last day falling on Sunday and the last line runs no train on that day, the passenger is entitled to passage on the next day.⁵⁸

§ 14. Nontransferable tickets.—In the absence of constitutional or statutory prohibition, or a stipulation to the contrary on the face thereof, a passenger ticket is transferable, and entitles the holder thereof to the rights of the original purchaser.⁵⁹ But

conductor on that road detached both coupons, and gave a conductor's check, good only for that trip by the rules of the company, the passenger who stops at the end of the division over night and offers his check the next day, is entitled to passage. *Palmer v. Charlotte, etc., R. Co.*, 3 S. C. 580.

On a commutation ticket one of the members of a partnership named on the face of the ticket is not entitled to ride unless he shows the conductor his name endorsed thereon in compliance with the conditions on the ticket. *Granier v. Louisiana Western R. Co.*, 42 La. Ann. 880. But a son, over age, residing with his father as a member of his family, is entitled to ride on a family commutation ticket given for the exclusive use of a man and his family. *Chicago, etc., R. Co. v. Chisholm*, 79 Ill. 584.

56. *Auerbach v. New York Cent., etc., R. Co.*, 89 N. Y. 281, 42 Am. Rep. 290; *Lundy v. Central Pac. R. Co.*, 66 Cal. 191, 56 Am. Rep. 100, 18 Am. & Eng. R. Cas. 309; *Georgia Southern R. Co. v. Bigelow*, 68 Ga.

219; *Evans v. St. Louis, etc., R. Co.*, 11 Mo. App. 463; *Rutherford v. St. Louis, etc., R. Co.*, (Tex. Civ. App.) 67 S. W. 161.

57. *Auerbach v. New York Cent., etc., R. Co.*, *supra*; *Gulf, etc., R. Co. v. Looney*, 85 Tex. 158, 34 Am. St. Rep. 787, 52 Am. & Eng. R. Cas. 197. But see *Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463, a ticket "good only three days after date," means that the journey must be completed within the three days.

58. *Little Rock, etc., R. Co. v. Dean*, 43 Ark. 529, 51 Am. Rep. 584, 21 Am. & Eng. R. Cas. 279.

59. *Nichols v. Southern Pac. R. Co.*, 23 Or. 123, 31 Pac. 296, 52 Am. & Eng. R. Cas. 205, 18 L. R. A. 55; *International, etc., R. Co. v. Ing*, (Tex. Civ. App.) 68 S. W. 722; *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 53, 47 N. W. 312; *Carsten v. Northern Pac. R. Co.*, 44 Minn. 454, 47 N. W. 49, 9 L. R. A. 688, 44 Am. & Eng. R. Cas. 392; *Hudson v. Kansas Pac. R. Co.*, 3 McCrary (U. S.) 249.

a common carrier has a right to issue and sell special tickets at a reduced rate of fare in consideration of the purchaser's agreement to certain conditions and limitations contained therein, among which it may be stipulated that the ticket shall not be transferred and shall be valid only in the hands of the original purchaser, and the purchaser of a ticket, marked "not transferable," and bought by him subject to that restriction, cannot sell the ticket to another, or take part of the journey and then sell the ticket to another, with effect to entitle the latter to passage on that ticket, or to the rights of a passenger; and the use of such a ticket by another to whom it has been transferred in violation of the contract is a fraud and an actionable wrong.⁶⁰ The same rule has been held to apply to the purchase of a nontransferable free pass,⁶¹ and of a train check given by a conductor to another passenger on a limited ticket.⁶²

§ 15. Persons riding gratuitously generally.—Although it was for a long time urged on behalf of the carrier that it was liable only on its contract, and consequently that the law imposed no liability upon it in the case of a gratuitous undertaking to carry a

60. Delaware, etc., R. Co. v. Frank, (U. S. C. C. N. Y.) 110 Fed. 689; Cody v. Central Pac. R. Co., 4 Sawy. (U. S.) 114; Way v. Chicago, etc., R. Co., 64 Iowa, 48, 52 Am. Rep. 431; Crosby v. Maine Cent. R. Co., 69 Me. 418; Post v. Chicago, etc., R. Co., 14 Neb. 110, 45 Am. Rep. 100, 9 Am. & Eng. R. Cas. 345; Drummond v. Southern Pac. Co., 7 Utah 118; Langdon v. Howell, 4 Q. B. Div. 337; Schubach v. McDonald, 179 Mo. 163, 78 S. W. 1020, and the carrier can invoke the aid of equity to cancel the contract because of the fraud thus perpetrated, or, if the ticket is used by another, it can sue for damages for the breach of contract. See also Kinney v. Lake Shore, etc., R. Co., 69 Ohio St. 339, 69 N. E. 614, holding the carrier entitled to an injunction restraining sale in violation of contract.

The rule applies although the ticket was issued in the name of the

wrong party, as for example to Mr. E. B. instead of Mrs. E. B., although it was bought for the latter and she offered to sign it. Chicago, etc., R. Co. v. Bannerman, 15 Ill. App. 106, and although the ticket was not signed by the original purchaser, Drummond v. Southern Pac. R. Co., 7 Utah 118.

But one is entitled to the rights of a passenger, if he presents such a ticket in good faith, and his claim to be carried thereon is recognized, and he is carried as a passenger. Robostelli v. New York, etc., R. Co., 33 Fed. 796, 34 Am. & Eng. R. Cas. 515.

61. Louisville, etc., R. Co. v. Thompson, 107 Ind. 442, 57 Am. Rep. 120, 27 Am. & Eng. R. Cas. 88, 329; Toledo, etc., R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613.

62. Walker v. Wabash, etc., R. Co., 15 Mo. App. 333, 16 Am. & Eng. R. Cas. 380.

passenger, there being no consideration and, therefore, no legal contract, express or implied, the courts finally held otherwise, and it is now well settled that the carrier owes a duty to all upon its vehicle, independent of contract, even when the service is gratuitous, and that the breach of this duty is negligence for which it is liable to the same extent that it is liable to passengers who pay fare. The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.⁶³ In some of the cases cited in support of the rule just stated, and in other cases, persons have been held to be passengers, who are riding free by consent of the carrier fairly obtained;⁶⁴ or with the consent of the conductor or brakeman of the train;⁶⁵ or by invitation of the general agent of

63. *N. Y.*—Carroll v. Staten Isl. and R. Co., 58 N. Y. 126, 17 Am. Rep. 221; Nolton v. Western R. Co., 15 N. Y. 444; Bissell v. New York Cent. R. Co., 25 N. Y. 442; Allen v. Sewall, 2 Wend. (N. Y.) 338; Bank of Orange v. Brown, 3 Wend. (N. Y.) 158. See also cases cited § 7, *supra*, Payment of fare.

U. S.—Philadelphia, etc., R. Co. v. Derby, 14 How. (U. S.) 468; Waterbury v. New York Cent., etc., R. Co., 17 Fed. 671; The Steamboat New World v. King, 16 How. (U. S.) 469.

Ind.—Cleveland, etc., R. Co. v. Ketcham, 133 Ind. 346, 36 Am. St. Rep. 550; Ohio, etc., R. Co. v. Selby, 47 Ind. 479, 17 Am. Rep. 719; Ohio, etc., R. Co. v. Nickless, 71 Ind. 271; Gillenwater v. Madison, etc., R. Co., 5 Ind. 339, 61 Am. Dec. 101.

Md.—State v. Western Maryland R. Co., 63 Md. 433, 21 Am. & Eng. R. Cas. 503.

Mass.—Todd v. Old Colony, etc., R. Co., 3 Allen (Mass.) 18, 80 Am. Dec. 49, 7 Allen (Mass.) 207, 83 Am. Dec. 679.

Mich.—Flint, etc., R. Co. v. Weir, 37 Mich. 111, 26 Am. Rep. 499.

Minn.—Jacobus v. St. Paul, etc., R. Co., 20 Minn. 125, 18 Am. Rep. 360.

Mo.—Lemon v. Chanslor, 68 Mo. 340, 30 Am. Rep. 799.

Pa.—Pennsylvania R. Co. v. Butler, 57 Pa. St. 335; Railroad Co. v. O'Hara, 12 W. N. C. (Pa.) 473.

Tex.—Gulf, etc., R. Co. v. McGown, 65 Tex. 640, 26 Am. & Eng. R. Cas. 274.

Wis.—Annas v. Milwaukee, etc., R. Co., 67 Wis. 46, 58 Am. Rep. 848, 27 Am. & Eng. R. Cas. 102.

64. Todd v. Old Colony, etc., R. Co., *supra*; Philadelphia, etc., R. Co. v. Derby, *supra*; Jacobus v. St. Paul, etc., R. Co., *supra*; Rose v. Des Moines Valley R. Co., 39 Iowa, 246; Grand Trunk R. Co. v. Stevens, 95 U. S. 655; Austin v. Great Western R. Co., L. R. 2 Q. B. 442.

65. Sherman v. Hannibal, etc., R. Co., 72 Mo. 62, 37 Am. Rep. 423, 4 Am. & Eng. R. Cas. 589; Buck v. Peoples St. R. etc., Co., 46 Mo. App. 555; Pittsburgh, etc., R. Co. v. Caldwell, 74 Pa. St. 421; Washburn v. Nashville, etc., R. Co., 3 Head (Tenn.) 638, 75 Am. Dec. 784; Wilton v. Middlesex R. Co., 107 Mass. 108, 9 Am. Rep. 11, 125 Mass. 130. The last three cases cited hold this, notwithstanding the agent violated his duty in inviting him, there being no

the carrier.⁶⁶ But where a person fraudulently induces an employee to disregard his duty and permit him to ride free, he cannot be considered a passenger.⁶⁷

§ 16. Persons riding on passes.—A person who enters the vehicle of a carrier, supplied by the carrier with a free pass entitling him to ride to a given point, is a passenger, and carriers are subject to the same liabilities for injuries from negligence to persons riding on a free pass as they are to those paying full fare.⁶⁸ If the pass is given for a valuable consideration the person riding on it is a passenger for hire.⁶⁹ A person riding on a pass, which is void under a statute providing that, if a common carrier charge any person a greater or less compensation than it charges any other person for a like service, the carrier shall be guilty of unjust discrimination liable to fine, is a passenger, and entitled to recover as such in case of injury by the negligence of the carrier, not being in *pari delicto* with the company in the violation of law.⁷⁰ So a person who travels upon a pass unlawfully

collusion to defraud. See also *Creed v. Pennsylvania R. Co.*, 86 Pa. St. 139, 27 Am. Rep. 693.

66. *Thompson v. Yazoo, etc., R. Co.*, 47 La. Ann. 1107.

67. *Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Toledo, etc., R. Co. v. Brooks*, 81 Ill. 245, 292.

68. *Dow v. Syracuse, etc., R. Co.*, 81 App. Div. (N. Y.) 362, 80 N. Y. Supp. 941; *Holt v. Hannibal, etc., R. Co.*, 87 Mo. App. 203; *Louisville, etc., R. Co. v. Faylor*, 126 Ind. 126; *Todd v. Old Colony, etc., R. Co.*, 3 Allen (Mass.) 18, 80 Am. Dec. 49, 7 Allen (Mass.) 207, 83 Am. Dec. 679; *Thompson v. Yazoo, etc., R. Co.*, 47 La. Ann. 1107; *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 286, 11 L. R. A. 486.

But a passenger who agrees that in consideration of being passed over the road free he will assume all risk of accident, or where his pass contains a condition that the carrier

shall not be liable for injuries caused by the negligence of its agents, cannot recover damages from the carrier for injuries sustained by an accident or caused by the negligence of its agents. *Kinney v. Central R. Co.*, 34 N. J. L. 513; *Griswold v. New York, etc., R. Co.*, 53 Conn. 371, 55 Am. Rep. 115, 26 Am. & Eng. R. Cas. 280; *Boering v. Chesapeake Beach Ry. Co.*, 20 App. D. C. 500.

69. *Griswold v. New York, etc., R. Co.*, *supra*.

70. *McNeill v. Durham, etc., R. Co.*, 135 N. C. 682, 47 S. E. 765. *Citing New York Cent. R. Co. v. Lockwood*, 17 Wall (U. S.) 357, 21 L. Ed. 627; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 134, 17 Am. Rep. 221; *Railroad v. Butler*, 57 Pa. 335; *Railroad v. Trautwein*, 52 N. J. L. 169, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442; *State v. Railroad*, 63 Md. 433; *Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799; *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125,

issued to him in violation of a law prohibiting the issuing of free passes is not a trespasser, but is entitled to the rights of a passenger.⁷¹ But a person who has attempted fraudulently to evade payment of fare by traveling on a nontransferable pass issued to another person is not a passenger to whom the carrier owes the duty to carry safely.⁷² The relation of carrier and passenger does not exist between an elevated railroad and a telegraph lineman, who is injured in repairing a telegraph wire which is carried on the railroad, because of a pass issued to him entitling him to free passage through the stations and structures of the railroad, but not to free transit on its trains, and the rule as to contracting against negligence when such relation exists is not applicable.⁷³

§ 17. Persons riding on drover's pass.—In contracts for the carriage of live stock it is usually provided that the drover or some one or more persons representing or employed by him shall ride free to take charge of the stock, thus relieving the carrier from this duty, and such persons usually ride on a pass known as the drover's pass. These persons are in no just sense to be regarded as gratuitous passengers and the courts do not so regard them, but

18 Am. Rep. 360; Tibby v. Railway Co., 82 Mo. 292; Opsahl v. Judd, 30 Minn. 126, 14 N. W. 575; Rose v. Railroad, 39 Iowa, 246; Louisville, etc., R. Co. v. Taylor, 126 Ind. 126, 25 N. E. 869; Cleveland, etc., R. Co. v. Curran, 19 Ohio St. 1, 2 Am. Rep. 362; Davis v. Railway Co., 93 Wis. 470, 67 N. W. 16, 33 L. R. A. 654, 57 Am. St. Rep. 935; Raflway Co. v. McGown, 65 Tex. 640; Railroad v. Crudup, 63 Miss. 291; Waterbury v. Railroad Co., 17 Fed. 671; Philadelphia, etc., R. Co. v. Derby, 14 How. (U. S.) 468, 14 L. Ed. 502; Steamboat New World v. King, 16 How. (U. S.) 469, 14 L. Ed. 1019; Todd v. Old' Colony, etc., R. Co., 3 Allen (Mass.) 18, 80 Am. Dec. 49; Railway Co. v. Stevens, 95 U. S. 655, 24 L. Ed. 535; Railroad v Sullivan, 120 Fed. 799, 57 C. C. A. 167, 61 L. R. A. 410.

71. Buffalo, etc., R. Co. v. O'Hara, (Pa.) 11 Am. L. R. 554, 9 Am. & Eng.

R. Cas. 317. A state officer who accepts a free railroad pass in violation of law cannot be deprived of his office on that ground until he has been adjudged guilty by a court of competent jurisdiction in an appropriate proceeding for that purpose. Sweeney v. Colter, 22 Ky. L. Rep. 885, 58 S. W. 784.

72. Toledo, etc., R. Co. v. Beggs, 85 Ill. 80; Louisville, etc., R. Co. v. Thompson, 107 Ind. 442, 27 Am. & Eng. R. Cas. 88, 57 Rep. 120; Handley v. Houston, etc., R. Co., 2 Tex. Unrep. Cas. 282.

And a person riding on a pass who refuses to comply with its conditions, ceases to be a passenger if the conductor so elect. Elliott v. Western, etc., R. Co., 58 Ga. 454.

73. Wagner v. Brooklyn Heights R. Co., 174 N. Y. 520, affg. 69 App. Div. (N. Y.) 349, 74 N. Y. Supp. 809.

hold them to be passengers for hire, the consideration for their passage being the service they render in taking care of the live stock, or the charge paid by the shippers of the live stock being as well for such passage as for the carriage of the property itself.⁷⁴ But such persons are not entitled to all the rights of a passenger.

74. *N. Y.*—*Pitcher v. Lake Shore, etc., R. Co.*, 61 Hun (N. Y.) 623, 40 St. Rep. (N. Y.) 896, 16 N. Y. Supp. 62, 28 St. Rep. (N. Y.) 647, 8 N. Y. Supp. 389, affd. 137 N. Y. 568, 33 N. E. 339, 50 St. Rep. (N. Y.) 934; *Poucher v. New York Cent. R. Co.*, 49 N. Y. 263, 10 Am. Rep. 364; *Smith v. New York Cent. R. Co.*, 24 N. Y. 222.

U. S.—*Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Delaware, etc., R. Co. v. Ashley*, 67 Fed. 209; *Chicago, etc., R. Co. v. Carpenter*, 56 Fed. 451; *Illinois Cent. R. Co. v. Foley*, 53 Fed. 459, 10 U. S. App. 537.

Ark.—*Little Rock, etc., R. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10, 13 Am. & Eng. R. Cas. 10.

Del.—*Flinn v. Philadelphia, etc., R. Co.*, 1 Houst. (Del.) 469.

Ill.—*Pennsylvania Co. v. Greso*, 102 Ill. App. 252; *Lake Shore, etc., R. Co. v. Brown*, 123 Ill. 162, 5 Am. St. Rep. 510, 31 Am. & Eng. R. Cas. 61; *Union R. Co. v. Shacklett*, 19 Ill. App. 145; *Illinois Cent. R. Co. v. Beebe*, 174 Ill. 13, 50 N. E. 1019, 11 Am. & Eng. R. Cas. N. S. 163; *Chicago, etc., R. Co. v. Winters*, 175 Ill. 293, 51 N. E. 901.

Ind.—*Ohio, etc., R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719, 8 Am. Ry. Rep. 177; *Indianapolis, etc., R. Co. v. Beaver*, 41 Ind. 493.

Ky.—*Louisville, etc., R. Co. v. Bell*, 100 Ky. 203, 38 S. W. 3, 18 Ky. L. Rep. 735, 8 Am. & Eng. R. Cas. N. S. 413.

Minn.—*Olson v. St. Paul, etc., R. Co.*, 45 Minn. 536, 47 Am. & Eng. R. Cas. 573.

Mo.—*Griffith v. Missouri Pac. R. Co.*, 98 Mo. 168; *Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239, 57 Am. Rep. 382, 26 Am. & Eng. R. Cas. 268; *Tibby v. Missouri Pac. R. Co.*, 82 Mo. 292; *Graham v. Pacific R. Co.*, 66 Mo. 536.

Neb.—*Omaha, etc., R. Co. v. Crow*, 47 Neb. 84.

Ohio.—*Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Lake Shore, etc., R. Co. v. Hotchkiss*, 24 O. C. C. 431, and he is a passenger while going along the tracks of the railroad in order to get on board of the caboose of the freight train, upon which he is to ride.

Pa.—*Rowdin v. Pennsylvania R. Co.*, 208 Pa. 623, 57 Atl. 1125; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315.

Tex.—*Missouri Pac. R. Co. v. Ivey*, 71 Tex. 409, 9 S. W. 346, 1 L. R. A. 500, 10 Am. St. Rep. 758, 37 Am. & Eng. R. Cas. 46; *Texas, etc., R. Co. v. Garcia*, 62 Tex. 285, 21 Am. & Eng. R. Cas. 384; *International, etc., R. Co. v. Campbell*, 1 Tex. Civ. App. 509; *Gulf, etc., R. Co. v. Cole*, 8 Tex. Civ. App. 635. One accompanying stock as an attendant, with the consent of the agent of the express company, which was transporting the stock, and of the conductor of the train, was a passenger, and entitled to protection as such, although his name did not appear on the written contract as an attendant who was to ac-

senger for hire; but are subject to the implied condition that they will submit to whatever inconveniences are necessarily incident to the undertaking.⁷⁵ And a contract with such a person, whereby he agrees to be regarded as an employee of the road, to whom the company shall be liable only as to its regular employees, is a pretense, a subterfuge, which cannot change the true relation of the parties.⁷⁶ So, where he is designated in the contract and in the way bill as "in charge free,"⁷⁷ or as "a man in charge."⁷⁸ And a minor knowingly received by a conductor as assistant to a drover, under a pass containing a provision prohibiting minors from traveling under such a pass, is to be regarded a passenger.⁷⁹ But one attempting wrongfully to secure a ride on a freight train, without paying for it, assumes all the perils incident to the ride,⁸⁰ as the wife of a drover, for whom he obtained a pass by fraudulently representing her to be a part owner of the stock shipped;⁸¹ or a person traveling to assist in the care of the stock, although he knew that the regulations of the carrier permitted one man only to go free for such purpose.⁸² The relation of passenger ceases after the arrival of the train at its destination and a reasonable opportunity for the passenger to leave;⁸³ or upon his boarding a

company the stock. American Express Co. v. Ogles (Tex. Civ. App.), 81 S. W. 1023.

Utah.—Saunders v. Southern Pac. R. Co., 13 Utah, 275.

W. Va.—Maslin v. Baltimore, etc., R. Co., 14 W. Va. 180, 35 Am. Rep. 748.

Wis.—Lawson v. Chicago, etc., R. Co., 64 Wis. 447, 54 Am. Rep. 634, 21 Am. & Eng. R. Cas. 249.

75. Lawson v. Chicago, etc., R. Co., *supra*; Omaha, etc., R. Co. v. Crow, *supra*.

76. Missouri Pac. R. Co. v. Ivey, *supra*.

77. Porter v. New York, etc., R. Co., 59 Hun (N. Y.), 177, 13 N. Y. Supp. 491; Cleveland, etc., R. Co. v. Curran, *supra*; Buffalo, etc., R. Co. v. O'Hara (Pa.), 11 Am. L. R. 554, 9 Am. & Eng. R. Cas. 317.

78. Indianapolis, etc., R. Co. v. Beaver, *supra*.

79. Texas, etc., R. Co. v. Garcia, *supra*.

80. Richmond, etc., R. Co. v. Burnsed, 70 Miss. 437, 12 So. 958.

81. Brown v. Missouri, etc., R. Co., 64 Mo. 536.

82. Gardiner v. New Haven, etc., R. Co., 51 Conn. 143, 50 Am. Rep. 12, 18 Am. & Eng. R. Cas. 170. But the shipper is a passenger and not a trespasser, by reason of having such an assistant on the train, where the carrier has consented to his remaining after being informed by the shipper that the assistant might be put off. Missouri Pac. R. Co. v. Aiken, 71 Tex. 373.

83. Oreutt v. Northern Pac. R. Co., 45 Minn. 368.

passenger train when his pass was to be good only on the train upon which his stock is transported.⁸⁴

§ 18. Persons riding on trains not generally used for passengers.—One who is received on a construction train as a passenger by the conductor in charge thereof is entitled to the rights of a passenger, although the conductor had no authority to receive him as such, unless he knew that he was riding in violation of the carrier's rules.⁸⁵ Where a person purchased a ticket and was accepted by the conductor of a construction train as a passenger thereon, which was against the carrier's orders, except on official permit, of which the purchaser of the ticket had no notice, but he had ridden thereon before as a passenger, and knew that other passengers were on the train when he took it, the conductor had such an apparent authority to accept him as a passenger that such acceptance made him a passenger, and as such he could recover for injuries caused by the carrier's negligence.⁸⁶ But a person riding upon a construction train and over and upon side tracks constructed in the ordinary manner accepts the risks incident to such a train and track, except for neglect of the carrier; and any presumption that a person so permitted to ride by an employee of the carrier is not lawfully thereon, may be overcome by special circumstances implying the authority of such employee to grant such privilege.⁸⁷ An employe of a railroad company who was invited to come on to its pay train to receive his wages, and the train was set in motion before he got quite off, was entitled to recover damages as though he had been a passenger.⁸⁸ But one entering, to ride thereon, a pay train, on which the carrier's rules do not

84. Thorp v. Concord R. Co., 61 Vt. 378, and the fact that similar tickets had been previously received for like passage does not alter the case.

85. Chicago, etc., R. Co. v. Frazer, 55 Kan. 582, 40 Pac. 923; St. Joseph, etc., R. Co. v. Wheeler, 35 Kan. 185, 26 Am. & Eng. R. Cas. 123, where a railroad company ordered the conductor of a construction train to allow no one to ride on it, yet, notwithstanding, persons often did ride on it, and a person, not knowing of

the order, was permitted to ride by the conductor, the carrier was held responsible for injuries caused by the negligence of the train hands.

86. Spence v. Chicago, etc., R. Co. (Iowa), 90 N. W. 346.

87. Rosenbaum v. St. Paul, etc., R. Co., 38 Minn. 173, 36 N. W. 447, 8 Am. St. Rep. 653, 34 Am. & Eng. R. Cas. 274.

88. Louisville, etc., R. Co. v. Stacke, 86 Tenn. 343, 6 Am. St. Rep. 840.

allow passengers to ride, is bound to leave it as soon as he prudently can after notified of the rule, or he will become a trespasser.⁸⁹ A railroad company may be liable for injuries arising to a person who takes passage on a gravel train, such train not being generally used for the transportation of passengers.⁹⁰ A person who with the knowledge of the conductor, boards a train on a railway operated to a stone quarry, and which train is run whenever necessary to carry stone, but on which the company is not in the habit of carrying passengers, and is permitted to ride thereon, no fare being demanded, is not a passenger.⁹¹ A railway company owes no duty to an intruder upon one of its timber trains upon which passengers are not carried, except not to wantonly or wilfully injure him, and is not liable for personal injuries sustained by him by the negligence of its employees.⁹² A person riding on the track on a railroad velocipede without the consent or with the mere acquiescence of the company is a trespasser, and can recover against the company for injuries only in case of wilful negligence.⁹³ A passenger allowed to ride on a special train, who has no notice of any want of authority to grant the permission, whether he pays fare or not, in the absence of collusion between him and the conductor, to defraud the company of its fare, becomes a passenger, and as such, is entitled to have the train on which he travels managed with the care that is due from a common carrier to passengers on a train of that character.⁹⁴

§ 19. Persons riding on engine.—One who rides upon an engine by consent of the engineer,⁹⁵ or engine driver,⁹⁶ or a fireman in

89. Chicago, etc., R. Co. v. Hoffman, 82 Ill. App. 453; Southwestern R. Co. v. Singleton, 66 Ga. 252.

90. Lawrenceburgh, etc., R. Co. v. Montgomery, 7 Ind. 474.

But a railroad company is not liable for an injury to a child caused by his falling under a moving freight train while attempting to mount it under the direction of an employee of the company in charge of the gravel train, by whom he had been invited to the place where the injury occurred, as his act in giving such advice was outside the scope of his employment. Keating v. Michigan Cent.

R. Co., 97 Mich. 154, 56 N. W. 346, 37 Am. St. Rep. 328.

91. Menaugh v. Bedford Belt Ry. Co., 157 Ind. 20, 60 N. E. 694.

92. Illinois Cent. R. Co. v. Meacham, 91 Tenn. 428, 19 S. W. 232.

93. Craig v. Mt. Carbon Co., 45 Fed. 448.

94. Wagner v. Missouri Pac. R. Co., 97 Mo. 512.

95. Robertson v. New York, etc., R. Co., 22 Barb. (N. Y.) 91; Radley v. Columbia Southern Ry. Co. (Or.), 75 Pac. 212.

96. Chicago, etc., R. Co. v. Michie, 83 Ill. 427.

charge of an engine,⁹⁷ but without the knowledge of the conductor, and in violation of the rules or regulations of the carrier, known to him or of which he has been informed, bears none of the relations of a passenger to the company, but is a wrong-doer, and cannot recover damages for a personal injury. The permission of such employes is not the permission of the carrier, they having no authority to grant it.⁹⁸ But an employe of the carrier who had charge of the trains, trainmen and rolling stock has been held to have such authority and his act to be that of the carrier.⁹⁹ On the other hand, a person attempting to get on the engine of a freight train to ride, although by invitation of the conductor of the train, has been held not to be a passenger.¹ It may be a question for the jury, in some cases, to determine whether, under all the facts of the case, the carrier has by its conduct held out its employes as authorized to consent to carry a person on the engine.² Where a contract for a shipment of stock entitled the shipper to free transportation in the caboose, the conductor of the train had no implied authority, irrespective of circumstances, to invite the shipper to ride on the engine, and where he had no express authority to do so or to waive the provision of the contract requiring the shipper to ride in the caboose, the question whether the conductor's invitation to the shipper to ride on the engine was a waiver of the provision of the contract was one of fact for the jury.³

97. Flower v. Pennsylvania R. Co., 69 Pa. St. 210; Woolsey v. Chicago, etc., R. Co., 39 Neb. 798, 58 N. W. 444.

98. Chicago, etc., R. Co. v. Casey, 9 Ill. App. 632; Virginia Midland R. Co. v. Roach, 83 Va. 375, 34 Am. & Eng. R. Cas. 271; Darwin v. Charlotte, etc., R. Co., 23 S. C. 531, 55 Am. Rep. 32, and the rule applies to a person so riding on the pilot of an engine. See also Ramm v. Minneapolis, etc., R. Co., 94 Iowa, 296, 62 N. W. 751.

99. Nashville, etc., R. Co. v. Erwin (Tenn.), 3 Am. & Eng. R. Cas. 465.

1. Files v. Boston, etc., R. Co., 149 Mass. 204, even though he had or-

dered the freight cars for the use of his employers in shipping goods, and had previously been permitted to ride by invitation, and had seen others, including railroad employes, do so.

2. Waterbury v. New York, etc., R. Co., 21 Blatchf. (U. S.) 314, 17 Fed. 671, so held in the case of a drover riding under a contract to carry his cattle.

3. Illinois Cent. R. Co. v. Jennings (Ill.), 75 N. E. 457, in order to establish a waiver by a conductor of such a provision in a contract, the shipper must affirmatively show, in the absence of evidence of express authority, that such action was within the apparent scope of the conductor's authority, and that the shipper did

§ 20. Persons riding on hand cars.—Persons riding on a hand car, ordinarily used for the transportation of the carrier's employes, without the knowledge and against the rules of the carrier, although riding by permission or invitation of an employe of the carrier, such as a section foreman or those in charge of the hand car to do other work, but not an authorized agent of the carrier for the purpose of carrying passengers on a hand car, are not passengers, but mere licensees, and assume all the risks of that mode of travel.⁴ In order to constitute a person riding on a hand car a passenger and render the carrier liable to him as such, the authority of the servant of the carrier to accept the person as a passenger and thus use the hand car must be shown,⁵ or that he was with the consent of the carrier so traveling,⁶ or that a custom of employees of the carrier to allow persons to so ride was known to and acquiesced in by the officers of the carrier,⁷ or that the carrier was a common carrier of passengers by hand cars.⁸

§ 21. Employes of others carried under contract—Mail clerks.—A mail agent or postal clerk employed and engaged in the service of the government and traveling in the postal or mail car, in charge of the mails, under a contract between the government and the carrier for the carriage of mail and the mail clerks having lawful custody thereof, is a passenger for hire to whom the carrier owes the same duty that it does to passengers riding upon the train, in so far as its liability for personal injuries arising from its negligence is concerned; the compensation for the carriage of such agents or clerks must be regarded as included in that paid by

not know or have reasonable ground to believe that the conductor was exceeding his authority. See *Lake Shore, etc., R. Co. v. Brown*, 123 Ill. 162.

4. *Rathbone v. Oregon R. Co.* (Or.), 66 Pac. 909; *Hoar v. Maine Cent. R. Co.*, 70 Me. 65; *Gulf, etc., R. Co. v. Dawkins*, 77 Tex. 228, even though the person may be ignorant of rules forbidding such transportation; *Willis v. Atlantic, etc., R. Co.*, 122 N. C. 905, 29 S. E. 941, but the carrier is liable for gross negligence by which he is injured.

5. *Pool v. Chicago, etc., R. Co.*, 56 Wis. 227, 8 Am. & Eng. R. Cas. 360; *International, etc., R. Co. v. Cock*, 68 Tex. 713; *International, etc., R. Co. v. Prince*, 77 Tex. 560, 44 Am. & Eng. R. Cas. 294.

6. *International, etc., R. Co. v. Gray*, 65 Tex. 32, 27 Am. & Eng. R. Cas. 318.

7. *Houston, etc., R. Co. v. Bolling*, 59 Ark. 395, 43 Am. St. Rep. 38.

8. *Hoar v. Maine Cent. R. Co.*, 70 Me. 65.

the government for the carriage of the mails. He is in no sense an employe of the railroad company on whose trains he travels in the performance of his official duty.⁹ The carrier is under the same obligation to him, as regards suitable and safe carriage, that it is to the ordinary passengers, and for a breach of its duty, expressly

N. Y.—*Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75, 18 Am. & Eng. R. Cas. 162; *Nolton v. Western R. Corp.*, 15 N. Y. 444, 69 Am. Dec. 623.

U. S.—*Chesapeake, etc., R. Co. v. Patton*, 23 App. D. C. 113, 32 Wash. L. Rep. 85; *Weaver v. Baltimore & O. Ry. Co.*, 3 App. D. C. 436, 22 Wash. L. Rep. 393; *Gleason v. Virginia Midland R. Co.*, 140 U. S. 435, 35 L. Ed. 458, 11 Sup. Ct. 859; *Arrowsmith v. Nashville, etc., R. Co.*, 57 Fed. 165, 58 Am. & Eng. R. Cas. 3. But see *Price v. Pennsylvania R. Co.*, 113 U. S. 219, dismissing writ of error in 96 Pa. St. 256, 1 Am. & Eng. R. Cas. 234, holding that under the statutes of Pennsylvania postal agents are excluded from the class therein designated as passengers, and are thereby placed on the same footing as the employes of the carrier in respect to their rights of action against the carrier for injury occasioned by negligence.

Ind.—*Cleveland, etc., R. Co. v. Ketcham*, 133 Ind. 346, 36 Am. St. Rep. 550, 19 L. R. A. 339, 33 N. E. 116; *Ohio, etc., R. Co. v. Voight*, 122 Ind. 288, 23 N. E. 774. In the first of these cases it was also held that doing extra work on a train, while not on his regular run, did not affect the carrier's liability, or make him a trespasser.

Ky.—*Louisville, etc., R. Co. v. Kingman*, 18 Ky. Law Rep. 82, 35 S. W. 264, 5 Am. & Eng. R. Cas. N. S. 401.

Me.—*Libby v. Maine Cent. R. Co.*, 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812.

Md.—*Baltimore, etc., R. Co. v. State*, 72 Md. 36, 20 Am. St. Rep. 454, 18 Atl. 1107, 6 L. R. A. 706.

Mo.—*Mellor v. Missouri Pac. R. Co.*, 105 Mo. 455, 47 Am. & Eng. R. Cas. 450, 16 S. W. 849, 10 L. R. A. 36; *Magoffin v. Missouri Pac. R. Co.*, 102 Mo. 540, 47 Am. & Eng. R. Cas. 489.

N. C.—*Grant v. Raleigh, etc., R. Co.*, 108 N. C. 462.

S. C.—*Hammond v. North Eastern R. Co.*, 6 S. C. 130.

Tex.—*Houston, etc., R. Co. v. McCullough*, 22 Tex. Civ. App. 208, 55 S. W. 392; *Houston, etc., R. Co. v. Hampton*, 64 Tex. 427, 22 Am. & Eng. R. Cas. 291; *Railroad Co. v. Davis*, 17 Tex. Civ. App. 340, 43 S. W. 540.

Vt.—*Hale v. Grand Trunk R. Co.*, 60 Vt. 605.

Va.—*Norfolk, etc., R. Co. v. Shott*, 92 Va. 34, 22 S. E. 811.

Eng.—*Collett v. London, etc., R. Co.*, 16 Q. B. 984, 71 E. C. L. 984.

In *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, the court says: "Whether the public carrier of passengers receives an agreed compensation for the transportation of such persons (mail agents, express agents or messengers), is compensated therefor by the charge for the car or for transportation of the property of which the person to be carried has charge, or receives no compensation whatever for the carriage of such persons, is a matter of no importance. It is

imposed upon the carrier by statute, to heat the mail car in which he is compelled to ride in the discharge of his duties, whereby an injury is sustained, a right of action accrues.^{9a}

§ 22. Employes of others carried under contract—Express messengers.—An express messenger, occupying an express car, in charge of express matter, in pursuance of a contract between the railroad company and the express company to transport the messengers of the express company and certain specified property free of charge, the latter company assuming all transportation risks and other liability arising in respect thereof, is a passenger, and cannot, without his knowledge or consent, be chargeable with the stipulations in the contract; while, when he entered into the service of the express company, he assumed the ordinary hazards incident to that business, there was no presumption or implied understanding, that he took upon himself the risks of injury which he might suffer through the railroad company's negligence.¹⁰ Presumptively he is entitled to protection against personal injury by the negligence of the carrier, and where there is no express exemption provided by the contract, the carrier is liable for the consequences of its own or its servant's negligence, to persons traveling upon its trains as messengers or agents of an express company, to the same extent as to other passengers, although no charge is made for their fare.¹¹ But an express messenger is not a passenger, within the meaning of the rule of public policy, which denies the validity of contracts limiting the liability of a carrier to a passenger for negligence, and cannot recover from the carrier for injuries sustained by the carrier's negligence, where the contract between the companies exempts the railroad company from such liability, while his own contract, voluntarily entered into as a condition of employment, assumes all such risks, and

enough that he is lawfully on the car, and entitled to transportation, to give him the character of a passenger."

9a. Lindsey v. Pennsylvania R. Co., 34 Wash. L. Rep. (Feb., 1906), 95.

10. Brewer v. New York Cent., etc., R. Co., 124 N. Y. 59, 21 Am. St. Rep. 647, 47 Am. & Eng. R. Cas. 485.

11. Blair v. Erie R. Co., 66 N. Y. 313, 23 Am. Rep. 55; Smith v. New

York Cent. R. Co., 24 N. Y. 222, 29 Barb. (N. Y.) 132; Nolton v. Western R. Co., 15 N. Y. 444, 69 Am. Dec. 623; Collett v. London, etc., R. Co., 16 Q. B. 984, 16 Ad. & E. 984. And one temporarily supplying the place of an express messenger stands in the same position and is entitled to the same protection. Blair v. Erie R. Co., *supra*.

stipulates that he will indemnify and hold his employer harmless from all liability for such injury.¹² Where there is no express contract between the express messenger and the railroad company, and he is being carried under a contract between the railroad company and the express company, his passage being paid for in the contract, he occupies the position of an ordinary passenger, as to the liability of the common carrier, for injuries he may sustain, caused by its negligence or that of its employes. In accepting his employment, he took upon himself the risk of accidents incident to the nature of his business, but not the risks resulting from the negligence of the railroad company in the management of its trains.¹³ But a person riding in an express car who is not in the employ of the express company,¹⁴ or one who imposes himself upon the carrier as an express messenger,¹⁵ or one who rides in an express car in violation of a known rule of the carrier, even with the permission, connivance, or knowledge of the conductor of the train,¹⁶ is not a passenger.

12. Baltimore, etc., R. Co. v. Voight, 176 U. S. 498, 20 Sup. Ct. 385, Adv. S. U. S. 385. But the rule is otherwise, where the messenger has not entered into such a contract and did not know of the agreement between the companies. Chamberlain v. Pierson, 87 Fed. 420, 59 U. S. App. 55.

An express messenger while riding in a railway car in the performance of the duties of his employment is not a passenger, nor does the railroad company occupy the relation of common carrier toward him, but of a private carrier only, and there is no public policy which forbids the parties from contracting for its exemption from liability for negligence in the carrying of such messenger; and the messenger is chargeable with notice of the contract under which he is being transported by the railroad company. Long v. Lehigh Valley R. Co. (U. S. C. C. A. N. Y.), 130 Fed. 870.

13. Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528; Yeomans v. Con-

tra Costa Steam Nav. Co., 44 Cal. 71; Pennsylvania Co. v. Woodworth, 26 Ohio St. 585; Jennings v. Grand Trunk R. Co., 15 Ont. App. 477; Baltimore, etc., R. Co. v. McCarney, 12 Ohio C. C. 543, when also baggage master entitled only to rights of employe. See also Hammond v. North Eastern R. Co., 6 S. C. N. S. 130, 24 Am. Rep. 467.

14. Pfister v. Central Pac. R. Co., 70 Cal. 169.

15. Union Pac. R. Co. v. Nichols, 8 Kan. 505, 3 Am. Ry. Rep. 419, 12 Am. Rep. 475, person learning route and assisting messenger. See also Muldoon v. Seattle City R. Co. (Wash.), 22 L. R. A. 794, note.

16. Florida Southern R. Co. v. Hirst, 30 Fla. 1, 52 Am. & Eng. R. Cas. 409, 11 So. 506, 16 L. R. A. 631, 12 Ry. & Corp. L. J. 218, although a carrier may abandon its rule prohibiting passengers to ride in an express car, the mere delinquency of a conductor in enforcing the rule is not sufficient to constitute an abandonment without such conduct as in ef-

§ 23. Persons riding on freight trains.—Railroad companies may prescribe the conditions on which passengers may ride on freight trains.¹⁷ In the absence of any rule permitting freight trains to carry passengers, the presumption is that one riding for his own convenience on such train is a trespasser, and not a passenger.¹⁸ In the absence of any rule or practice permitting freight trains to carry passengers, the presumption is that conductors have no authority to authorize them to ride thereon; but this presumption may be overcome by proof of an order to the conductor from the superior officer to carry the person on his freight train; and where such an order is within the scope of his agency, the apparent authority of such superior officer is as binding on the railroad company as actual authority would have been.¹⁹ Though rules are made and promulgated by a carrier prohibiting the carriage of passengers on freight trains, when such rules are openly and habitually violated by the conductor and brakeman with the knowledge of the carrier's officers, or such violation had continued for such a length of time that such officers, by the use of ordinary care might have known of it, and no attempt is made to enforce the rules, and such freight trains had for years openly, publicly, and without protest from the carrier's officers carried passengers, to the knowledge of the general public and a person, who in response to the invitation of the conductor and the brakeman, boarded a freight train and paid his fare, having no knowledge of the carrier's rules, such rules will be presumed to have been abrogated, the person so boarding the train authorized to presume that the carrying of passengers was permitted, and that he would be protected as one, knowledge of the acts of the conductor and brakeman will be imputed to the carrier, and it will be held responsible for such acts.²⁰ A conductor of a freight train having authority to receive and carry persons on his train on certain con-

fect establishes the concurrence of the carrier in the disregard of the regulation.

17. Eaton v. Delaware, etc., R. Co., 57 N. Y. 382, 15 Am. Rep. 513; Greenfield v. Detroit, etc., R. Co., 10 Detroit Leg. N. 256, 95 N. W. 546.

18. Eaton v. Delaware, etc., R. Co., *supra*; Purple v. Union Pac. R. Co., 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700.

19. Dysart v. Missouri, etc., R. Co., 122 Fed. 228, 58 C. C. A. 592.

20. Missouri, etc., R. Co. v. Huff (Tex. Civ. App.), 78 S. W. 249, judg. revd. 81 S. W. 525. See also Burke v. Missouri Pac. R. Co., 51 Mo. App. 491; Jones v. Wabash, etc., R. Co., 17 Mo. App. 158. The rule is different where the carrier used reasonable efforts to suppress the violation of the rule and to enforce its observance. San An-

ditions, his action in receiving and carrying, in violation of his instructions, unauthorized persons ignorant of the limitations on his authority, is within his apparent authority; so that the carrier will be liable to such persons, as passengers, for injury from negligence of operators of the train.²¹ When a carrier receives and undertakes to carry a person upon a freight train,²² or such person is lawfully on such train treating with the conductor for passage,²³ or, having a ticket for passage upon the railroad, in good faith boards a freight train which does not carry passengers, believing the ticket good on that train,²⁴ or in good faith boards an extra freight train which does not carry passengers, but is in all appearance similar to a regular freight which does carry passengers, and is allowed by the conductor to ride thereon,²⁵ he is to be regarded as a passenger to whom the carrier is bound by all the obligations of a common carrier of passengers the same as it is to passengers upon regular passenger trains. And, generally, persons permitted by the carrier's servants to ride without payment of fare, if the servants had authority, express or implied, to grant such permission,²⁶ or whom they permit to ride and accept the

tonio, etc., R. Co. v. Lynch (Tex. Civ. App.), 40 S. W. 631; Houston, etc., R. Co. v. Norris (Tex. Civ. App.), 41 S. W. 708.

21. Simmons v. Oregon R. & Nav. Co., 41 Or. 151, 69 Pac. 440, 1022.

22. Ohio, etc., R. Co. v. Muhling, 30 Ill. 9, 81 Am. Dec. 336; Ohio, etc., R. Co. v. Dickerson, 59 Ind. 317; Texas, etc., R. Co. v. Garcia, 62 Tex. 285; Hazard v. Chicago, etc., R. Co., 1 Biss. (U. S.) 503; Missouri Pac. R. Co. v. Holcomb, 44 Kan. 332, 24 Pac. 467; Perkins v. Chicago, etc., R. Co., 60 Miss. 726.

23. Western, etc., R. Co. v. Turner, 72 Ga. 292, 53 Am. Rep. 842, 28 Am. & Eng. R. Cas. 455.

24. Illinois Cent. R. Co. v. Davenport, 177 Ill. 110, 52 N. E. 266; Boehm v. Duluth, etc., R. Co., 91 Wis. 592; Boggess v. Chesapeake, etc., R. Co., 37 W. Va. 297. See also Lucas v. Milwaukee, etc., R. Co., 33 Wis.

41, 14 Am. Rep. 735; McGee v. Missouri Pac. R. Co., 92 Mo. 208, 1 Am. St. Rep. 760, 31 Am. & Eng. R. Cas. 1.

25. Simmons v. Oregon R. Co., *supra*; Everett v. Oregon, etc., R. Co., 9 Utah, 340.

26. Secord v. St. Paul, etc., R. Co., 18 Fed. 221, 5 McCrary (U. S.), 515; Pittsburg, etc., R. Co. v. Caldwell, 74 Pa. St. 421; Creed v. Pennsylvania R. Co., 86 Pa. St. 139, 27 Am. Rep. 693; Pennsylvania R. Co. v. Books, 57 Pa. St. 345; St. Joseph, etc., R. Co. v. Wheeler, 35 Kan. 185, 26 Am. & Eng. R. Cas. 173; Wilton v. Middlesex R. Co., 107 Mass. 108, 9 Am. Rep. 11, 125 Mass. 130; Grabin v. St. Paul, etc., R. Co., 30 Minn. 217, 11 Am. & Eng. R. Cas. 644; Sherman v. Hannibal, etc., R. Co., 72 Mo. 62, 37 Am. Rep. 423, 4 Am. & Eng. R. Cas. 589; Muehlhausen v. St. Louis R. Co., 91 Mo. 332; Buck v. Power Co., 108 Mo. 185.

customary fare,²⁷ become passengers for whose safety the carrier is liable. But persons unlawfully riding on freight trains are not passengers, as when they have boarded the train in violation of the rules of the carrier,²⁸ or after having been refused free transportation by the conductor,²⁹ or where a condition of the ticket, expressly assented to, provides that it shall not be good for passage on freight trains;³⁰ and an excursion ticket marked "good going on any train" on a certain day, applies to passenger trains, and gives no right to ride upon a through freight train on which, by rule of the company, passengers are not allowed to ride without a special permit.³¹ Freight trains are run primarily for the transportation of freight, not passengers. The law would in general only confer upon the conductor of such a train such authority as was incidental to the movement of freight, and no power whatever as to the transportation of passengers. He would have no implied authority to invite or permit wayfarers to become passengers, and persons riding on such trains, by the invitation or permission of the carrier's agents who have no authority, express or implied, to invite or permit them so to do, are not to be re-

And such persons are not wholly trespassers, though the train is not intended and operated for carrying passengers, and the conductor has no authority to permit such persons to ride. Alabama, etc., R. Co. v. Yarbrough, 83 Ala. 238, 3 Am. St. Rep. 715; Whitehead v. St. Louis, etc., R. Co., 99 Mo. 263, 39 Am. & Eng. R. Cas. 410. See also Prince v. International, etc., R. Co., 64 Tex. 144, 21 Am. & Eng. R. Cas. 152.

27. Edgerton v. New York, etc., R. Co., 39 N. Y. 227, 35 Barb. (N. Y.) 389; New York, etc., R. Co. v. Doane, 115 Ind. 435, 37 Am. & Eng. R. Cas. 87, 7 Am. St. Rep. 451; Dunn v. Grand Trunk R. Co., 58 Me. 187; Lake Shore, etc., R. Co. v. Brown, 123 Ill. 162, 31 Am. & Eng. R. Cas. 61; International, etc., R. Co. v. Irvine, 64 Tex. 529, 23 Am. & Eng. R. Cas. 518. *Contra:* St. Louis, etc., R. Co.

v. White (Tex. Civ. App.), 34 S. W. 1049; Texas, etc., R. Co. v. Black, 87 Tex. 160.

28. Planz v. Boston, etc., R. Co., 157 Mass. 577; Cleveland, etc., R. Co. v. Bartram, 11 Ohio St. 457; Haase v. Oregon R., etc., Co., 19 Or. 354, 44 Am. & Eng. R. Cas. 360; San Antonio, etc., R. Co. v. Lynch, 8 Tex. Civ. App. 513; Powers v. Boston & M. R. Co., 153 Mass. 188, 26 N. E. 446; Staleup v. Louisville, etc., R. Co., 16 Ind. App. 584, 45 N. E. 802.

29. Hendrix v. Kansas City, etc., R. Co., 45 Kan. 377; Atchison, etc., R. Co. v. Headland, 18 Colo. 477, 58 Am. & Eng. R. Cas. 4.

30. Dunlap v. Northern Pac. R. Co., 35 Minn. 203; Perkins v. Chicago, etc., R. Co., 60 Miss. 726, 21 Am. & Eng. R. Cas. 242.

31. Thomas v. Chicago, etc., R. Co., 72 Mich. 355, 40 N. W. 463, 37 Am. & Eng. R. Cas. 108.

garded as passengers.³² This is especially so where the carrier's regulations, publicly made known, prohibit the employes to accept passengers on freight trains.³³

§ 24. Persons accompanying passengers.—Persons entering the carrier's depot, premises, or a car or train, for the purpose of assisting aged, or helpless passengers, or children, and seeing them safely on and off the car or train, or for the purpose of seeing a friend arrive or depart, are not passengers, but simply licensees to whom the carrier owes certain duties.³⁴ The carrier is under special duty to provide suitable and safe accommodations with regard to its depot and platforms for such persons,³⁵ and to give persons assisting or escorting sick or infirm passengers on and off a car reasonable time, and as fair a warning of the starting of the train as passengers are entitled to, under the implied license granted them to board the train for such purpose.³⁶ But the ob-

32. Eaton v. Delaware, etc., R. Co., 57 N. Y. 382, 15 Am. Rep. 513; Waterbury v. New York Cent., etc., R. Co., 17 Fed. 671; Smith v. Louisville, etc., R. Co., 124 Ind. 394; Louisville, etc., R. Co. v. Hailey, 94 Tenn. 383; Candiff v. Louisville, etc., R. Co., 42 La. Ann. 477; Powell v. East Tennessee, etc., R. Co. (Miss.), 8 So. 738. See also Janny v. Great Northern R. Co., 63 Minn. 380; Brevig v. Chicago, etc., R. Co., 64 Minn. 168; Atchison, etc., R. Co. v. Johnson, 3 Okla. 41.

33. Gardner v. New Haven, etc., R. Co., 51 Conn. 143, 50 Am. Rep. 12, 18 Am. & Eng. R. Cas. 170; Chicago, etc., R. Co. v. Michie, 83 Ill. 427; Toledo, etc., R. Co. v. Brooks, 81 Ill. 245; Duff v. Alleghany Valley R. Co., 91 Pa. St. 458; Jenkins v. Chicago, etc., R. Co., 41 Wis. 112; Houston, etc., R. Co. v. Moore, 49 Tex. 31, 30 Am. Rep. 98; Gulf, etc., R. Co. v. Campbell, 76 Tex. 174, 41 Am. & Eng. R. Cas. 100.

34. Dunne v. New York, etc., R. Co., 99 App. Div. (N. Y.) 571, 91 N.

Y. Supp. 145; Griswold v. Chicago, etc., R. Co., 64 Wis. 652, 23 Am. & Eng. R. Cas. 463. See also cases cited in following notes to this section.

35. Hamilton v. Texas, etc., R. Co., 64 Tex. 251, 21 Am. & Eng. R. Cas. 336; Texas, etc., R. Co. v. Best, 66 Tex. 116; Atchison, etc., R. Co. v. Johns, 36 Kan. 769, 59 Am. Rep. 609, 34 Am. & Eng. R. Cas. 480; Montgomery, etc., R. Co. v. Thompson, 77 Ala. 448, 54 Am. Rep. 72; McKone v. Michigan Cent. R. Co., 51 Mich. 601, 47 Am. Rep. 596, 13 Am. & Eng. R. Cas. 29. But its duty does not extend to persons at the station at an unusual hour to bid farewell to one about to leave on a freight train in charge of stock, and who is a passenger only in a limited and restricted sense. Dowd v. Chicago, etc., R. Co., 84 Wis. 105, 58 Am. & Eng. R. Cas. 18.

36. Doss v. Missouri, etc., R. Co., 59 Mo. 27, 21 Am. Rep. 371, 8 Am. Ry. Rep. 462; Louisville, etc., R. Co. v. Crunk, 119 Ind. 542, 12 Am. St. Rep. 443, 41 Am. & Eng. R. Cas.

ligation of the carrier to one accompanying a passenger into a car is not that due a passenger, although, if it suffers him to enter its car, it owes him ordinary care while he is entering the car, while he is in it, and while he is leaving it. There is no obligation upon the carrier to hold its train or car until every person not a passenger leaves the same, irrespective of the time of the stop made at the station.³⁷ It is the duty of one who has assisted a passenger on board, if the train starts before he has had time to get off, to remain until he can make known his wish to get off, and if he alight while the train is in motion, he does so at his own risk, and cannot maintain an action against the carrier for injuries received unless he shows that he exercised due care and the carrier was negligent.³⁸ It is not negligence for the carrier to start its train before such a person has had time to get off, unless its servants had notice of his intention to do so.³⁹ And where railroad employes offer to assist a passenger needing assistance to board or leave the

158; *Hamilton v. Texas, etc., R. Co., supra.*

37. *Dunne v. New York, etc., R. Co., supra; Lucas v. Taunton, etc., R. Co., 6 Gray (Mass.), 64, 66 Am. Dec. 406.*

38. *Coleman v. Georgia, etc., R. Co., 84 Ga. 1, 10 S. E. 498, 40 Am. & Eng. R. Cas. 690; Lucas v. Taunton, etc., R. Co., supra.* The carrier is not liable where such a person boards the train at an improper place some distance from the depot and is injured through such negligence. *Stiles v. Atlanta, etc., R. Co., 65 Ga. 370, 8 Am. & Eng. R. Cas. 195.*

39. *Dunne v. New York, etc., R. Co., 99 App. Div. (N. Y.) 571, 91 N. Y. Supp. 145, wherein the court held:* The fact that servants of a railroad saw a person who accompanied a passenger onto the train walking in the aisle of the car, or coming out on the platform, did not require them to forbear from giving the signal that the train could proceed; but their obligation so to do only arose after they had received, or should, in the exercise of due care,

have received, actual notice of the intention of such person to leave the car. The mere fact that such person descended on to the step of the car was not sufficient to render the conduct of the railroad's servants in starting the train negligence. A railroad is not required, as a matter of law, to have a servant stationed at the foot of the steps to hold a train until a person not a passenger can leave the same, when that person only signifies his intention of leaving by his act of alighting. Where it was the custom of a railroad to so station a brakeman, who was not to signal the train to proceed until all persons, including those in the act of alighting, had reached the ground in safety, a person who accompanied a passenger into the train and knew of the custom, had a right to rely on its observance; but, if he did not know of such a custom, he took the consequences of his act in alighting from the car. See also *Yarnell v. Kansas City, etc., R. Co., 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; Little Rock, etc., R. Co. v. Lawton, 55 Ark. 428,*

car, the escort has no right to enter the coach for that purpose, and the company owes him no duty except to refrain from wilful or wanton injury.⁴⁰

§ 25. Employes of carrier as passengers.—An employe of a railroad company, traveling from his home to his post of duty upon the cars of the company free of charge, as stipulated for in the contract of service, is not a passenger but will be regarded a servant or employe, and the company is not liable for his death or injury, while so traveling, caused by the negligence of a co-employe.⁴¹ And where an employe of a railroad company, after his day's work was done, took gratuitous passage on a freight train from the place of his work to his home, the gratuitous carriage was a privilege incidental to his contract of service, and did not make him a passenger.⁴² An engine wiper riding on an engine was not a passenger, though the carrier knew that he and other of its employes were habitually violating its express rules, which prohibited them, under any circumstances, riding on the engine; and, being a co-employe, could not recover for injuries sustained through the negligence of an engineer with whom he was riding.⁴³

18 S. W. 543, 29 Am. St. Rep. 48, 52 Am. & Eng. R. Cas. 260; Missouri, etc., R. Co., v. Miller, 8 Tex. Civ. App. 241, 27 S. W. 905; Louisville, etc., R. Co. v. Espenscheid, 17 Ind App. 558, 571, 47 N. E. 186.

40. Little Rock, etc., R. Co. v. Lawton, *supra*.

41. Vick v. New York Cent., etc., R. Co., 95 N. Y. 267, 47 Am. Rep. 36, 17 Am. & Eng. R. Cas. 609; Ross v. New York Cent., etc., R. Co., 74 N. Y. 617; Russell v. Hudson River R. Co., 17 N. Y. 134; Ewald v. Chicago, etc., R. Co., 70 Wis. 420, 5 Am. St. Rep. 178; Kansas Pac. R. Co. v. Salmon, 11 Kan. 83; Columbus, etc., R. Co. v. Arnold, 31 Ind. 174; Gillshant v. Stony Brook R. Corp., 10 Cush. (Mass.) 228; Seaver v. Boston, etc., R. Co., 14 Gray (Mass.), 466; Higgins v. Hannibal, etc., R. Co., 36 Mo. 418; Ryan v. Cumberland Valley R. Co., 23 Pa. St. 384; McQueen v. Cen-

tral, etc., Pac. R. Co., 30 Kan. 689, 15 Am. & Eng. R. Cas. 226; Hutchinson v. York, etc., R. Co., 6 Eng. Ry. & C. Cas. 580; Tunney v. Midland R. Co., L. R. 1 C. P. 291; Wright v. Northampton, etc., R. Co., 122 N. C. 852, 29 S. E. 100, 8 Am. & Eng. R. Cas. N. S. 151; State, Abell v. Western Maryland R. Co., 63 Md. 433. See also Howland v. Milwaukee R. Co., 54 Wis. 226; Kumler v. Junction R. Co., 33 Ohio St. 150; Ladd v. Railroad Co., 119 Mass. 412; Sullivan v. India Mfg. Co., 113 Mass. 396; Ohio, etc., R. Co. v. Tyndall, 13 Ind. 366, 74 Am. Dec. 259; May v. Ontario, etc., R. Co., 10 Ont. Rep. 70, 26 Am. & Eng. R. Cas. 337.

42. Ionnone v. New York, etc., R. Co. (R. I.), 44 Atl. 592. See also Moss v. Johnson, 22 Ill. 633; Dobson v. New Orleans, etc., R. Co., 52 La. Ann. 1127, 27 So. 670, *contra*.

43. Streets v. Grand Trunk R. Co.,

A railroad employe traveling upon a train, operated by a yard master when he is not on duty, for the purpose of taking employes to and from a meeting, is not a passenger to whom the company is liable as such for injuries.⁴⁴ But, in some jurisdictions, it is held that where employes of a railroad are carried to and from their work as a part of their wages,⁴⁵ or where their contract entitles them to free transportation and they are not under any obligation to ride, or engaged in any service for the company while so riding,⁴⁶ or where they are riding for purposes of their own when off duty, and their time is their own,⁴⁷ they must be deemed to be passengers and governed by the rules applicable as between carrier and passenger. So, a station agent riding to his home on a passenger train of his employers, by permission of the conductor, five hours after his labors of the day had ceased,⁴⁸ and a section hand of a street railway company riding upon one of its cars by direction of his foreman, though paying no fare,⁴⁹ have been held to be passengers. And the fact that an employe of a railroad was riding on one of its cars under a rule allowing employes to ride at

178 N. Y. 553, affg. 76 App. Div. (N. Y.) 480, 78 N. Y. Supp. 729.

44. Chicago, etc., R. Co. v. Bryant, 65 Fed. 969, 13 C. C. A. 249. But see Bryant v. Chicago, etc., R. Co., 53 Fed. 997, 58 Am. & Eng. R. Cas. 15. So where the employe and others operated the train for their own purposes by permission of the yard master. Davis v. Chicago, etc., R. Co., 45 Fed. 543.

45. Carswell v. Macon, etc., R. Co., 118 Ga. 826, 45 S. E. 695, a telegraph lineman; Chattanooga R. T. Co. v. Venable, 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 886; New York, etc., R. Co. v. Burns, 51 N. J. L. 340; O'Donnell v. Allegheny Valley R. Co., 59 Pa. St. 239; Doyle v. Fitchburg R. Co., 162 Mass. 66, 44 Am. St. Rep. 335; Gillenwater v. Madison, etc., R. Co., 5 Ind. 339; Poole v. Chicago, etc., R. Co., 53 Wis. 658, 3 Am. & Eng. R. Cas. 332, a detective employed to discover stolen property.

46. McNulty v. Pennsylvania R. Co., 182 Pa. St. 479, 38 L. R. A. 376, 41 W. N. C. 105, 28 Pittsb. L. J. N. S. 149, 38 Atl. 524; Texas, etc., R. Co. v. Smith, 67 Fed. 524, 31 L. R. A. 321, and notes.

47. Whitney v. New York, etc., R. Co., 102 Fed. 850, 43 C. C. A. 19; Albion Lumber Co. v. De Nobra, 72 Fed. 739; McDaniel v. Highland Ave. R. Co., 90 Ala. 64; Rosenbaum v. St. Paul, etc., R. Co., 35 Minn. 173, 34 Am. & Eng. R. Cas. 274; Simmons v. Oregon R., etc., Co. (Or.), 60 Pac. 440.

48. Louisville, etc., R. Co. v. Scott's Admtr., 22 Ky. Law Rep. 30, 56 S. W. 674, 50 L. R. A. 381.

49. Denver, etc., R. Co. v. Dwyer, 20 Colo. 132. *Contra*, as to a section master of a train, Wright v. Northampton, etc., R. Co., 122 N. C. 852, 29 S. E. 100, 10 Am. & Eng. R. Cas. N. S. 151.

any time free of charge did not deprive him of the rights of a passenger.⁵⁰ Where a passenger upon a street car undertakes, at the request of an employe of the carrier to render some casual service or assistance, such as pushing, jumping or lifting a car,⁵¹ or cutting cars loose in a train,⁵² applying brakes, etc.,⁵³ he does not lose the character of a passenger and become a volunteer servant or a fellow-employe; though, if injured, the question of his contributory negligence may be, in some circumstances, a question for the jury.⁵⁴

§ 26. Rules and regulations of the carrier.—It is the right and duty of railroad corporations and carriers generally to make regulations for the convenience, comfort, and safety of their passengers and for the management of the business of conveying passengers and their baggage, and the propriety and reasonableness of such regulations is to be determined by the court, rather than by a jury. This rule is well settled in New York and some other States.⁵⁵ It is quite generally held that such rules or regulations

50. Dickinson v. West End St. Ry. Co., 177 Mass. 365, 59 N. E. 60, 52 L. R. A. 326.

51. McIntire St. R. Co. v. Bolton, 43 Ohio St. 224, 54 Am. Rep. 803, 21 Am. & Eng. R. Cas. 501; Stastney v. Second Ave. R. Co., 61 N. Y. Super. Ct. 104, affd. 138 N. Y. 609, 51 St. Rep. (N. Y.) 932, 18 N. Y. Supp. 800.

52. Cumberland Valley R. Co. v. Myers, 55 Pa. St. 288.

53. Peoples Pass. R. Co. v. Green, 56 Md. 84, 6 Am. & Eng. R. Cas. 108; Brown v. Scarboro, 97 Ala. 316, 58 Am. & Eng. R. Cas. 364. Compare Everhart v. Terre Haute, etc., R. Co., 78 Ind. 292, 41 Am. Rep. 567, 4 Am. & Eng. R. Cas. 599; Sherman v. Hannibal, etc., R. Co., 72 Mo. 62, 37 Am. Rep. 423, 4 Am. & Eng. R. Cas. 589; Wright v. London, etc., R. Co., 33 L. T. N. S. 830, 12 B. Div. 252, 45 L. J. Q. B. Div. 570; Potter v. Faulkner, 1 B. & S. 800, 101 E. C. L. 800.

54. Stastney v. Second Ave. R. Co., *supra*.

55. O'Gorman v. New York, etc., R. Co., 96 App. Div. (N. Y.) 594, 89 N. Y. Supp. 589, forbidding carriage of dogs on cars; Rowe v. Brooklyn, etc., R. Co., 71 App. Div. (N. Y.) 474, 75 N. Y. Supp. 893, prohibiting employees in uniform from occupying a front seat; Dowd v. Albany Ry., 47 App. Div. (N. Y.) 202, 62 N. Y. Supp. 179, relating to the size of packages which passengers may carry; Muckle v. Rochester R. Co., 79 Hun (N. Y.) 32, 29 N. Y. Supp. 732; Avery v. New York Cent., etc., R. Co., 121 N. Y. 31, 24 N. E. 20; Morris v. Atlantic Ave. R. Co., 116 N. Y. 552, 22 N. E. 1097; Peck v. New York Cent., etc., R. Co., 70 N. Y. 587, requiring females traveling alone, or with male relatives or friends, to ride in a special car; Putnam v. Broadway, etc., R. Co., 55 N. Y. 108, 14 Am. Rep. 190; Vedder v. Fellows, 20 N.

must be reasonable and not violative of law in order to be binding upon passengers.⁵⁶ The courts have held that carriers of passengers may make reasonable rules for the conducting of business,⁵⁷ for the dispatch of business,⁵⁸ for the management of trains,⁵⁹ for the government of their employes in the conduct of their business upon trains,⁶⁰ for the conduct of employes, and also for the conduct of passengers,⁶¹ for the transportation of passengers from point to point,⁶² for the safe and orderly conduct of their

Y. 126; Hibbard v. New York, etc., R. Co., 15 N. Y. 455; Tracy v. New York, etc., R. Co., 9 Bosw. (N. Y.) 396; Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420, 92 Am. Dec. 278; Chilton v. St. Louis, etc., R. Co., 114 Mo. 88; South Florida R. Co. v. Rhodes, 25 Fla. 40, 23 Am. St. Rep. 506, 37 Am. & Eng. R. Cas. 100; Louisville, etc., R. Co. v. Fleming, 14 Lea (Tenn.), 128, 18 Am. & Eng. R. Cas. 347; Norfolk, etc., R. Co. v. Wysor, 82 Va. 250, 26 Am. & Eng. R. Cas. 234; Florida Southern R. Co. v. Hirst, 30 Fla. 1, 52 Am. & Eng. R. Cas. 409; Pierce v. Randolph, 12 Tex. 290.

56. Boster v. Chesapeake, etc., R. Co., 36 W. Va. 318, 52 Am. & Eng. R. Cas. 357, 15 S. E. 158; Day v. Owen, 5 Mich. 520; State v. Chovin, 7 Iowa, 204; Robinson v. Southern Pac. R. Co., 105 Cal. 526; Eddy v. Rider, 79 Tex. 53; Central R., etc., Co. v. Strickland, 90 Ga. 562, 52 Am. & Eng. R. Cas. 216; Northern Cent. R. Co. v. O'Connor, 76 Md. 207, 52 Am. & Eng. R. Cas. 176; Gulf, etc., R. Co. v. Moody (Tex. Civ. App.), 30 S. W. 574. See also cases cited in last preceding note.

57. Houston, etc., R. Co. v. Moore, 49 Tex. 31.

58. Watkins v. Pennsylvania R. Co. (D. C.), 52 Am. & Eng. R. Cas. 159; Chicago, etc., R. Co. v. Graham, 3 Ind. App. 28; Browne v. Raleigh,

etc., R. Co., 108 N. C. 34; International, etc., R. Co. v. Goldstein, 2 Tex. App. Civ. Cas. § 274.

59. Atchison, etc., R. Co. v. Gants, 38 Kan. 608, 5 Am. St. Rep. 780; Lake Shore, etc., R. Co. v. Greenwood, 79 Pa. St. 373; Plott v. Chicago, etc., R. Co., 63 Wis. 511; Connell v. Mobile, etc., R. Co. (Miss.), 7 So. 344; McRae v. Wilmington, etc., R. Co., 88 N. C. 526, 43 Am. Rep. 745, 18 Am. & Eng. R. Cas. 316; Britton v. Atlanta, etc., R. Co., 88 N. C. 536, 43 Am. Rep. 749, 18 Am. & Eng. R. Cas. 391; Texas, etc., R. Co. v. White, 4 Tex. App. Civ. Cas. § 259.

60. Crawford v. Cincinnati, etc., R. Co., 26 Ohio St. 580, 13 Am. & Eng. Rep. 387.

61. Chicago, etc., R. Co. v. McLallen, 84 Ill. 109, 16 Am. Ry. Rep. 425; New Orleans, etc., R. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689; Macon, etc., R. Co. v. Johnson, 38 Ga. 409; Pittsburg, etc., R. Co. v. Pillow, 76 Pa. St. 510; West Chester, etc., R. Co. v. Miles, 55 Pa. St. 209, 93 Am. Dec. 744.

62. Gray v. Cincinnati Southern R. Co., 11 Fed. 683. A rule that passenger coaches shall be run in the same train with freight cars is not unreasonable unless the safety of passengers is endangered. Arkansas M. R. Co. v. Canman, 52 Ark. 517.

business, and to protect themselves against impositions,⁶³ for the admission of passengers to their trains,⁶⁴ for the division of passengers into classes,⁶⁵ and providing separate cars for ladies,⁶⁶ and for white and colored passengers.⁶⁷ In some of the cases cited the reasonableness of this class of rules is held to be a pure question of fact for the jury,⁶⁸ while in others it is held to be a mixed question of law and fact, to be found by the jury on the trial, under the instructions of the court.⁶⁹ If the facts are undisputed, the question would seem to be a proper one for the court,⁷⁰ while if the facts are controverted, the question should be submitted to the jury, under appropriate instructions.⁷¹ In many cases it is held that passengers seeking to take passage on railway trains are bound to make inquiry and inform themselves as to the rules established by the carrier with reference to the proposed transit, and the conduct of the trains, and conform thereto, and that if no inquiry be made, they are subject to such rules of the carrier, if reasonable,

63. Wrightman v. Chicago, etc., R. Co., 73 Wis. 169. (Mass.) 596, 41 Am. Dec. 465; West Chester, etc., R. Co. v. Miles, 55 Pa. St. 209, 93 Am. Dec. 744; Day v. Owen, 5 Mich. 525, 72 Am. Dec. 62; Chesapeake, etc., R. Co. v. Wells, 83 Tenn. 615; Britton v. Atlanta, etc., Air Line R. Co., 88 N. C. 542, 43 Am. Rep. 749.

64. Johnson v. Concord R. Corp., 46 N. H. 213; Cleveland, etc., R. Co. v. Bartram, 11 Ohio St. 457; Northern Cent. R. Co. v. O'Connor, 76 Md. 207, 52 Am. & Eng. R. Cas. 176; Baltimore, etc., R. Co. v. Carr, 71 Md. 135. (34 N. J. L. 135; Morris, etc., R. Co. v. Ayres, 29 N. J. L. 393, 80 Am. Dec. 215; State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671; State v. Chovin, 7 Iowa, 204.

65. Chicago, etc., R. Co. v. Parks, 18 Ill. 460, 68 Am. Dec. 562.

66. Chicago, etc., R. Co. v. Williams, 58 Ill. 185, 8 Am. Rep. 641; Memphis, etc., R. Co. v. Benson, 85 Tenn. 627, 4 Am. St. Rep. 776; Bass v. Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495.

67. Railroad companies are authorized, in the absence of statute, to establish such rules, if equal accommodations are afforded to each class. Ohio Valley R. Co. v. Lander, 20 Ky. L. Rep. 913, 926, 47 S. W. 344, 882, 48 S. W. 145; McGuinn v. Forbes, 37 Fed. 639; Houck v. Southern Pac. R. Co., 38 Fed. 226; Commonwealth v. Power, 7 Metc.

68. Compton v. Van Valkenburgh, 34 N. J. L. 135; Morris, etc., R. Co. v. Ayres, 29 N. J. L. 393, 80 Am. Dec. 215; State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671; State v. Chovin, 7 Iowa, 204.

69. Bass v. Chicago, etc., R. Co., 36 Wis. 458, 17 Am. Rep. 495; Day v. Owen, 5 Mich. 520, 72 Am. Dec. 62; Commonwealth v. Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465; Jencks v. Coleman, 2 Sumn. (U. S.) 221; Brown v. Memphis, etc., R. Co., 4 Fed. 37.

70. Pittsburg, etc., R. Co. v. Lyon, 123 Pa. St. 140, 10 Am. St. Rep. 517, 37 Am. & Eng. R. Cas. 231.

71. Avery v. New York Cent., etc., R. Co., 121 N. Y. 31.

even though unknown to them.⁷² Other cases hold that reasonable rules of the carrier are binding upon passengers when they are notified thereof, or the carrier has given such publicity to them that, by the use of reasonable care and caution, they should have known of them.⁷³ A conductor has no general power to waive or modify the rules of the carrier,⁷⁴ but his violation thereof may in some cases bind the carrier,⁷⁵ and a waiver or modification of the rules may be established by custom and habit of the carrier to the contrary or long continued disregard thereof.⁷⁶ In the enforcement of order upon the train, and in the execution of reasonable regulations for the safety and comfort of the passengers and for the security of the train, the authority of the officers, exercised upon the responsibility of the carrier, must be obeyed by the passengers; but the carrier is bound to afford reasonable facilities to enable passengers to comply with its rules and regulations,⁷⁷ and a carrier has author-

72. Terry v. Flushing, etc., R. Co., 13 Hun (N. Y.) 359; Elmore v. Sands, 54 N. Y. 512; Beebe v. Ayres, 28 Barb. (N. Y.) 275; Northern R. Co. v. Page, 22 Barb. (N. Y.) 130; Dunphy v. Erie R. Co., 42 N. Y. Super. Ct. 128; Cheney v. Boston, etc., R. Co., 11 Metc. (Mass.) 121; Duling v. Philadelphia, etc., R. Co., 65 Md. 120, 5 Cent. Rep. 570; McRae v. Wilmington, etc., R. Co., 88 N. C. 526, 43 Am. Rep. 745, 18 Am. & Eng. R. Cas. 316; Britton v. Atlanta, etc., Air Line R. Co., 88 N. C. 536, 33 Am. Rep. 749, 18 Am. & Eng. R. Cas. 391; Southern Kansas R. Co. v. Hinsdale, 38 Kan. 507, 34 Am. & Eng. R. Cas. 256; Atchison, etc., R. Co. v. Gants, 38 Kan. 608; Drew v. Central Pac. R. Co., 51 Cal. 425; Oil Creek, etc., R. Co. v. Clark, 72 Pa. St. 231; State v. Overton, 24 N. J. L. 435; Dietrich v. Pennsylvania R. Co., 71 Pa. St. 432; Huffard v. Grand Rapids, etc., R. Co., 64 Mich. 631; Georgia R. Co. v. Murden, 86 Ga. 434; Lake Shore, etc., R. Co. v. Rosenzweig, 113 Pa. St. 519, 26 Am. & Eng. R. Cas. 489; Johnson v. Concord R. Corp., 46 N.

H. 213; Gulf, etc., R. Co. v. Moody, (Tex. Civ. App.) 30 S. W. 574; Drake v. Pennsylvania R. Co., 137 Pa. St. 352.

73. Wright v. California Cent. R. Co., 78 Cal. 360; Macon, etc., R. Co. v. Johnson, 38 Ga. 409; Norfolk, etc., R. Co. v. Wysor, 82 Va. 250, 26 Am. & Eng. R. Cas. 234; Baltimore City Pass. R. Co. v. Wilkinson, 30 Md. 224; Trotlinger v. East Tennessee, etc., R. Co., 11 Lea (Tenn.) 533, 13 Am. & Eng. R. Cas. 49; Motteram v. Eastern Counties R. Co., 7 C. B. N. S. 58, 97 E. C. L. 58, 6 Jur. N. S. 583, 29 L. J. M. C. 59.

74. Lake Shore, etc., R. Co. v. Pierce, 47 Mich. 277, 3 Am. & Eng. R. Cas. 340.

75. McGee v. Missouri Pac. R. Co., 92 Mo. 208, 31 Am. & Eng. R. Cas. 1.

76. Greenfield v. Detroit, etc., R. Co., 10 Det. Leg. N. 256, (Mich.) 95 N. W. 546; Burke v. Missouri Pac. R. Co., 51 Mo. App. 491. But see Drake v. Pennsylvania R. Co., 137 Pa. St. 352.

77. Cincinnati, etc., R. Co. v. Lohe, (Ohio) 67 N. E. 161; Bass v. Chicago, etc., R. Co., 36 Wis. 450

ity to enforce observance of its regulations only by preventing, not by punishing the breach of them. Only by present or prospective, and not by past, misconduct, does a passenger lose his privileges.⁷⁸

9 Am. Ry. Rep. 101; Chicago, etc., R. Co. v. Graham, 3 Ind. App. 28; Brown v. Kansas City, etc., R. Co., 38 Kan. 634; Crawford v. Cincinnati, etc., R. Co., 26 Ohio St. 580, 13 Am. Ry. Rep. 387; Baltimore, etc., R. Co. v. Carr, 71 Md. 135; Baltimore, etc., R. Co. v. Blocher, 27 Md. 277; Florida Southern R. Co. v. Hirst, 30 Fla. 1, 52 Am. & Eng. R. Cas. 409; Chicago, etc., R. Co. v. Rielly, 40 Ill. App. 416; Britton v. Atlanta, etc., Air Line R. Co., 88 N. C. 536, 43 Am. Rep. 749, 18 Am. & Eng. R. Cas. 391; Downey v. Chesapeake, etc., R. Co., 28 W. Va. 732; Central R. Co., v. Strickland, 90 Ga. 562; Jennings v. Great Northern R. Co., 35 L. J. Q. B. 15, L. R. 1 Q. B. 7, 1 Ry. & C. T. Cas. 15; Houston, etc., R. Co. v. Bryant. (Tex. Civ. App.) 72 S. W. 885.

78. Smith v. Manhattan Ry. Co., 45 St. Rep. (N. Y.) 856, 18 N. Y. Supp. 759, affd. 138 N. Y. 627, 33 N. E. 1083; Penfield v. Cleveland, etc., R. Co., 26 App. Div. (N. Y.) 413, 50 N. Y. Supp. 79; Hart v. Metropolitan St. R. Co., 34 Misc. Rep. (N. Y.) 531, 69 N. Y. Supp. 906; Steamboat Co. v. Brockett, 121

U. S. 637, 7 S. C. Rep. 1039; Rowe v. Brooklyn, etc., R. Co., 80 App. Div. (N. Y.) 477, 81 N. Y. Supp. 106; Choctaw, etc., R. Co. v. Hill, (Tenn.) 75 S. W. 963.

Rules and regulations of street railways.—A railway company has the right to make reasonable rules and regulations prohibiting passengers from occupying positions on its cars considered to be dangerous, except at their own risk; but when, notwithstanding such rules, passengers are permitted, and in some instances required, to occupy such positions, the company is still under the duty to exercise extraordinary care and diligence for their safety. Augusta Ry. & Elec. Co. v. Smith, 3 St. Ry. Rep. 75, 121 Ga. 29, 48 S. E. 681. See also as to other rules and regulations: Stevens v. Boston Elev. Ry. Co., 2 St. Ry. Rep. 435, 184 Mass. 476, 69 N. E. 338; Nassau Elec. Ry. Co. v. Corliss, 2 St. Ry. Rep. 999, 126 Fed. 355; United Railways & Elec. Co. v. Hertel (Md.), 1 St. Ry. Rep. 273, 55 Atl. 428; Frizzell v. Omaha St. Ry. Co., 1 St. Ry. Rep. 854, 124 Fed. 176. See also note, 1 St. Ry. Rep. 273.

CHAPTER XX.

DUTIES AND LIABILITIES OF CARRIERS OF PASSENGERS.

- SECTION**
1. Care required of carrier in general.
 2. Obstructions on or near tracks.
 3. Duty of railroad company to fence tracks.
 4. Locomotives, cars, and appliances.
 5. Improved appliances and methods.
 6. Duty of inspection.
 7. Liability for latent defects.
 8. Negligence of persons engaged in construction or manufacture.
 9. Liability of carrier employing leased lines, or using cars of another company.
 10. Liability for injuries caused by inevitable accident.
 11. Means and appliances for receiving and discharging passengers.
 12. Passenger carriers by stage coaches.
 13. Carriers of passengers by water.
 14. Carrier's liability as to employment of servants.
 15. Duty to receive and transport passengers.
 16. Persons who may be refused transportation.
 17. When refusal to transport must be made.
 18. Duty to carry passengers on freight and special trains.
 19. Duty of carrier to protect passenger.
 20. Acts or omissions of carrier's employes.
 21. The New York rule.
 22. Carrier's liability for assaults by servants.
 23. Liability for insult and abuse by servants.
 24. Liability for expulsion by servants.
 25. Liability for false arrest of passengers.
 26. Liability for acts of fellow passengers or other third persons.
 27. Liability for assaults by passengers or other third persons.
 28. Indecent language and conduct of fellow passengers or intruders.
 29. Duty to protect from acts of drunken passengers.
 30. Duty of carrier to sick passengers.
 31. Protection from accidental injuries.
 32. Care of carrier in the carriage of passengers.
 33. Management of conveyance.—Sudden jerks and jolts.
 34. Duty of carrier to announce stations.
 35. Duty of carrier to stop at stations.
 36. Warning of departure of trains.
 37. Duty to provide safe means of ingress and egress.
 38. Reasonable time for ingress and egress.

39. Duty to warn, instruct, or inform passengers.
40. Duty to assist aged, infirm, or helpless passengers.
41. Duty to carry to point of destination.
42. Carrying passengers beyond destination.
43. Duty to carry promptly.
44. Safety of passengers.
45. Safety of passengers on freight and other trains.
46. Duty of carrier to provide passengers with seats.
47. Liability for injuries caused by collision.
48. Duty of carrier for safety of sick passengers.
49. Articles constituting personal baggage.
50. Duty to carry baggage.
51. Liability of carrier for loss or injury.
52. Limitation of liability.
53. Baggage checks mere receipts or vouchers.
54. Commencement and termination of liability.
55. Carrier's liability as warehouseman.
56. Connecting carriers.

§ 1. Care required of carriers in general.—While the common carrier of passengers is not an insurer of the safety of its passengers, the rule is firmly established that it is bound to use the utmost care, so far as human skill and foresight can go, to guard against the possibility of accidents arising from the condition of its road and the machinery used in the transportation of passengers. This obligation exists only with respect to those results which are naturally to be apprehended from unsafe roadbeds, defective machinery, imperfect cars, and other conditions endangering the success of the undertaking. The degree of care to be exercised in any case is dependent upon the circumstances; and, where the injury occurs from a defect in the roadbed, or machinery, or in the construction of the cars, or where it results from a defect in any of the appliances such as would be likely to occasion great danger and loss of life to those traveling on the road, as the result of the least negligence may be of so fatal a nature, the duty of vigilance, on the part of the carrier, requires the exercise of that amount of care and skill in order to prevent accidents.¹ But in the

1. Stierle v. Union Ry. Co., 156 N. Y. 70, 50 N. E. 419, 5 Am. Annot. Cas. 326; Almer v. Delaware, etc., Canal Co., 120 N. Y. 170, 17 Am. St. Rep. 629; Coddington v. Brooklyn, etc., R. Co., 102 N. Y. 66, 5 N. E. 795; Carroll v. Staten Island, etc.,

R. Co., 58 N. Y. 126, 17 Am. Rep. 221; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Maverick v. Eighth Ave. R. Co., 36 N. Y. 378; Deyo v. New York Cent. R. Co., 34 N. Y. 9; Bower v. New York Cent. R. Co., 18 N. Y. 410, 72 Am. Dec.

approaches to the cars, such as platforms, halls, stairways, and the like, a less degree of care is required, and for the reason that the consequences of a neglect of the highest skill and care which human foresight can attain to are naturally of a less serious nature. The rule in such cases is that the carrier is bound simply to exercise ordinary care in view of the dangers to be apprehended.² So, likewise, the courts have not held carriers to the exercise of such a high degree of care in the operation of their roads to prevent injuries to other travelers, as at railroad crossings and, notably in the case of street railways, as is required of them in respect to passengers, but have held them bound to exercise due and ordinary care and prudence and such reasonable diligence and caution as all the surrounding circumstances of the case require.³

529.; Hegeman v. Western R. Co., 13 N. Y. 9, 64 Am. Dec. 517; Ingalls v. Bills, 9 Metc. (Mass.) 1; Moreland v. Boston, etc., R. Co., 141 Mass. 31, 6 N. E. 225; Central R. Co. v. Freeman, 75 Ga. 331; Metropolitan St. Ry. Co. v. Hanson, 1 St. Ry. Rep. 234, (Kan.) 72 Pac. 775; St. Louis, etc., R. Co. v. Mitchell, 57 Ark. 418, 21 S. W. 883; Eureka Springs R. Co. v. Timmons, 51 Ark. 459, 40 Am. & Eng. R. Cas. 698; George v. St. Louis, etc., R. Co., 34 Ark. 613; Holloway v. Passadona, etc., R. Co., 130 Cal. 177, 62 Pac. 478; Macon Consol. St. R. Co. v. Barnes, 113 Ga. 212, 38 S. E. 746; Illinois Cent. R. Co. v. Kuhn, 107 Tenn. 106, 64 S. W. 202; Smith v. St. Paul City Ry. Co., 32 Minn. 1, 18 N. W. 827; Gilson v. Jackson, etc., R. Co., 76 Mo. 282; Searle v. Kanawha, etc., R. Co., 32 W. Va. 370, 37 Am. & Eng. R. Cas. 179. See Nellis St. Rd. Acct. Law, 47, 55; Louisiana, etc., R. Co. v. Crumpler, 122 Fed. 425.

2. Kelly v. Manhattan R. Co., 112 N. Y. 443; Palmer v. Pennsylvania Co., 111 N. Y. 488, 18 N. E. 859; Morris v. New York Cent., etc., R. Co., 106 N. Y. 678, 13 N. E. 475;

Miller v. Ocean Steamship Co., 118 N. Y. 211; Unger v. Forty-second St. R. Co., 51 N. Y. 497; Taylor v. Pennsylvania Co., 50 Fed. 755; Cleveland, etc., R. Co. v. Anderson, 21 O. C. C. R. 288, 11 O. C. D. 765.

As to defective platforms and stations: See Wagner v. Brooklyn H. R. Co., 3 St. Ry. Rep. 710, 95 App. Div. (N. Y.) 219, 88 N. Y. Supp. 791; Indianapolis St. Ry. Co. v. Robinson, 157 Ind. 414, 61 N. E. 936; Wood v. Metropolitan St. Ry. Co., 3 St. Ry. Rep. 540, 181 Mo. 433, 81 S. W. 152; Haselton v. Portsmouth, etc., St. Ry. Co., 71 N. H. 589, 53 Atl. 1016. See also Leveret v. Shreveport Belt Line Co. (La.), 1 St. Ry. Rep. 253 (and note), 34 So. 579; Cotant v. Boone Sub. Ry. Co. (Ia.), 2 St. Ry. Rep. 269 (and note), 99 N. W. 115.

3. Weber v. New York Cent. R. Co., 58 N. Y. 451; Baltimore, etc., R. Co. v. Breinig, 25 Md. 378; Etherington v. Prospect Park, etc., R. Co., 88 N. Y. 461; Weiler v. Manhattan R. Co., 53 Hun (N. Y.) 372, 6 N. Y. Supp. 320; Geipel v. Steinway R. Co., 14 App. Div. (N. Y.) 551, 43 N. Y. Supp. 934; Western, etc., R. Co. v.

The carrier is required to exercise the highest degree of care in providing a properly constructed and safe roadbed and track,⁴ and in constructing, maintaining and repairing its road when upon a street or highway and the crossings where it intersects a public highway at grade, and the approaches thereto, in a safe condition.⁵ It is required to have safe and properly constructed bridges,⁶ and

King, 70 Ga. 261, 19 Am. & Eng. R. Cas. 255; Gorman's Admr. v. Louisville, etc., R. Co., 24 Ky. L. Rep. 1938, 72 S. W. 760; Goldrick v. Union R. Co., 20 R. I. 128, 37 Atl. 635, 2 Am. Neg. Rep. 647; Hall v. Ogden City St. R. Co., 13 Utah, 243, 44 Pac. 1046, 4 Am. & Eng. R. Cas. N. S. 77; Pendleton St. R. Co. v. Shires, 18 Ohio St. 255; Pendleton St. R. Co. v. Stallman, 22 Ohio St. 1; Potts v. Chicago City R. Co., 33 Fed. 610; Roller v. Sutter St. R. Co., 66 Cal. 230, 5 Pac. 108; Fort Worth St. R. Co., v. Witten, 74 Tex. 202, 11 S. W. 1091; Boland v. Missouri R. Co., 36 Mo. 484; Citizens St. R. Co. v. Steen, 42 Ark. 321; Wilman v. Peoples Ry. Co., (Del.) 55 Atl. 332; Koenig v. Union Depot R. Co., 173 Mo. 698, 73 S. W. 637; Aldrich v. St. Louis Trans. Co., (Mo. App.) 74 S. W. 141. See Nellis St. Rd. Acct. Law, 217.

4. Chicago, etc., R. Co. v. Lewis, 145 Ill. 67, 33 N. E. 960; Peoria, etc., R. Co. v. Reynolds, 88 Ill. 418; Pittsburgh, etc., R. Co. v. Thompson, 56 Ill. 138; O'Donnell v. Allegheny Valley R. Co., 59 Pa. St. 239, 98 Am. Dec. 336; Pittsburgh, etc., R. Co. v. Williams, 74 Ind. 462; Nashville, etc., R. Co. v. Johnson, 15 Lea (Tenn.) 677; Gulf, etc., R. Co. v. Killebrew, (Tex.) 20 S. W. 182; Virginia Cent. R. Co. v. Sanger, 15 Gratt. (Va.) 250; Great Western R. Co. v. Fawcett, 1 Mo. P. C. N. S. 101. See also cases cited in preceding notes to this section; Macon Consol. St. R.

Co. v. Barnes, 113 Ga. 212, 38 S. E. 756; Illinois Cent. R. Co. v. Kuhn, 107 Tenn. 106, 64 S. W. 202.

5. Gilmore v. City of Utica, 121 N. Y. 561; Post v. West Shore R. Co., 123 N. Y. 580; People v. New York, etc., R. Co., 89 N. Y. 266, 10 Am. & Eng. R. Cas. 250, having constructed its line through a street or crossed a highway, it must restore it to such a condition that its usefulness will not be unnecessarily impaired; Pittsburgh, etc., R. Co. v. Dunn, 56 Pa. St. 280; Paducah, etc., R. Co. v. Commonwealth, 80 Ky. 147, 10 Am. & Eng. R. Cas. 318; People v. Chicago, etc., R. Co., 67 Ill. 188; State v. Dayton, etc., R. Co., 56 Ohio St. 436, 5 Am. & Eng. R. Cas. 447; Maltby v. Chicago, etc., R. Co., 52 Mich. 108, 13 Am. & Eng. R. Cas. 606; Cooke v. Boston, etc., R. Co., 113 Mass. 185; Farley v. Chicago, etc., R. Co., 42 Iowa, 234.

6. Birmingham v. Rochester City, etc., R. Co., 137 N. Y. 13, 58 Am. & Eng. R. Cas. 134; Oliver v. New York, etc., R. Co., 1 Edm. Sel. Cas. (N. Y.) 589; Pershing v. Chicago, etc., R. Co., 71 Iowa, 561, 34 Am. & Eng. R. Cas. 405; Locke v. Sioux City, etc., R. Co., 46 Iowa, 109; Jamison v. San Jose, etc., R. Co., 55 Cal. 593, 3 Am. & Eng. R. Cas. 350; Kansas Pac. R. Co. v. Miller, 2 Colo. 442, 20 Am. Ry. Rep. 245; Toledo, etc., R. Co. v. Conroy, 68 Ill. 560; Louisville, etc., R. Co. v. Snyder, 117 Ind. 435, 10 Am. St. Rep. 60, 37 Am. & Eng. R. Cas. 137; Louisville, etc.,

culverts,⁷ sound ties,⁸ and rails,⁹ and to have the latter safely spiked or fastened;¹⁰ its embankments and walls must be properly and safely constructed,¹¹ and switches which are not defective in construction or out of repair provided.¹² The common carrier

R. Co. v. Thompson, 107 Ind. 442, 57 Am. Rep. 120; Bedford, etc., R. Co. v. Rainbolt, 99 Ind. 551, 21 Am. & Eng. R. Cas. 446; Union Pac. R. Co. v. Hand, 7 Kan. 380, 1 Am. Ry. Rep. 548; Dallas, etc., R. Co. v. Spicker, 01 Tex. 427, 48 Am. Rep. 297, 21 Am. & Eng. R. Cas. 160; Baltimore, etc., R. Co. v. Noell, 32 Gratt. (Va.) 394; Grote v. Chester, etc., R. Co., 2 Exch. 251.

7. Philadelphia, etc., R. Co. v. Anderson, 94 Pa. St. 351, 39 Am. Rep. 787, 2 Am. & Eng. R. Cas. 407; Bonner v. Mayfield, 82 Tex. 234. See also Withers v. North Kent R. Co., 3 H. & N. 969.

8. Chicago, etc., R. Co. v. Lewis, 145 Ill. 67, 58 Am. & Eng. R. Cas. 126; St. Louis Coal R. Co. v. Moore, 14 Ill. App. 510; Pittsburg, etc., R. Co. v. Thompson, 56 Ill. 138; Southern Kansas R. Co., v. Walsh, 45 Kan. 653, 47 Am. & Eng. R. Cas. 493; Texas, etc., R. Co. v. Hardin, 62 Tex. 367, 21 Am. & Eng. R. Cas. 460.

9. N. Y.—Reed v. New York Cent. R. Co., 56 Barb. (N. Y.) 493; Brignoli v. Chicago, etc., R. Co., 4 Daly (N. Y.) 182.

U. S.—Vicksburg, etc., R. Co. v. Putnam, 118 U. S. 545, 27 Am. & Eng. R. Cas. 291; Newman v. Alabama G. S. R. Co., 38 Fed. 819.

Ark.—George v. St. Louis, etc., R. Co., 34 Ark. 613, 1 Am. & Eng. R. Cas. 294.

Dak.—Patten v. Chicago, etc., R. Co., 5 Dak. 267, 34 Am. & Eng. R. Cas. 399.

Fla.—Florida R., etc., Co. v. Webster, 25 Fla. 394.

Ill.—Peoria, etc., R. Co. v. Reynolds, 88 Ill. 418.

Ind.—Cleveland, etc., R. Co. v. Newell, 75 Ind. 542, 8 Am. & Eng. R. Cas. 377.

Iowa.—Pershing v. Chicago, etc., R. Co., 71 Iowa, 561, 34 Am. & Eng. R. Cas. 405.

N. H.—Taylor v. Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229.

Eng.—Pym v. Great Northern R. Co., 2 F. & F. 619.

10. Chicago, etc., R. Co. v. Lewis, 145 Ill. 67, 58 Am. & Eng. R. Cas. 126; Toledo, etc., R. Co. v. Apperson, 49 Ill. 480; Florida R., etc., Co. v. Webster, 25 Fla. 394; Southern Kansas R. Co. v. Walsh, 45 Kan. 653, 47 Am. & Eng. R. Cas. 93.

11. Hanley v. Harlem R. Co., 1 Edm. Sel. Cas. (N. Y.) 395; Kansas Pac. R. Co. v. Ludin, 3 Colo. 94; Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 47 Am. & Eng. R. Cas. 513; Philadelphia, etc., R. Co. v. Anderson, 94 Pa. St. 351, 39 Am. Rep. 787; International, etc., R. Co. v. Halloren, 53 Tex. 46, 37 Am. Rep. 744, 3 Am. & Eng. R. Cas. 343.

12. Stodder v. New York, etc., R. Co., 50 Hun (N. Y.) 221, 2 N. Y. Supp. 780, affd. 121 N. Y. 655; Smith v. New York, etc., R. Co., 19 N. Y. 127, 75 Am. Dec. 305; Caswell v. Boston, etc., R. Corp., 98 Mass. 194, 93 Am. Dec. 151; McElroy v. Nashua, etc., R. Corp., 4 Cush. (Mass.) 400, 50 Am. Dec. 794; Peoria, etc., R. Co. v. Lane, 83 Ill. 449; Baltimore, etc., R. Co. v. Worthington, 21 Md. 275, 83 Am. Dec. 578; Farrell v. Houston, etc., R. Co., 4 N. Y. Supp. 597. See

always guarantees the safety of the vehicle in which the passenger is transported, since the law implies a contract, in all cases, on the part of the carrier, that the vessel or coach, or vehicle, whatever it may be, is sufficient for the business in which it is employed.¹³ The railroad is part of the machinery for the carriage of passengers, as much as the stage coach or ship.¹⁴ Carriers of persons and passengers over railways operated by the powerful agency of steam or electricity are, therefore, bound to construct their road-bed and track with all possible care, and are bound to keep it in a safe and proper condition. They are bound to exercise the utmost skill and care in the preparation and management of their road and of all the means of conveyance thereon. As common carriers of passengers, they impliedly warrant and guarantee to every person who gets into one of their cars to be transported over their road, or any point or part thereof, that such road is land-worthy, or road-worthy; that its track, bridges, and all its structures are made and constructed in the most skillful manner and of suitable and proper materials, and are, in all respects, kept and maintained in a sound and safe condition; that their locomotives and cars and all their appurtenances are constructed with the utmost care and skill, and are kept in sound and proper order; and, also, that they have provided for the care and management of the trains and cars on their said road, careful, skillful, competent and sober engineers, conductors, switchtenders, brakemen, and all other necessary agents.¹⁵

§ 2. Obstructions on or near tracks.—A railroad company engaged in the carriage of passengers must exercise the highest degree of care and skill in the construction and maintenance of its tracks so that they will be free from obstructions by reason of the dangerous proximity of parallel tracks, or of structures, or excavations to the tracks,¹⁶ and in disposing of materials brought upon

State v. Young, (N. J.) 56 Atl. 471, as to whether a derailing switch is a necessary precaution to be used on a street railroad track.

13. Camden, etc., R. Co. v. Burke, 13 Wend. (N. Y.) 628, 28 Am. Dec. 488; Story Bail., §§ 509, 592.

14. Curtis v. Rochester, etc., R. Co., 18 N. Y. 536, 75 Am. Dec. 258.

15. Perkins v. New York Cent. R.

Co., 24 N. Y. 219, 82 Am. Dec. 282; Curtis v. Rochester, etc., R. Co., *spra*; Costikyan v. Rome, etc., R. Co., 58 Hun (N. Y.), 590, 12 N. Y. Supp. 683; Hegeman v. Western R. Corp., 13 N. Y. 22; Story Bail., § 593; Angell Carr., §§ 78, 338. McAllister v. People Ry. Co. (Del. Super.), 54 Atl. 743.

16. Sias v. Rochester R. Co., 169

the ground, or removed by it, or any obstruction which prevents the safe movement of its cars or trains,¹⁷ and in discovering and removing such obstructions.¹⁸

§ 3. Duty of railroad company to fence tracks.—A railroad company, for the safety of its passengers as well as its employes upon its engines and cars, must exercise reasonable prudence and care in keeping its tracks free from obstructions, animate, as well as inanimate, and if from want of proper care, such obstructions are permitted to be or come upon the track, and a train is thereby wrecked, and any person thereon injured, the railroad company, upon common law principles, must be held responsible. Adequate measures, reasonable in their nature, must be taken to guard against such danger, and independently of any statutory requirement, it may be the duty of a railroad company, under the facts of a given case, to fence its tracks to guard against such danger.¹⁹ Statutes

N. Y. 118, 62 N. E. 132; *Gray v. Rochester City, etc., R. Co.*, 61 Hun (N. Y.), 212, 15 N. Y. Supp. 927; *Craighead v. Brooklyn City R. Co.*, 123 N. Y. 391, 25 N. E. 387, 33 St. Rep. (N. Y.) 620; *North Chicago St. R. Co. v. Polkey*, 1 St. Ry. Rep. 94, 106 Ill. App. 98, affg. 203 Ill. 225; *Harbison v. Metropolitan St. R. Co.*, 24 Wash. L. Rep. 438, 9 App. D. C. 60; *Kowalski v. Newark Pass. Ry. Co.*, 15 N. J. L. 50; *Herd़ v. Rochester City, etc., R. Co.*, 65 Hun (N. Y.) 625, 20 N. Y. Supp. 346, affd. 142 N. Y. 626; *Murphy v. Ninth Ave. R. Co.*, 6 Misc. Rep. (N. Y.) 298, 26 N. Y. Supp. 783, 58 St. Rep. (N. Y.) 140, affd. 149 N. Y. 609; *Coleman v. Second Ave. R. Co.*, 114 N. Y. 609, 21 N. E. 1064, 41 Hun (N. Y.), 380; *Mohnke v. New Orleans City, etc., R. Co.*, 104 La. 411, 29 So. 52; *Texas, etc., R. Co. v. McLean (Tex.)*, 32 S. W. 776, 2 Am. & Eng. R. Cas. N. S. 263; *Richmond City R. Co. v. Scott*, 86 Va. 902, 11 S. E. 404; *Dickinson v. Port Huron, etc., R. Co.*, 53 Mich. 43, 21 Am. & Eng. R. Cas. 456. See *Berry v.*

Utica, etc., St. Ry. Co., 3 St. Ry. Rep. 654, and note, 181 N. Y. 198, 73 N. E. 970, as to contributory negligence of passenger injured by an obstruction while attempting to board a street car.

17. *Dixon v. Brooklyn City, etc., R. Co.*, 100 N. Y. 170, 3 N. E. 65; *Mowrey v. Central City R. Co.*, 66 Barb. (N. Y.) 43; *Valentine v. Middlesex R. Co.*, 137 Mass. 28; *Smith v. St. Paul City Ry. Co.*, 32 Minn. 1, 16 Am. & Eng. R. Cas. 310; *Citizens' St. Ry. Co. v. Twinname*, 111 Ind. 587, 13 N. E. 55. See *Nellis St. Rd. Acct-Law*, 55-62; *Indianapolis St. Ry. Co. v. Schmidt (Ind.)*, 71 N. E. 201.

18. *Lynch v. New York Cent., etc., R. Co.*, 8 App. Div. (N. Y.) 458, 40 N. Y. Supp. 775; *Louisville, etc., R. Co. v. Ritter*, 85 Ky. 368, 28 Am. & Eng. R. Cas. 167; *Virginia Cent. R. Co. v. Sanger*, 15 Gratt. (Va.) 230; *Carrico v. West Virginia Cent., etc., R. Co.*, 35 W. Va. 389, 52 Am. & Eng. R. Cas. 393. See also cases cited in last two preceding notes.

19. *Donnegan v. Erhardt*, 119 N. Y. 468, 42 Am. & Eng. R. Cas. 580;

requiring railroad companies to fence their tracks are generally held to be designed to protect the persons on the trains as well as the owners of the cattle, and to impose an absolute duty upon the railroad companies, for a violation of which the company is liable. Responsibility for injuries to animals is specially imposed by such statutes, because, in most cases, there would be none independently of the statute, as at common law the owners of animals are bound to restrain them, and if they trespass upon a railroad, there is no liability for their destruction unless intentionally or wilfully caused.²⁰

§ 4. Locomotives, cars, and appliances.—The highest degree of care and diligence is due from a railroad company to its passengers and employes in respect to the character of its rolling stock, in equipping its road with sufficient and safe locomotives and cars, in providing them with safe and proper appliances and keeping them in good order and repair.²¹ The safety of its locomotives should be established by the application of every test recognized as necessary by experts, and it is responsible for injuries occasioned to passengers by reason of any insufficiency or defect.²² The carrier is, in all cases, bound to provide a safe and secure carriage

Louisville, etc., R. Co. v. Hendricks, 128 Ind. 462; Wright v. Pennsylvania R. Co., 3 Pittsb. (Pa.) 116; Sullivan v. Philadelphia, etc., R. Co., 30 Pa. St. 234, 72 Am. Dec. 698; Fordyce v. Jackson, 56 Ark. 594; Gulf, etc., R. Co. v. Wilson, 79 Tex. 371; Lackawana, etc., R. Co. v. Chenewith, 52 Pa. St. 382, 91 Am. Dec. 168.

20. Jones v. Seligman, 81 N. Y. 191, 3 Am. & Eng. R. Cas. 236; Purdy v. New York, etc., R. Co., 61 N. Y. 353; Shepard v. Buffalo, etc., R. Co., 35 N. Y. 641; Tracy v. Troy, etc., R. Co., 38 N. Y. 433, 98 Am. Dec. 54, 55 Barb. (N. Y.) 229; Corwin v. New York, etc., R. Co., 13 N. Y. 42; Graham v. Delaware, etc., Canal Co., 46 Hun (N. Y.), 386; Hayes v. Railroad Co., 111 U. S. 228, 4 Sup. Ct. 369; Atchison, etc., R. Co. v. Reesman, 60 Fed. 370; Trice v. Rail-

road Co., 49 Mo. 438; Blair v. Milwaukee, etc., R. Co., 20 Wis. 254; Taylor v. Railroad Co., 45 Mich. 74, 7 N. W. 728; Buxton v. Northeastern R. Co., L. R. 3 Q. B. 543.

21. Bajus v. Syracuse, etc., R. Co., 103 N. Y. 312, 57 Am. Rep. 723; Missouri, etc., R. Co. v. Flood (Tex. Civ. App.), 70 S. W. 1106; Alabama Midland R. Co. v. Guilford, 119 Ga. 523, 46 S. E. 655; Howell v. Lansing City Elec. R. Co., 11 Detroit Leg. N. 82 (Mich.), 99 N. W. 406; Citizens' St. R. Co. v. Sinclair (Tex. Civ. App.) 81 S. W. 329.

22. Robinson v. New York Cent., etc., R. Co., 20 Blatchf. (U. S.) 338; Bajus v. Syracuse, etc., R. Co., *suo* *pra*, but it is not liable for an injury to one of its employes caused by the diminished power of one of its engines; Manser v. Eastern Counties R. Co., 3 L. T. N. S. 585.

for the transportation of the passengers, and nothing can exempt it from the responsibility, but the existence of some latent defect, which no reasonable degree of human skill and foresight could guard against; and this obligation extends to every species of appliances necessary for the safety of the passenger belonging to the carrier and used by it in the business in which it is engaged.²³ In respect to railroads the rule applies to the cars,²⁴ wheels,²⁵ axles,²⁶ safety beams,²⁷ platform guards or gates,²⁸ window barriers or guards,²⁹ seats in the car,³⁰ brakes,³¹ air brakes and bell pulls,³²

23. Curtis v. Rochester, etc., R. Co., 18 N. Y. 534, 75 Am. Dec. 258.

24. Hanley v. Harlem R. Co., 1 Edm. Sel. Cas. (N. Y.) 359; Pennsylvania R. Co. v. Roy, 102 U. S. 451, 1 Am. & Eng. R. Cas. 225; Cleveland, etc., R. Co. v. Walrath, 38 Ohio St. 461; East Line, etc., R. Co. v. Smith, 65 Tex. 167.

25. Toledo, etc., R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Meier v. Pennsylvania R. Co., 64 Pa. St. 225, 3 Am. Rep. 581; Texas, etc., R. Co. v. Hamilton, 66 Tex. 92, 26 Am. & Eng. R. Cas. 182.

26. McPadden v. New York Cent. R. Co., 44 N. Y. 478, 4 Am. Rep. 705; Alden v. New York Cent. R. Co., 26 N. Y. 102, 82 Am. Dec. 401; Hege-man v. Boyd, 65 Ind. 526; Richardson v. Great Eastern R. Co., L. R. 10 C. P. 486, 1 C. P. Div. 342.

27. Smith v. New York, etc., R. Co., 6 Duer (N. Y.), 231.

28. Gaffney v. Brooklyn City R. Co., 6 Misc. Rep. (N. Y.) 1, 58 St. Rep. (N. Y.) 119, 25 N. Y. Supp. 996; Byron v. Lynn, etc., R. Co., 177 Mass. 303, 58 N. E. 1015; Augusta R. Co. v. Glover, 4 Am. Electl. Cas. 433, 92 Ga. 132, 58 Am. & Eng. R. Cas. 269, 18 S. E. 406; Chicago, etc., R. Co. v. Hazzard, 26 Ill. 373.

29. So held in Chicago, etc., R. Co. v. Pondrom, 51 Ill. 333, 2 Am. Rep. 306, and in New Jersey R. Co. v. Kennard, 21 Pa. St. 203. The latter

case was, however, overruled by Pittsburgh, etc., R. Co. v. McClurg, 56 Pa. St. 294.

Railroad companies are not bound to place bars or screens on their windows to prevent passengers from putting their arms out; Indianapolis, etc., R. Co. v. Rutherford, 29 Ind. 82, 92 Am. Dec. 336; Missimer v. Philadelphia, etc., R. Co., 17 Phila. (Pa.) 172, or to protect them from missiles thrown by persons outside.

30. International, etc., R. Co. v. Anthony (Tex. Civ. App.), 57 S. W. 897; Boyles v. Texas, etc., R. Co. (Tex. Civ. App.), 86 S. W. 936.

31. Costello v. Syracuse, etc., R. Co., 63 Barb. (N. Y.) 92; Cleveland, etc., R. Co. v. McHenry, 47 Ill. App. 301; New York, etc., R. Co. v. Dougherty, 11 W. N. C. (Pa.) 437; Union Pac. R. Co. v. Harwood, 31 Kan. 388; Forbes v. Atlantic, etc., R. Co., 76 N. C. 454; Farish v. Reigle, 11 Gratt. (Va.) 697, 62 Am. Dec. 666, where a stage company omitted to have proper blocks to the brakes of its vehicles; Western, etc., R. Co. v. State, 95 Md. 637, 53 Atl. 969; Mock v. Los Angeles Tract. Co., 1 St. Ry. Rep. 19 (Cal.), 73 Pac. 455.

32. Arkansas Midland R. Co. v. Canman, 52 Ark. 517; Texas, etc., R. Co. v. Hamilton, 66 Tex. 92, 26 Am. & Eng. R. Cas. 182; Terre Haute Elec. Co. v. Kiely, 3 St. Ry. Rep. 202

coupling apparatus³³ headlights,³⁴ stoves and furnaces,³⁵ vestibule doors,³⁶ and spark arresters or appliances for preventing the escape of sparks and cinders.³⁷ But a less degree of care on the part of the carrier is applicable to other structures provided by the carrier, and the manner of their construction and maintenance, which are not a part of the machinery, or the appliances and apparatus which constitute and sustain the operative means of conveyance and transportation; such as station platforms,³⁸ curtain hooks,³⁹ slippery steps of stairway to elevated train,⁴⁰ or icy car steps and platform,⁴¹ which the carrier has not had opportunity to remedy after becoming aware of their dangerous condition.

(Ind. App.), 72 N. E. 658. See also note on Defective Appliances, 3 St. Ry. Rep. 203.

33. Palmer v. Delaware, etc., Canal Co., 120 N. Y. 170, 17 Am. St. Rep. 629; Gottlieb v. New York, etc., R. Co., 100 N. Y. 462; Costikyan v. Rome, etc., R. Co., 58 Hun (N. Y.), 590, affd. 128 N. Y. 633; Holland v. St. Louis, etc., R. Co., 105 Mo. App. 117, 79 S. W. 508; Whitwam v. Wisconsin, etc., R. Co. 58 Wis. 408; St. Louis, etc., R. Co. v. Keitt (Tex. Civ. App.), 76 S. W. 311.

34. Alabama G. S. R. Co. v. Jones, 71 Ala. 487.

35. In New York the heating of cars by stoves or furnaces except roads less than fifty miles long, is forbidden by a statute, which has been held to apply to all roads in the State of over fifty miles, although part of the road may be in another State; that it is a police regulation and not an infringement of interstate commerce or of the Federal Constitution. People v. New York, etc., R. Co., 55 Hun (N. Y.), 409, 8 N. Y. Supp. 672, affd. 123 N. Y. 635. The rule of the text prevails as to the carrier's duty to furnish coaches properly heated. Arrington v. Texas, etc., R. Co. (Tex. Civ. App.), 70 S. W. 551; St. Louis, etc., R. Co. v. Duck (Tex. Civ. App.), 72 S. W. 445.

36. Robinson v. Chicago, etc., R. Co., 10 Detroit Leg. N. 727 (Mich.), 97 S. W. 689. See Sansom v. Southern R. Co., 111 Fed. 887, 50 C. C. A. 53, the placing of a car without vestibules in a train advertised as a "solid vestibule train" can not be considered negligence, since the condition of the car is apparent.

37. St. Louis, etc., R. Co. v. Parks (Tex.), 76 S. W. 740, revg. 69 S. W. 125; Missouri, etc., R. Co. v. Flood (Tex. Civ. App.), 60 S. W. 797. See also Steinweg v. Erie R. Co., 43 N. Y. 123.

38. Lafflin v. Buffalo, etc., R. Co., 106 N. Y. 136, 60 Am. Rep. 433; Kohm v. Interborough Rapid Trans. Co., 93 N. Y. Supp. 671.

39. Kelly v. New York, etc., R. Co., 109 N. Y. 44.

40. Kelly v. Manhattan R. Co., 112 N. Y. 443.

41. Palmer v. Pennsylvania Co., 111 N. Y. 488.

Injuries to passengers by defective appliances on street cars. —As to defective device for opening and shutting door, see Williams v. Citizens' Elec. St. Ry. Co., 2 St. Ry. Rep. 433, 184 Mass. 437, 68 N. E. 840; as to burns received from a floor plate heated by friction caused by the overcrowding of a street car, see Powell v. Hudson Valley Ry. Co., 2

§ 5. Improved appliances and methods.—Carriers of passengers, especially in vehicles and conveyances propelled by steam or electricity, where the consequences of an accident from defective machinery are almost certainly fatal to human life, are bound to use every precaution which human skill, care and foresight can provide, and to exercise similar care and foresight in ascertaining and adopting new improvements to secure additional protection. It is their duty to adopt and use such means of safety as science has made known and demonstrated to be useful and effective, not unknown and untested practices, but those which, to some extent at least, have been used and deemed indispensable to safety.⁴² While it has been held that carriers of passengers are bound to keep pace with science and art and modern improvements in supplying safe vehicles, and must adopt the most improved modes of construction and machinery and appliances of safety in known use;⁴³ it is now more generally held by the courts that it is sufficient that they have all approved appliances that are up to the standard of those in general use, and which are necessary for the

St. Ry. Rep. 800, 88 App. Div. (N. Y.) 133, 84 N. Y. Supp. 337; as to injury by defective gate on platform, see Aston v. St. Louis Transit Co. (Mo.), 2 St. Ry. Rep. 631.

Degree of care to protect passengers in use of electricity.—A street railway company operating its cars by electricity is bound to use the very highest degree of care in seeing that the electrical appliances in use on the car do not get out of order and so endanger the safety of passengers. Leonard v. Brooklyn Heights R. Co., 57 App. Div. (N. Y.) 125, 67 N. Y. Supp. 985.

In the case of Willis v. Second Ave. Tract. Co., 189 Pa. St. 430, 42 Alt. 1, the company was held negligent because of injuries received from a defective controller. In the case of Burt v. Douglas County St. Ry. Co., 83 Wis. 229, 53 N. W. 447, 18 L. R. A. 479, the defendant was held liable for injuries to a passenger caused by an electric shock from a handrail

charged with electricity because of imperfect insulation, which could have been easily discovered. See also Buckbee v. Third Ave. R. Co., 64 App. Div. (N. Y.) 360, 72 N. Y. Supp. 217; South Covington, etc., Ry. Co. v. Smith, 3 St. Ry. Rep. 264 (Ky.), 86 S. W. 970.

Injuries to employes due to defects in cars, tracks and appliances. See cases cited in notes to Terre Haute Elec. Co. v. Kiely (Ind. App.), 72 N. E. 658, 3 St. Ry. Rep. pp. 204 to 218.

42. Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Steinweg v. Erie R. Co., 43 N. Y. 123; Alden v. New York Cent. R. Co., 26 N. Y. 102. 82 Am. Dec. 401; Hegeman v. Western R. Co., 13 N. Y. 9, 64 Am. Dec. 517; Lowery v. Manhattan R. Co., 12 Daly (N. Y.), 431.

43. Treadwell v. Whittier, 80 Cal. 574, 13 Am. St. Rep. 175; Meier v. Pennsylvania R. Co., 64 Pa. St. 225, 3 Am. Rep. 581.

safety of passengers.⁴⁴ But the rule does not impose upon carriers the duty of so providing for the safety of passengers that they shall encounter no possible danger, and meet with no casualty, in the use of the appliances provided by the carrier;⁴⁵ and negligence cannot be attributed for the use of an appliance which has been

44. Wynn v. Central Park, etc., R. Co., 133 N. Y. 575, 30 N. E. 721; Central Vermont R. Co. v. Bateman, 26 U. S. App. 584, 75 Fed. 1021, 20 C. C. A. 679; Penny v. Rochester R. Co., 7 App. Div. (N. Y.) 595, 40 N. Y. Supp. 172; Garoni v. Campagnie, etc., R. Co., 39 St. Rep. (N. Y.) 63, 14 N. Y. Supp. 797; Boehncke v. Brooklyn City R. Co., 3 Misc. Rep. (N. Y.) 49, 22 N. Y. Supp. 712; Alabama, etc., R. Co. v. Guilford, 119 Ga. 523, 46 S. E. 655; North Chicago St. R. Co. v. Wrixon, 51 Ill. App. 307; Metropolitan R. Co. v. Falvey (D. C. App.), 23 Wash. L. Rep. 53; Bishop v. St. Paul City R. Co., 48 Minn. 26, 50 N. W. 927; Lorimer v. St. Paul City R. Co., 48 Minn. 391, 51 N. W. 125; Witsell v. West Asheville, etc., R. Co., 120 N. C. 557, 27 S. E. 125; Caveny v. Neely, 43 S. C. 70, 20 S. E. 806. See also Nellis St. Rd. Act. Law, 62-67; Feary v. Metropolitan St. Ry. Co., 162 Mo. 75, 62 S. W. 452.

As to the adoption of improvements and new inventions generally, in addition to cases cited above, see:

U. S.—Randall v. Baltimore, etc., R. Co., 109 U. S. 478.

N. Y.—Smith v. New York, etc., R. Co., 19 N. Y. 127, 75 Am. Dec. 305; Brown v. New York Cent. R. Co., 34 N. Y. 404; Bowen v. New York Cent. R. Co., 18 N. Y. 408, 72 Am. Dec. 529; Salters v. Delaware, etc., Canal Co., 3 Hun (N. Y.), 340, 5 T. & C. (N. Y.) 561.

Del.—Wallace v. Wilmington, etc., R. Co. (Del.), 18 Atl. 818.

Ga.—Bartley v. Georgia R. Co., 60 Ga. 182.

Ind.—St. Louis, etc., R. Co. v. Vallirus, 56 Ind. 511.

Ky.—Kentucky Cent. R. Co. v. Thomas, 79 Ky. 160, 42 Am. Rep. 208, 1 Am. & Eng. R. Cas. 79.

Md.—Baltimore, etc., R. Co. v. State, 29 Md. 252, 96 Am. Dec. 528.

Mass.—Warren v. Fitchburg R. Co., 8 Allen (Mass.), 227, 85 Am. Dec. 700; Le Barron v. East Boston Ferry Co., 11 Allen (Mass.), 312, 87 Am. Dec. 717.

Miss.—Natchez, etc., R. Co. v. McNeil, 61 Miss. 434, 19 Am. & Eng. R. Cas. 518.

Mo.—Yerkes v. Keokuk, etc., Packet Co., 7 Mo. App. 265.

N. H.—Taylor v. Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229.

Pa.—Frankford, etc., Turnpike Co. v. Philadelphia, etc., R. Co., 54 Pa. St. 345, 93 Am. Dec. 708; Lackawanna, etc., R. Co. v. Doak, 52 Pa. St. 379, 91 Am. Dec. 166; New York, etc., R. Co. v. Dougherty, 11 W. N. C. (Pa.) 437.

Tex.—Texas, etc., R. Co. v. Hamilton, 66 Tex. 92; International, etc., R. Co. v. Halloren, 53 Tex. 46, 37 Am. Rep. 744, 3 Am. & Eng. R. Cas. 343.

Eng.—Ford v. London, etc., R. Co., 2 F. & F. 730; Freemantle v. London, etc., R. Co., 10 C. B. N. S. 95, 100 E. C. L. 95.

45. Loftus v. Union Ferry Co., 84 N. Y. 461, 38 Am. Rep. 533; Dougan v. Champlain Transp. Co., 56 N. Y. 1; Crocheron v. North Shore, etc., Ferry Co., 56 N. Y. 656; Cleveland

employed, under varying conditions, upon countless occasions, and uniformly answered its purpose without injury to any one.⁴⁶ And they are not bound to adopt and use a new and improved method because safer and better than the methods employed by them, if it is not requisite to the reasonable safety and convenience of passengers, and if the expense is unreasonably excessive.⁴⁷

§ 6. Duty of inspection.—The rule of liability requires a carrier of passengers to exercise the greatest diligence to secure them safe transportation, and while it is not an insurer of its passengers against accident, the inspection of its cars and appliances, roadbed and machinery, must be such as, in the judgment of those who understand the subject, will be sufficient to secure, or such as experience has shown to be sufficient to secure, the safety of its passengers.⁴⁸ The mode of inspection should be such as is generally found adequate and sufficient to discover defects if any exist, and should be made with such frequency as the liability to impairment reasonably requires and is practically possible consistently with the conduct of its business;⁴⁹ but the carrier is not bound to keep up a continuous inspection, or to know at each moment the

v. New Jersey Steamboat Co., 68 N. Y. 306.

46. Burke v. Witherbee, 98 N. Y. 562; Crafter v. Metropolitan R. Co., L. R. 1 C. P. 300.

47. Le Barron v. East Boston Ferry Co., 11 Allen (Mass.), 312, 87 Am. Dec. 717; Taylor v. Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229; Pershing v. Chicago, etc., R. Co., 71 Iowa, 561, 34 Am. & Eng. R. Cas. 405; Pittsburg, etc., R. Co. v. Thompson, 56 Ill. 138; Louisville, etc., R. Co. v. Jones, 83 Ala. 376, 34 Am. & Eng. R. Cas. 417.

48. Schneider v. Second Ave. R. Co., 133 N. Y. 583, 30 N. E. 752, 44 St. Rep. (N. Y.) 680; Stierle v. Union Ry. Co., 156 N. Y. 74, 684, 50 N. E. 419, 834; Koehne v. New York, etc., R. Co., 32 App. Div. (N. Y.) 419, 52 N. Y. Supp. 1088; Leonard v. Brooklyn H. R. Co., 7 Am. Electl.

Cas. 683, 57 App. Div. (N. Y.) 125, 67 N. Y. Supp. 985; Smith v. Metropolitan St. R. Co., 59 App. Div. (N. Y.) 60, 69 N. Y. Supp. 176; Volkmar v. Manhattan R. Co., 134 N. Y. 418, 31 N. E. 870; O'Flaherty v. Nassau Elec. R. Co., 34 App. Div. (N. Y.) 74, 54 N. Y. Supp. 96; Toledo, etc., R. Co. v. Apperson, 49 Ill. 480; Cleveland, etc., R. Co. v. Newell, 104 Ind. 264, 54 Am. Rep. 312; Furnish v. Missouri Pac. R. Co., 102 Mo. 438; Texas, etc., R. Co. v. Suggs, 62 Tex. 323, 21 Am. & Eng. R. Cas. 475. See Nellis St. Rd. Acct. Law, 67-71.

49. Palmer v. Delaware, etc., R. Co., 120 N. Y. 170, 17 Am. St. Rep. 629, 44 Am. & Eng. R. Cas. 298; Poulsen v. Nassau Elec. R. Co., 7 Am. Electl. Cas. 675, 18 App. Div. (N. Y.) 221; Richardson v. Great Eastern, etc., R. Co., 24 W. R. 907, 1 C. P. Div. 342, 35 L. T. N. S. 351.

condition of every part of a train and its equipments.⁵⁰ Ordinarily, whether the system and manner of executing its duty in examining its machinery and appliances are all that may be required of a carrier cannot be measured by any rule of law to be applied by the court, but is a question of fact for the jury, to be determined upon proper instructions.⁵¹ A railroad company is bound to know the effect of time and weather upon its appliances and it should, by proper inspection, and timely changes and renewals, keep them safe;⁵² it should inspect its lines with more than ordinary promptitude under circumstances of more than ordinary peril; the greater the peril the greater the vigilance demanded.⁵³ A neglect of its duty of proper and adequate inspection will render the carrier liable for any injuries to passengers caused by defects which might have been discovered by proper care and skill and the consequences thus avoided.⁵⁴

§ 7. Liability for latent defects.—In an early case in New York, based upon an early English case, it was held that a common carrier of passengers was bound absolutely, and irrespective of negligence, to provide road-worthy vehicles, and that it was liable for injuries caused by defects, although they could not have been discovered by any practical mode of examination.⁵⁵ But in a later case it was pointed out that that case had no foundation of authority to rest on, and it was said to be a departure from every prior decision and authority to be found in the books of this country and England, and never to have been followed anywhere

50. *Proud v. Philadelphia, etc., R. Co. (N. J.),* 46 Atl. 710, 50 L. R. A. 468.

51. *Palmer v. Delaware, etc., Canal Co., supra;* *Mansee v. Eastern Counties R. Co.,* 3 L. T. N. S. 585.

52. *Leveret v. Shreveport Belt Line Co.,* 1 St. Ry. Rep. 253 (La.), 34 So. 579; *Williams v. Electric Co.,* 43 La. Ann. 300; *Aiken v. Southern Pac. Co.,* 104 La. 162, 29 So. 1.

53. *Libby v. Maine Cent. R. Co.,* 85 Me. 34, 20 L. R. A. 812, 58 Am. & Eng. R. Cas. 81, 26 Atl. 943; *Hardy v. North Carolina Cent. R. Co.,* 74 N. C. 734; *International, etc., R. Co. v. Halloren,* 53 Tex. 46.

54. *Chicago, etc., R. Co. v. Lewis,* 145 Ill. 67, 58 Am. & Eng. R. Cas. 126; *Hanley v. Harlem R. Co.,* 1 Edm. Sel. Cas. (N. Y.) 395; *Furnish v. Missouri Pac. R. Co.,* 102 Mo. 438; *Peoria, etc., R. Co. v. Reynolds,* 88 Ill. 418, 21 Am. Ry. Rep. 324; *St. Louis, etc., R. Co. v. Mitchell,* 57 Ark. 418; *Texas, etc., R. Co. v. Hamilton,* 66 Tex. 92, 26 Am. & Eng. R. Cas. 162. See also cases cited in preceding notes to this section.

55. *Alden v. New York Cent. R. Co.,* 26 N. Y. 102, 82 Am. Dec. 401, 3 Am. L. Reg. N. S. 498; *Sharp v. Grey,* 9 Bing. 457, 23 E. C. L. 331, 2 M. & S. 621.

out of New York.⁵⁶ So, the English case above referred to was subsequently distinctly repudiated by the English courts, and the rule was established that the contract made by a common carrier of passengers for hire with a passenger is to take due care, including in that term the use of skill and foresight, to carry the passenger safely, and that it does not contain or imply a warranty that the vehicle in which he travels shall be in all respects perfect for its purpose and road-worthy; that the carrier is not liable for latent defects not discoverable by the most careful inspection or by any degree of care, skill, and foresight.⁵⁷ The same rule is maintained by the courts of several of our States.⁵⁸ The doctrine of the New York courts now firmly established is that a latent defect in its road and appliances, which will relieve the carrier of passengers from responsibility, is such only as no reasonable degree of human skill and foresight could guard against.⁵⁹ And it is so held in the Federal courts.⁶⁰ In some of the cases the rule is stated to be that the carrier is not liable for defects not discoverable by the application of any tests known or practiced, or by the usual and proper tests, by skillful and experienced men.⁶¹ But

56. McPadden v. New York Cent. R. Co., 44 N. Y. 478, 4 Am. Rep. 705.

57. Readhead v. Midland R. Co., L. R. 2 Q. B. 412, 15 W. R. 831, 8 B. & S. 371, 36 L. J. Q. B. 181, affd. 9 B. & S. 519, L. R. 4 Q. B. 379, 38 L. J. Q. B. 169, 20 L. T. N. S. 628, 17 W. R. 737; Stokes v. Eastern Counties R. Co., 2 F. & F. 691; Richardson v. Great Eastern R. Co., 1 C. P. Div. 342; Christie v. Griggs, 2 Campb. 79.

58. Buckland v. New York, etc., R. Co. (Mass.), 62 N. E. 955; Ladd v. New Bedford R. Co., 119 Mass. 413, 20 Am. Rep. 331; Ingalls v. Bills, 9 Metc. (Mass.) 1, 43 Am. Dec. 346; Pittsburg, etc., R. Co. v. Thompson, 53 Ill. 138; Meier v. Pennsylvania R. Co., 64 Pa. St. 225, 3 Am. Rep. 581; Hadley v. Cross, 34 Vt. 586, 80 Am. Dec. 699; Yerkes v. Keokuk, etc., Packet Co., 7 Mo. App. 265; St. Louis Coal R. Co. v. Moore, 14 Ill. App. 510.

59. Birmingham v. Rochester, etc., R. Co., 137 N. Y. 13; Palmer v. Delaware, etc., Canal Co., 120 N. Y. 170, 17 Am. St. Rep. 629, 44 Am. & Eng. R. Cas. 298; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Brown v. New York Cent. R. Co., 34 N. Y. 404; Bowen v. New York Cent. R. Co., 18 N. Y. 408, 72 Am. Dec. 529; Hegeman v. Western R. Corp., 13 N. Y. 9, 64 Am. Dec. 517; Poulsen v. Nassau Elec. R. Co., 7 Am. Electl. Cas. 675, 18 App. Div. (N. Y.) 221, 45 N. Y. Supp. 941; Schneider v. Second Ave. R. Co., 15 N. Y. Supp. 556; Curtis v. Rochester, etc., R. Co., 18 N. Y. 534, 75 Am. Dec. 238.

60. Pennsylvania Co. v. Roy, 102 U. S. 451, 1 Am. & Eng. R. Cas. 225.

61. Carroll v. Staten Island R. Co., 58 N. Y. 126; Toledo, etc., R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Illinois Cent. R. Co. v. Phillips, 49 Ill. 234; Frelsen v. Southern Pac.

it has been held in New York, that the carrier is liable, if the defects could have been discovered in the course of the manufacture of the machinery or materials used in the structure or operation of the road, by any process or test known to the skillful in such business, whether discoverable by any exercise of care and skill on the part of the immediate agents of the carrier or not.⁶²

§ 8. Negligence of persons engaged in construction or manufacture.—While carriers of passengers are not insurers of the safety of the persons whom they carry, and do not undertake that the vessels or vehicles which they use, or the machinery and appliances which they employ, or the roadbeds or tracks, are absolutely free from defects, they are held to the utmost skill and care in the construction and management of both, and when they undertake to carry by such dangerous agencies as steam or electricity, they cannot escape liability for injuries occasioned to passengers thereby, unless it appears that the accident happened from causes beyond their control and to which neither the negligence of the carrier, or of those employed in the construction of the carrier's road, or of the manufacture of the machinery, or of those employed to manage it, contributed.⁶³ The carrier of passengers contracts not only for his own skill and care in the conduct of the business, but for the skill and care of all those who have made or furnished any of the instrumentalities or appliances by means of which the business is conducted; and the fact that the road was constructed under the supervision of competent engineers, or the machinery was constructed by skillful and reputable manufacturers, will not relieve the carrier from liability for injuries due to defects discoverable by the builder or maker in the process of construction or manufacture, by the exercise of the highest care and diligence.⁶⁴

Co., 42 La. Ann. 673, 44 Am. & Eng. R. Cas. 319; Dube v. Reg., 3 Can. Exch. 147.

62. Bissell v. New York Cent. R. Co., 25 N. Y. 445, 82 Am. Dec. 369; Hegeman v. Western R. Corp., 13 N. Y. 9, 64 Am. Dec. 517; Brown v. New York Cent. R. Co., 34 N. Y. 404.

63. Carroll v. Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221.

64. Birmingham v. Rochester, etc., R. Co., 59 Hun (N. Y.), 583, revd. on another point in 137 N. Y. 13; Palmer v. Delaware, etc., Canal Co., 120 N. Y. 170, 24 N. E. 302; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 287, 56 Barb. (N. Y.) 425; Bissell v. New York Cent. R. Co., 25 N. Y. 442, 82 Am. Dec. 369; Perkins v. New York Cent. R. Co., 24 N. Y.

§ 9. Liability of carrier employing leased lines or using cars of another company.—Where a railroad company uses the track of another road, or the bridge of another company, which it in neither case owns or controls, but which it simply leases, or otherwise legally obtains the right of trackage thereon, in doing so it makes the roadway or bridge, which it obtains the right to use, its own, and is under the same liability by virtue of its own act as if it had itself built, equipped, and operated the roadbed or bridge.⁶⁵ The railroad company so owning and leasing the road is also liable to one who is injured, while riding on the train of the other company over its road, by reason of any defect in its road, since it is liable in such case to any one lawfully traveling over its road.⁶⁶ But where a street railroad is confronted by one of the canals of the State, over which it has no right to build a bridge, but which it is necessary to cross in order to carry out the purpose of its organization, to lay railroad tracks in the public streets, and the bridge forms in substance a continuation of the street, it may cross such bridge with the permission of the State authorities, without thereby making it a part of its appliances, for a latent defect in which it must be held responsible if discoverable in the

219, 82 Am. Dec. 282; *Curtis v. Rochester*, etc., R. Co., 18 N. Y. 538, 75 Am. Dec. 258; *Hegeman v. Western R. Corp.*, 13 N. Y. 9, 64 Am. Dec. 517; *Philadelphia*, etc., R. Co. v. *Anderson*, 94 Pa. St. 351, 39 Am. Rep. 787, 6 Am. & Eng. R. Cas. 407; *Treadwell v. Whittier*, 80 Cal. 574, 13 Am. St. Rep. 175; *Pym v. Great Northern R. Co.*, 2 F. & F. 619; *Burns v. Cork*, etc., R. Co., 13 Ir. C. L. R. 543; *Grote v. Chester*, etc., R. Co., 2 Exch. 251; *Francis v. Cockrell*, L. R. 5 Q. B. 184. *Contra*, *Grand Rapids*, etc., R. Co. v. *Huntley*, 38 Mich. 537, 31 Am. Rep. 321; *Nashville*, etc., R. Co. v. *Jones*, 9 Heisk. (Tenn.) 27, 19 Am. Ry. Rep. 61, but in a case where the action was by an employe of the road, to whom the duty of the carrier is not the same as that it owes to passengers. See also *Knoxville Iron Co. v. Dobson*, 7

Lea (Tenn.), 367; *Guthrie v. Louisville*, etc., R. Co., 11 *Lea* (Tenn.) 372, 47 Am. Rep. 286.

65. *Birmingham v. Rochester City*, etc., R. Co., 137 N. Y. 13, 59 Hun (N. Y.), 583, 14 N. Y. Supp. 13; *Philadelphia*, etc., R. Co. v. *Anderson*, 94 Pa. St. 351, 39 Am. Rep. 787, 6 Am. & Eng. R. Cas. 407; *Murch v. Concord R. Corp.*, 29 N. H. 9, 61 Am. Dec. 631; *Eureka Springs Co. v. Timmons*, 51 Ark. 459, 40 Am. & Eng. R. Cas. 698; *Wisconsin Cent. R. Co. v. Ross*, 142 Ill. 9, 34 Am. St. Rep. 49, 53 Am. & Eng. R. Cas. 73; *John v. Bacon*, L. R. 5 C. P. 437.

66. *Stodder v. New York*, etc., R. Co., 50 Hun (N. Y.), 221, 2 N. Y. Supp. 780, affd. 121 N. Y. 655; *Smith v. New York*, etc., R. Co., 19 N. Y. 127. *Contra*: *Philadelphia*, etc., R. Co., v. *Anderson*, *supra*; *Murch v. Concord R. Corp.*, *supra*.

process of the manufacture, and is not liable unless it has been guilty of negligence in failing to discover the defect.⁶⁷ Where a carrier of passengers by railroad uses cars of another company to transport its passengers, as for example, sleeping or palace cars, for the purpose of the contract with the railroad company for transportation, and in view of its obligation to use only cars that are adequate for safe conveyance, the palace or sleeping car company, its conductor and porter, are, in law, the servants and employes of the railroad company, and the negligence of either of them, as to any matters involving the safety or security of passengers, is that of the railroad company.⁶⁸

§ 10. Liability for injuries caused by inevitable accident.—In the law of negligence and common carriers no case or principle can be found, or if found can be maintained, subjecting a person to liability for an act done without fault on his part. If one who is doing a lawful and proper act, using due care and proper precaution necessary to the exigencies of the case to avoid injuring others, accidentally does injure another, it is the result of pure accident, or is involuntary and unavoidable, and is but the misfortune of the sufferer, and no action will lie.⁶⁹ Common carriers are not to be held liable for injuries which are the result of a purely accidental occurrence, or an inevitable accident—an act of God—*vis major*—a fortuitous occurrence occasioned by natural causes exclusively without the intervention and beyond the control of man, or of an act of the public enemy, such as no human care and foresight on their part could have foreseen and prevented, and not

67. Birmingham v. Rochester City, etc., R. Co., 137 N. Y. 13.

68. Pennsylvania Co. v. Roy, 102 U. S. 457. See Palace and sleeping car companies, § 24, chap. 2.

69. Sheldon v. Sherman, 42 N. Y. 484, 1 Am. Rep. 569; Harvey v. Dunlop, Hill & D. Supp. (N.Y.) 193, 17 Barb. (N. Y.) 94; Seaboard, etc., R. Co. v. Spencer, 111 Ga. 868, 36 S. E. 921; American Express Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561; Murphy v. City of Dayton, 7 Ohio N. P. 227; Shailer & Schniglan Co. v. Corcoran, 11 O. C. D. 599, 21 Chio C. C. 639; Brown v. Kendal, 6

Cush. (Mass.) 296; Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372; Burton v. Davis, 15 La. Ann. 448; Gulf, etc., R. Co. v. Wood (Tex. Civ. App.), 63 S. W. 164. A collision of two vessels at sea under circumstances where neither vessel was chargeable with any fault must be attributed to unavoidable accident. Dunton v. Allen Line S. S. Co., 115 Fed. 250. But the defense of inevitable accident in a suit for collision will not avail a vessel unless she is shown to have been free from fault. The Severn, 113 Fed. 578.

due in any way to negligence on the part of the carriers.⁷⁰ A railway company is required to construct its road so as to be sufficient to resist all such violence of weather as might be reasonably expected to occur, even though rarely, in the climate and locality through which it runs.⁷¹ But it is not bound to anticipate or provide against storms or floods of an unusual, extraordinary and unprecedented nature, or other inevitable casualty, such as have not within practical experience been known in the locality in which its road is operated, and which could not have been foreseen and guarded against by due care, and prudence.⁷² Thus, a carrier is not liable for an injury to a passenger caused by the breaking of a rail from extreme cold, under circumstances which human foresight could not have anticipated or prevented, provided the rail before the accident was such as a person of competent skill might reasonably presume upon inspection to be free from liability.

70. Illinois Cent. R. Co. v. Smiesni, 104 Ill. App. 194; Wald v. Pittsburgh, etc., R. Co., 162 Ill. 545, 44 N. E. 888, 5 Am. & Eng. R. Cas. N. S. 770, 43 Cent. L. J. 423; Atchison, etc., R. Co. v. Flynn, 24 Kan. 627, 1 Am. & Eng. R. Cas. 240; Halilhan v. Hannibal, etc., R. Co., 71 Mo. 113, 2 Am. & Eng. R. Cas. 38; Hestonville, etc., R. Co. v. Kelly, 102 Pa. St. 115; Roadbridge v. Delaware, etc., R. Co., 105 Pa. St. 460; Meyer v. Missouri Pac. R. Co., 2 Neb. 320; State v. Baltimore, etc., R. Co., 24 Md. 84; Beach v. Parmeter, 23 Pa. St. 197; Rea v. St. Louis, etc., R. Co. (Tex.), 73 S. W. 555; Gulf, etc., R. Co. v. Bell (Tex. Civ. App.), 58 S. W. 614; Denver, etc., R. Co. v. Andrews, 11 Colo. App. 204, 53 Pac. 518; Henry Sonneborn & Co. v. Southern Ry. Co., 65 S. C. 502, 44 S. E. 77; Texas, etc., R. Co. v. Anderson (Tex. Civ. App.), 61 S. W. 424, regardless of whether or not the carrier used ordinary care; Sawyer v. Hannibal, etc., R. Co., 37 Mo. 240, 90 Am. Dec. 382, where a passenger was injured by the precipitation of

a train into a chasm, the bridge over which had been burned by the public enemy.

Where a steamship company contracted to carry a passenger to a certain port, an ice blockade, preventing the port from being reached, was not an act of God, excusing the breach. Bullock v. White Star S. S. Co., 30 Wash. 448, 70 Pac. 1106.

71. Libby v. Maine Cent. R. Co., 85 Me. 34, 58 Am. & Eng. R. Cas. 81; Missouri Pac. R. Co. v. Johnson, 72 Tex. 95, 37 Am. & Eng. R. Cas. 128; Gulf, etc., R. Co. v. Pomeroy, 67 Tex. 498; International, etc., R. Co. v. Halloren, 53 Tex. 46, 37 Am. Rep. 744, 3 Am. & Eng. R. Cas. 343; McPherson v. St. Louis, etc., R. Co., 97 Mo. 253; Great Western R. Co. v. Braid, 1 Moore, P. C. N. S. 101.

72. Connelly v. Manhattan R. Co., 68 Hun (N. Y.), 456, 23 N. Y. Supp. 88; Ellet v. St. Louis, etc., R. Co., 76 Mo. 518, 12 Am. & Eng. R. Cas. 183; Withers v. North Kent R. Co., L. J. Exch. 417. See also cases cited in last preceding note. Gillespie v. St. Louis, etc., R. Co., 6 Mo. App. 454.

ity to such fracture.⁷³ The test of liability is whether the carrier exercised such prudence and foresight as exercised before the event would have prevented the accident, and not particular precautions that might have been adopted, apparent from an investigation after the accident. Nothing is so easy as to be wise after the event.⁷⁴ Where an accident is not the reasonable, natural, and probable result of the situation which ought to have been foreseen by the carrier in the exercise of the degree of care exacted from a carrier of passengers, no liability follows.⁷⁵

§ 11. Means and appliances for receiving and discharging passengers.—The rule of liability of a carrier of passengers for hire that it is bound by its contract to use the utmost diligence possible to secure the safe transportation of the passenger, and, to that end, to furnish carriages of the most approved construction, and keep them in perfect repair, so far as human skill and foresight can provide, applies as well to the means and appliances provided for receiving and discharging passengers as for transporting them; and it is the duty of a railroad company to provide passengers with reasonably safe and convenient means of ingress and egress from its cars.⁷⁶ It must provide safe exits, and reason-

73. McPadden v. New York Cent. R. Co., 44 N. Y. 478, 4 Am. Rep. 705; Missouri Pac. R. Co. v. Johnson, 72 Tex. 95, 37 Am. & Eng. R. Cas. 128; Missouri Pac. R. Co. v. Mitchell, 72 Tex. 171.

74. Bowen v. New York Cent. R. Co., 18 N. Y. 408, 72 Am. Dec. 529; Libby v. Maine Cent. R. Co., 85 Me. 34, 58 Am. & Eng. R. Cas. 81; Cornman v. Eastern Counties R. Co., 4 H. & N. 781.

75. Ayers v. Rochester R. Co., 156 N. Y. 104, 50 N. E. 960; Cleveland v. New Jersey Steamboat Co., 125 N. Y. 299; Loftus v. Union Ferry Co., 84 N. Y. 455; Dougan v. Champlain Transp. Co., 56 N. Y. 1; Snediker v. Nassau Elec. R. Co., 41 App. Div. (N. Y.) 628, 58 N. Y. Supp. 457; Nelson v. Lehigh Valley R. Co., 25 App. Div. (N. Y.) 535, 50 N. Y. Supp. 63;

Chicago City R. Co. v. Burrell, 70 Ill. App. 60; Hamilton v. West End St. R. Co., 163 Mass. 199, 30 N. E. 1010; Perry v. Malarin, 107 Cal. 363, 40 Pac. 489; Denver, etc., R. Co. v. Andrews, 11 Colo. App. 204, 53 Pac. 518; Holt v. Southwestern Mo. Elec. R. Co., 84 Mo. App. 443; Feary v. Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452; Davis v. Chicago, etc., R. Co., 93 Wis. 470, 67 N. W. 16, 1132. See Nellis St. Rd. Acct. Law, 17-19.

76. Chase v. Jamestown St. R. Co., 60 Hun (N. Y.), 582, 38 St. Rep. (N. Y.) 954, 15 N. Y. Supp. 35, affd. 133 N. Y. 619, where a passenger was injured by her dress catching in the sheet iron covering of the car wheel projecting above the floor; Falk v. New York, etc., R. Co., 56 N. J. L. 380, 58 Am. & Eng. R. Cas. 191;

ably safe platforms or facilities and places for entering and leaving the cars, and wait long enough for a diligent passenger to be able to do so.⁷⁷ But the rule in relation to the liability of railroad corporations for injuries sustained by passengers by reason of defects in the approaches to the cars, such as platforms, halls, stairways, and the like, differs from that which obtains in the case of an injury to a passenger while he is being carried over the road of the corporation and where the injury occurs from a defect in the roadbed or machinery, or in the construction of the cars, or where it results from a defect in any of the appliances, such as would be likely to occasion great danger and loss of life to those traveling on the road. The rule in the former case is that the carrier is bound to exercise simply ordinary care in view of the danger to be apprehended, and for the reason that the consequences of a neglect of the highest care and skill which human foresight can attain to are naturally of a much less serious nature.⁷⁸ A railroad company, which has made an arrangement

Louisville, etc., R. Co. v. Lucas, 119 Ind. 583; Alabama, etc., R. Co. v. Stacy, 68 Miss. 463; Alexandria, etc., R. Co. v. Herndon, 87 Va. 193.

77. Wells v. Steinway R. Co., 18 App. Div. (N. Y.) 180, 45 N. Y. Supp. 864; Onderdonk v. New York, etc., R. Co., 74 Hun (N. Y.), 42, 26 N. Y. Supp. 310; Van Ostran v. New York Cent., etc., R. Co., 35 Hun (N. Y.), 590; Memphis, etc., R. Co. v. Whitfield, 44 Miss. 486, 7 Am. Rep. 699; Missouri, Pac. R. Co. v. Long, 81 Tex. 253, 26 Am. St. Rep. 811; Missouri Pac. R. Co. v. Wortham, 73 Tex. 25, 37 Am. & Eng. R. Cas. 82; Leveret v. Shreveport Belt Line Co., 1 St. Ry. Rep. 253, and notes, (La.) 31 So. 579; West Chicago St. R. Co. v. Buckley, 102 Ill. App. 314; Bass v. Concord St. R. Co. (N. H.), 46 Atl. 1056; Henry v. Grant St. Elec. R. Co., 24 Wash. 246, 64 Pac. 137. See Nellis St. Rd. Acct. Law, 102-118.

78. Kelly v. Manhattan R. Co., 112 N. Y. 443, 20 N. E. 383; Weston

v. New York El. R. Co., 73 N. Y. 595; McMahon v. New York El. R. Co., 50 N. Y. Super. Ct. 507; Lafflin v. Buffalo, etc., R. Co., 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599; Morris v. New York Cent., etc., R. Co., 106 N. Y. 678, 13 N. E. 455; Palmer v. Pennsylvania Co., 111 N. Y. 488, 18 N. E. 859; Unger v. Forty-Second St. R. Co., 51 N. Y. 497; Flagg v. Manhattan R. Co., 49 N. Y. Super. Ct. 251; Timpson v. Manhattan R. Co., 52 Hun (N. Y.), 489, 5 N. Y. Supp. 684; Ryan v. Manhattan R. Co., 121 N. Y. 126, 23 N. E. 1131; Hanrahan v. Manhattan R. Co., 52 Hun (N. Y.), 111, 4 N. Y. Supp. 848; Palmer v. Delaware, etc., Canal Co., 120 N. Y. 177, 24 N. E. 302; Moreland v. Boston, etc., R. Co., 141 Mass. 31, 6 N. E. 225; Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874; Pittsburgh, etc., R. Co. v. Brigham, 29 Ohio St. 374; Beard v. Conn. & Pass. R. R. Co., 48 Vt. 101; McKone v. Michigan Cent. R. Co., 51 Mich. 601; St. Louis, etc., R. Co. v. Fair-

with a transfer company to furnish at its passenger station all the vehicles necessary for the accommodation of the passengers arriving there on its trains or on the trains of other railroad companies using the station, may legally exclude from the station and depot grounds all other hackmen and cabmen seeking entrance for the purpose of soliciting for themselves the custom or patronage of passengers. It has the right, if it is not its legal duty to erect and maintain a passenger station and depot buildings for the accommodation of passengers and shippers as well as for its benefit; and it is its duty to maintain that station so as to subserve, primarily, the convenience, comfort, and safety of passengers and the wants of shippers. It is, therefore, its duty to see to it that passengers are not annoyed, disturbed, or obstructed in the use either of the station house or of the grounds over which such passengers, whether arriving or departing, must pass. Any arrangement to that end is neither unnecessary, unreasonable, or arbitrary, and is within the legal rights of the company in the efficient conduct of its business.^{78a}

bairn (Mo.), 4 S. W. 50; Moore v. Wabash, etc., R. C., 84 Mo. 481; Taylor v. Pennsylvania Co., 50 Fed. 755. See also Nellis St. Rd. Acct. Law, 181-186, and cases there cited.

78a. Donovan v. Pennsylvania Co., 26 Sup. Ct. Rep. (U. S.) 91, affg. 124 Fed. 1016, 60 C. C. A. 168. It was further held that licensed hackmen or cabmen, when not forbidden by valid municipal regulations may, within reasonable limits, use the public sidewalk in front of, adjacent to, or about the main entrance to a railway passenger station in prosecuting their calling, but are not entitled to congregate upon such sidewalk so as to interfere with the ingress and egress of passengers and employees. It was also decided that the inadequacy of any remedy at law justifies injunctive relief against the constant, unlawful attempt of hackmen and cabmen to enter a railway passenger station and depot grounds to solicit patronage, and their use of the side-

walk in front of the station so as to interfere unduly with the ingress and egress of passengers. Id. See also Barney v. Oyster Bay S. B. Co., 67 N. Y. 301; Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; The D. R. Martin, 11 Blatchf. 233, Fed. Cas. No. 1,030; Commonwealth v. Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465; Old Colony R. Co. v. Tripp, 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89; Commonwealth v. Carey, 147 Mass. 40, note, 17 N. E. 97; State ex rel. Sheets v. Union Depot Co., 71 Ohio St. 379, 68 L. R. A. 792, 73 N. E. 633; Norfolk & W. R. Co. v. Old Dominion Baggage Transfer Co., 99 Va. 111, 50 L. R. A. 722, 37 S. E. 784; Fluker v. Georgia R. & Bkg. Co., 81 Ga. 461, 2 L. R. A. 843, 12 Am. St. Rep. 328, 8 S. E. 529; Griswold v. Webb, 16 R. I. 649, 7 L. R. A. 302, 19 Atl. 143; Summitt v. State, 8 Lea (Tenn.) 413, 41 Am. Rep. 637; New York, N. H. & H. R. Co. v. Sco-

§ 12. Passenger carriers by stage coaches.—Passenger carriers by stages are liable for injuries resulting even from the slightest negligence on the part of the coachman or proprietor of the stage, and are bound to use the utmost care and diligence of cautious persons to prevent injury to passengers. They are bound to furnish such good coaches, gentle and well broke horses, good harness, and prudent and skillful drivers as will best secure the safety of the passengers.⁷⁹ They are answerable to a passenger for an injury which happens by reason of any defect in a coach, which might have been discovered by the most careful and thorough examination, but not for an injury which happens by reason of a hidden defect which could not, upon such examination, have been discovered.⁸⁰ They are responsible for the negligence of their driver, but not for mere accident.⁸¹

§ 13. Carriers of passengers by water.—Carriers of passengers by steamboat or steamship are bound to provide good, stanch and sufficient boats and ships, with proper and sufficient machinery and appliances, but it is not necessary that they should be constructed of the best material, and in the most perfect manner care and diligence can suggest.⁸² They are liable, both under the common law and the Federal statutes, for any injuries caused by known defects of the steaming apparatus, and a certificate by the United States inspector that the vessel, her boilers and machinery come up to the requirements of the statute does not exonerate the owner from liability for such defects.⁸³ They are bound to use

vill, 71 Conn. 136, 42 L. R. A. 157, 71 Am. St. Rep. 159, 41 Atl. 246; Kates v. Alabama Baggage & Cab. Co., 107 Ga. 636, 46 L. R. A. 431, 34 S. E. 372; Godbout v. St. Paul Union Depot Co., 79 Minn. 188, 47 L. R. A. 522, 81 N. W. 835; Boston & A. R. Co. v. Brown, 177 Mass. 65, 52 L. R. A. 418, 58 N. E. 189; Boston & M. R. Co. v. Sullivan, 177 Mass. 230, 83 Am. St. Rep. 275, 58 N. E. 689; New York, N. H. & H. R. Co. v. Bork, 23 R. I. 218, 49 Atl. 965; St. Louis Drayage Co. v. Louisville & N. R. Co., 5 Inters. Com. Rep. 137, 65 Fed. 39; Hedding v. Gallagher, 72 N. H. 377, 64 L. R. A. 811, 57 Atl. 225.

79. McKinney v. Neal, 1 McLean (U. S.), 540; Farish v. Reigle, 11 Gratt. (Va.) 697, 62 Am. Dec. 666; Maury v. Talmadge, 2 McLean (U. S.), 157; Hyman v. Nye, 6 Q. B. Div. 685, 29 Moak 769; Fairchild v. California Stage Co., 13 Cal. 599; Peck v. Neil, 3 McLean (U. S.), 22.

80. Ingalls v. Bills, 9 Metc. (Mass.) 1, 43 Am. Dec. 346.

81. McLane v. Sharpe, 2 Harr. (Del.) 481.

82. Yerkes v. Keokuk, etc., Packet Co., 7 Mo. App. 265.

83. Swarthout v. New Jersey Steamboat Co., 48 N. Y. 209, 8 Am. Rep. 541.

ordinary skill and care in the construction and erection of the berths in the boat or ship, and to use materials of sufficient strength, and, so far as practicable such as would be safe and secure against the commotion of the elements, and the violence occasioned thereby, and they will be liable for any injury to the passengers by reason of their failure to perform their duty in this respect.⁸⁴ They may become liable for a failure to provide proper guard rails along the side of their cabins.⁸⁵ Carriers of passengers by water are required to provide safe approaches and landings for the receipt and discharge of passengers, and are liable for injuries to passengers while boarding or leaving the steamer by the falling of a stage, plank, or gangway,⁸⁶ or by an obstruction negligently placed in the gangway,⁸⁷ or by the negligence of a watchman in misdirecting a passenger as to the proper approach.⁸⁸

§ 14. Carrier's liability as to employment of servants.—Carriers of passengers, whether by land or water, are under obligation, and, as we have already stated, impliedly warrant and guarantee, to every passenger transported over their route, to provide for the care and management of their vehicles of transportation, careful, skillful, competent and sober engineers, conductors, drivers, brakemen, switchmen, and all other necessary employes, to the end that they may be safely, promptly, comfortably, and properly carried to their destinations; and the law holds them responsible for the manner in which they execute this duty or obligation, and makes them liable for injuries resulting from a failure to do so.⁸⁹

84. Smith v. British, etc., Steam Packet Co., 86 N. Y. 408.

85. American Steamship Co. v. Landreth, 102 Pa. St. 131, 48 Am. Rep. 196.

86. Eagle Packet Co. v. Defries, 94 Ill. 598, 34 Am. Rep. 245.

87. Osborn v. Union Ferry Co., 53 Barb. (N. Y.) 629.

88. Magorie v. Little, 25 Fed. 627, 23 Blatchf. (U. S.) 399.

89. *N. Y.*—Perkins v. New York Cent., etc., R. Co., 24 N. Y. 219, 82 Am. Dec. 282; Curtis v. Rochester, etc., R. Co., 18 N. Y. 536, 75 Am. Dec. 258; Hegeman v. Western R. Corp., 13 N. Y. 22; Stewart v. Brook-

lyn, etc., R. Co., 90 N. Y. 588, 43 Am. Rep. 185; Brand v. Schenectady, etc., R. Co., 8 Barb. (N. Y.) 368; Cleg-horn v. New York Cent., etc., R. Co., 56 N. Y. 44, 15 Am. Rep. 375.

U. S.—Gallena v. Hot Springs R. Co., 13 Fed. 116; Nieto v. Clark, 1 Cliff. (U. S.) 145.

Ala.—Louisville, etc., R. Co. v. Jones, 83 Ala. 376; Gray v. Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729; Kansas City, etc. R. Co. v. Sanders, 98 Ala. 293, 58 Am. & Eng. R. Cas. 140.

Conn.—Hall v. Connecticut River Steamboat Co., 13 Conn. 319; Der-wort v. Loomer, 21 Conn. 245.

The proprietors of stages, as well as corporations operating steam and electric railroads or steamship lines, rest under the same obligation, it being the duty of the former to provide prudent and skillful drivers for their conveyances; and for negligence in this respect they become liable for any injuries sustained by their passengers by reason thereof.⁹⁰ If a person acts in the capacity of an employe of a carrier, whether regularly employed or not, and the carrier, through its regular agents, authorizes, requests, permits or acquiesces in his so acting, the carrier is liable for any injury resulting from his incompetency, unskillfulness, or negligence.⁹¹

Del.—McAllister v. Peoples Ry. Co. (Del. Super.), 54 Atl. 743.

Ga.—Gasway v. Atlanta, etc., R. Co., 58 Ga. 216.

Ill.—Chicago, etc., R. Co. v. Flexman, 9 Ill. App. 250; Chicago, etc., R. Co. v. Pillsbury, 123 Ill. 9, 5 Am. St. Rep. 483.

Ind.—Grand Rapids, etc., R. Co. v. Boyd, 65 Ind. 526; Evansville, etc., R. Co. v. Baum, 26 Ind. 70; Gillenwater v. Madison etc., R. Co., 5 Ind. 339, 61 Am. Dec. 101.

Kan.—Topeka City R. Co. v. Higgs, 38 Kan. 375, 5 Am. St. Rep. 754.

Ky.—Alexander v. Louisville, etc., R. Co., 83 Ky. 589, 25 Am. & Eng. R. Cas. 458; Sherley v. Billings, 8 Bush (Ky.), 147, 8 Am. Rep. 451.

La.—Carmanty v. Mexican Gulf R. Co., 5 La. Ann. 703.

Me.—Goddard v. Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39.

Mich.—Day v. Owen, 5 Mich. 520, 72 Am. Dec. 62.

Mass.—Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 311; Simmons v. New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99.

Miss.—New Orleans, etc., R. Co. v. Allbritton, 38 Miss. 242.

Mont.—Wall v. Helena St. R. Co., 12 Mont. 44.

Or.—Sullivan v. Oregon, etc., R. Co., 12 Or. 392, 53 Am. Rep. 364.

Pa.—Pennsylvania R. Co. v. Vandiver, 42 Pa. St. 365, 82 Am. Dec. 520; Sullivan v. Philadelphia, etc., R. Co., 30 Pa. St. 234, 72 Am. Dec. 698; Laing v. Colder, 8 Pa. St. 479, 49 Am. Dec. 533; Pennsylvania R. Co. v. Books, 57 Pa. St. 339, 98 Am. Dec. 229.

S. C.—Caveny v. Neely, 43 S. C. 70.

Tenn.—Nashville, etc., R. Co. v. Messino, 1 Sneed (Tenn.), 220.

Tex.—Dallas City R. Co. v. Beeman, 74 Tex. 291; Hays v. Gainesville St. R. Co., 70 Tex. 602, 34 Am. & Eng. R. Cas. 97; International, etc., R. Co. v. Halloren, 53 Tex. 46.

W. Va.—Gillingham v. Ohio River R. Co., 35 W. Va. 588, 29 Am. St. Rep. 827.

90. Stokes v. Saltonstall, 13 Pet. (U. S.) 181; Saltonstall v. Stockton, Taney (U. S.), 11; Derwort v. Loomer, 21 Conn. 245; Ware v. Gray, 11 Pick. (Mass.) 106; Stockton v. Frey, 4 Gill (Md.), 406, 45 Am. Dec. 138; Sales v. Western Stage Co., 4 Iowa, 547; Frink v. Coe, 4 Green (Iowa), 555, 61 Am. Dec. 141; Schafer v. Gilmer, 13 Nev. 330; Gallagher v. Bowie, 66 Tex. 265; Sawyer v. Dulany, 30 Tex. 479. See also § 12, *ante*, and cases there cited.

91. Tuller v. Talbot, 23 Ill. 357, 76 Am. Dec. 695, where a passenger drove a stage at the request of the

Carriers of passengers by sea who are required by law to carry a duly qualified and competent physician, and railroad companies who voluntarily assume the responsibility of engaging a surgeon and placing him in charge of parties that may be injured, are not liable for the negligence of such physician or surgeon. They are liable, however, for any carelessness or negligence in the selection of such surgeon or physician, and unless, in the former case, they employ a duly qualified and competent surgeon and medical practitioner and furnish him with proper instruments and medicine, and in the latter case, employ a reasonably competent man and he is ordinarily competent for that duty, the carriers become liable. They are not obliged to engage the very highest and best talent that can be engaged, but they must engage a man who is reasonably competent in his profession so that he would be an ordinarily competent man, having ordinary knowledge and skill to perform the duties placed upon him.⁹² The servants of carriers of passengers ordinarily must be persons of reasonable skill, possessing knowledge, experience and skill ordinarily fit to meet the exigencies of their employment and such as might reasonably have been anticipated.⁹³ Carriers of passengers must employ a sufficient number of suitable and competent servants to meet the ordinary conditions attending the proper management of their trains, vessels, or other means of transportation, and to meet any emergencies which, in the exercise of the greatest vigilance and care consistent with the nature and extent of their business, might reasonably be anticipated.⁹⁴ But it is not incumbent upon them to pro-

driver; *Lakin v. Oregon Pac. R. Co.*, 15 Or. 220, 34 Am. & Eng. R. Cas. 500, a person acting by request of the engineer of a railroad in the management of the engine.

92. *Allan v. State Steamship Co.*, 132 N. Y. 91, 28 Am. St. Rep. 556, 15 L. R. A. 166; *O'Brien v. Cunard Steamship Co.*, 154 Mass. 272; *Laubheim v. De Koninglyke Nederlandsche Stoomboot Maatschappy*, 107 N. Y. 228, 1 Am. St. Rep. 817; *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Secord v. St. Paul R. Co.*, 18 Fed. 221; *McDonald v. Hospital*, 120 Mass. 432; *Gadsden, etc., R. Co. v. Cansler*, 97

Ala. 235, 58 Am. & Eng. R. Cas. 258; *Gabrielson v. Waydell*, 67 Fed. 342.

93. *Bartlett v. New York, etc., Transp. Co.*, 57 N. Y. Super. Ct. 348, 8 N. Y. Supp. 309; *Holliday v. Kennard*, 12 Wall. (U. S.) 254; *Tanner v. Louisiana, etc., R. Co.*, 60 Ala. 621; *Farish v. Reigle*, 11 Gratt. (Va.) 697, 62 Am. Dec. 666; *Sawyer v. Dulaney*, 30 Tex. 479.

94. *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311; *Schmidt v. Chicago, etc., R. Co.*, 83 Ill. 405; *In re Meyer*, 74 Fed. 881; *Wright v. Chicago, etc., R. Co.*, 4 Colo. App. 102; *Grey v. Mobile Trade Co.*, 55 Ala. 387, 28 Am. Rep. 729.

vide a number sufficient to act as a police force in protecting their passengers from violence unexpectedly and suddenly offered.⁹⁵

§ 15. Duty to receive and transport passengers.—Common carriers of passengers are in some instances required by statute to receive and transport all proper persons who apply to be carried on payment of fare.⁹⁶ Independent of statutory requirement, however, they are bound to receive and transport all persons who require a passage and offer to pay, or are ready and willing to pay, the legal fare, provided there is room in the conveyance, the passenger is a fit person to be admitted, and there is no legal excuse for refusal.⁹⁷ It has been held in the case of railroad corporations that it is a duty incident to the business for which their corporate powers were conferred, that it is a public trust which may be enforced for the public benefit, and that it also rests upon the contract between the corporation and the State, expressed in its charter, or implied by the acceptance of the franchise.⁹⁸ But the duty exists independent of contract, arises by implication of law from

95. Pittsburgh, etc., R. Co. v. Hinds, 53 Pa. St. 512, 91 Am. Dec. 224; Britton v. Atlanta, etc., Air Line Co., 88 N. C. 536, 43 Am. Rep. 749.

96. See Railroad Law of New York and statutes of California. People v. New York Cent., etc., R. Co., 25 Hun (N. Y.), 543; Wheeler v. San Francisco, etc., R. Co., 31 Cal. 46, 89 Am. Dec. 147.

97. N. Y.—Abbott v. Johnstown, etc., Horse R. Co., 80 N. Y. 31, 36 Am. Rep. 572; Beekman v. Saratoga, etc., R. Co., 3 Paige (N. Y.), 45, 22 Am. Dec. 679; Barney v. Oyster Bay, etc., Steamboat Co., 67 N. Y. 301.

Cal.—Tarbell v. Central Pac. R. Co., 34 Cal. 616.

Dak.—Waldron v. Chicago, etc., R. Co., 1 Dak. 336.

Ill.—Chicago, etc., R. Co. v. Bryan, 90 Ill. 126; Galena, etc., R. Co. v. Yarwood, 15 Ill. 468.

Ind.—Indianapolis, etc., R. Co. v. Rinard, 46 Ind. 293.

Iowa.—State v. Chovin, 7 Iowa, 204.

Ky.—Winnegar v. Central Pass. R. Co., 85 Ky. 547.

Me.—Railroad Comrs. v. Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208.

N. H.—Bennett v. Dutton, 10 N. H. 481.

N. J.—Mershon v. Hobensack, 22 N. J. L. 372.

Ohio.—Cleveland, etc., R. Co. v. Bartram, 11 Ohio St. 457.

Va.—Norfolk, etc., R. Co. v. Galliher, 89 Va. 639.

U. S.—Hannibal, etc., R. Co., v. Swift, 12 Wall. (U. S.) 262; Pearson v. Duane, 4 Wall. (U. S.) 605; Saltonstall v. Stockton, Taney (U. S.) 11.

Eng.—Bretherton v. Wood, 3 Brod. & B. 54, 7 E. C. L. 345.

98. Abbott v. Johnstown, etc., Horse R. Co., *supra*; People v. New York Cent., etc., R. Co., *supra*.

the nature of their employment, and applies to all common carriers of passengers.⁹⁹ The same rule applies to the passenger's personal baggage, there being an implied contract that it shall be transported, the price that a passenger pays for his ticket or fare being the consideration for the carriage of his baggage as well as his person.¹ But this right of passengers to be received and transported is not an unlimited one, but is subject to reasonable regulations and restrictions. Generally, carriers are not bound to receive passengers who refuse to obey their reasonable regulations, or who are guilty of gross and vulgar habits of conduct, or who makes disturbances on board, or whose characters are doubtful or dissolute, or suspicious, or unequivocally bad, or whose object it is to interfere with the interest or patronage of the carriers.² They are not bound to carry passengers who are fleeing from justice, or whose conduct is riotous or disorderly or who are known to be dangerous characters or maniacs, or whose clothing is in such a filthy or disgusting condition as to make them obnoxious to other passengers, or who are affected with a contagious disease, or with vermin, or who are intoxicated.³ It may be the duty of a common carrier of passengers to carry under discriminating restrictions or to refuse to carry those who, by reason of their physical condition would injure, endanger, disturb, or annoy other passengers.⁴ They may refuse carriage to one going upon the train to assault a passenger, or to commit robbery, larceny, or any crime or offense.⁵

99. Carroll v. Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221; Delaware, etc., R. Co. v. Trautwein, 52 N. J. L. 169, 19 Am. St. Rep. 442, 41 Am. & Eng. R. Cas. 187, 7 Ry. & Corp. L. J. 316, 19 Atl. 178, 7 L. R. A. 435; New York, etc., R. Co. v. Ball, 53 N. J. L. 283; Bennett v. Dutton, 10 N. H. 481, so held with reference to the proprietors of a stage coach; Austin v. Great Western R. Co., L. R. 2 Q. B. 442.

1. Wilson v. Grand Trunk R. Co., 56 Me. 60. See also Duty to Carry Baggage, § 50, *post*.

2. Jencks v. Coleman, 2 Sumn. (U. S.) 221, per Story, J. In an action for damages against a corporation operating a street railway for the re-

fusal of one of its conductors to accept a passenger carrying in his arms a live goat, it is error to submit to the jury the reasonableness of a regulation of the company forbidding the carrying of live animals in the car. Daniel v. North Jersey St. Ry. Co. (N. J.), 46 Atl. 625.

3. Putnam v. Broadway, etc., R. Co., 55 N. Y. 108, 14 Am. Rep. 190; Walsh v. Chicago, etc., R. Co., 42 Wis. 23, 24 Am. Rep. 376.

4. McDuffee v. Portland, etc., R. Co., 52 N. H. 451, 13 Am. Rep. 72.

5. Brown v. Memphis, etc., R. Co., 7 Fed. 51, 1 Am. & Eng. R. Cas. 247; Thurston v. Union Pac. R. Co., 4 Dill. (U. S.) 321; Stephens v. Smith, 29 Vt. 160; Beeson v. Chicago, etc., R.

§ 16. Persons who may be refused transportation.—Common carriers are not bound to receive as a passenger and may refuse any person who is in an intoxicated and almost helpless condition, or is intoxicated to such a degree as to make it reasonably certain that by act or speech he will become disgusting, offensive, or annoying to other passengers, or interfere with their reasonable comfort and convenience.⁶ But the mere fact that a man is intoxicated does not of itself deprive him of the right of carriage, or free the carrier from its duty to render him as a passenger due care; and slight intoxication, such as would not be likely to seriously affect the conduct of the person intoxicated and render him obnoxious or offensive to other passengers, would not be sufficient ground to refuse him passage in a public conveyance.⁷ The right of passenger carriage is not confined to persons who are physically sound, but is open, within a reasonable degree, to those ailing and infirm.⁸ The blindness of a person does not justify his rejection as a passenger where unaccompanied by some other person, unless he is otherwise incompetent to travel alone.⁹ But a carrier of passengers is not under obligation to carry persons infected with contagious diseases, to the danger of other passengers.¹⁰ Common carriers are not obliged, as a matter of law, to receive as a passenger an insane person or one whose physical or mental condition is such

Co., 62 Iowa, 173, 13 Am. & Eng. R. Cas. 45.

6. Freedon v. New York Cent., etc., R. Co., 24 App. Div. (N. Y.) 306, 48 N. Y. Supp. 584; Putnam v. Broadway, etc., R. Co., 55 N. Y. 108, 113, 13 Am. Rep. 190, 15 Abb. Pr. N. S. (N. Y.) 383; Pittsburgh, etc., R. Co. v. Hinds, 53 Pa. St 512, 91 Am. Dec. 224; Flint v. Norwich, etc., Transp. Co., 34 Conn. 554, 6 Blatchf. (U. S.) 158; Vinton v. Middlesex R. Co., 11 Allen (Mass.) 304, 87 Am. Dec. 14; Pittsburgh, etc., R. Co. v. Vandyne, 57 Ind. 576, 26 Am. Rep. 68, 18 Am. Ry. Rep. 454; Pittsburg, etc., R. Co. v. Pillow, 76 Pa. St. 510; Murphy v. Union R. Co., 118 Mass. 228; Lemont v. Washington, etc., R. Co., 1 Mackey (D. C.) 180, 47 Am. Rep. 238, 1 Am. & Eng. R. Cas. 263; Stevenson

v. West Seattle, etc., Co., (Wash.) 60 Pac. 51.

7. Milliman v. New York Cent., etc., R. Co., 4 Hun (N. Y.) 409, 6 T. & C. (N. Y.) 586, affd. 66 N. Y. 642; Pittsburg, etc., R. Co. v. Vandyne, *supra*.

8. Mathew v. Wabash R. Co., (Mo. App.) 78 S. W. 271; New Orleans, etc., R. Co. v. Statham, 42 Miss. 607.

9. Zackry v. Mobile, etc., R. Co., 75 Miss. 746, 23 So. 434, 41 L. R. A. 385. But see Illinois Cent. R. Co. v. Allen, (Ky.) 89 S. W. 150, holding that the carrier was justified in refusing to sell a blind man a ticket unless he secured an attendant.

10. Walsh v. Chicago, etc., R. Co., 42 Wis. 23, 24 Am. Rep. 376; Thurston v. Union Pac. R. Co., 4 Dill. (U. S.) 321.

that his presence upon the vehicle may cause injury or substantial discomfort to the other passengers,¹¹ nor can they absolutely refuse to transport insane persons, but they may in all cases insist that such persons be properly attended and sufficiently restrained, and when it becomes necessary to transport a lunatic, who may endanger the safety or interfere with the comfort of other travelers, they are entitled to reasonable notice so that proper arrangements may be made for his transportation.¹² The increased risk arising from conditions of health affecting the fitness of a passenger to travel, where such conditions are unknown to the carrier, must be assumed by the passenger.¹³ But a carrier who voluntarily accepts as a passenger, without an attendant, a person whose inability to care for himself is apparent or made known at the time to its servants, is negligent if it fails to render such passenger the necessary care and assistance.¹⁴ The degree of care required of the carrier in such cases is that which is reasonable for the safety of the passenger in view of his physical and mental condition.¹⁵ Carriers may avail themselves of the opportunity which their business gives them to supply the special wants of travelers by the sale of books, papers, refreshments, and the establishment of an agency for the delivery of baggage and in other respects, and have the right to exclude third persons as passengers from entering the car or vessel to carry on the same business in opposition to them. The passenger has the right to be carried on equal terms with other passengers, but he has no right to demand that the carrier shall surrender in any respect rights incident to his ownership of the property.¹⁶ A carrier, however, is not justified in refusing

11. Meyer v. St. Louis, etc., R. Co., 54 Fed. 116.

Putnam v. Broadway, etc., R. Co., 55 N. Y. 108, 14 Am. Rep. 190.

12. Owen v. Macon, etc., R. Co., 119 Ga. 230, 46 S. E. 87, 63 L. R. A. 946.

16. Barney v. Oyster Bay, etc., Steamboat Co., 67 N. Y. 301; Smallman v. Whilter, 87 Ill. 545, 29 Am. Rep. 76; The D. R. Martin, 11 Blatchf. (U. S.) 233. See also Old

13. Pullman Palace Car Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89.

Colony R. Co. v. Tripp, 147 Mass. 35, 9 Am. St. Rep. 661, 38 Abb. L. J. 45; Summitt v. State, 8 Lea. (Tenn.)

14. Croom v. Chicago, etc., R. Co., 52 Minn. 296, 7 Am. R. & Corp. Rep. 468, 53 N. W. 1128, 18 L. R. A. 602, 38 Am. St. Rep. 557.

413, 41 Am. Rep. 637; Landigan v. State, 31 Ark. 50, 25 Am. Rep. 547; People *ex rel.* v. Hudson River Tel. Co., 19 Abb. N. C. (N. Y.) 478, 10 St.

15. Meyer v. St. Louis, etc., R. Co., 54 Fed. 116, 58 Am. & Eng. R. Cas. 111, 10 U. S. App. 677. And see

to receive as a passenger a non-union laborer, because a mob of strikers make unreasonable demonstrations of hostility against his person.¹⁷ The carrier cannot refuse passage to a person on account of race or color, although it may exclude persons of color from a particular car or room when order and harmony are likely to be promoted thereby; but accommodations equal in comfort and equipment must be provided in other parts of the train or boat.¹⁸ While the right to be carried by a common carrier of passengers is a right superior to the rules and regulations for the accommodation of passengers, their accommodation while being transported is subject to such general rules as the carrier may think proper to make, provided they are reasonable.¹⁹ An action of tort will lie and punitive damages are recoverable against a railroad company for disregard of its statutory duty to stop at a station for a passenger, when it has advertised for passengers for that train and has room for them, or could by reasonable diligence have had cars enough to accommodate them.²⁰ But when an unusual, extraordinary demand for the transportation of passengers occurs, the carrier should be held only to such diligence as is reasonable under the circumstances, and there is no negligence on the part of a carrier in not furnishing sufficient cars to seat all passengers, if so large a number could not reasonably be expected.²¹ The Revised Statutes of the United States regulate the number of passengers which may be brought in a vessel from a foreign port, and when

Rep. (N. Y.) 284; Fluker v. Georgia R. Co., 2 L. R. A. 844.

17. Chicago, etc., R. Co. v. Pittsburgh, (Ill.) 8 N. E. 803.

18. Houck v. Southern Pac. R. Co., 38 Fed. 226; Gray v. Cincinnati Southern R. Co., 11 Fed. 638, 6 Am. & Eng. R. Cas. 588; West Chester, etc., R. Co. v. Miles, 55 Pa. St. 209; Chicago, etc., R. Co. v. Williams, 55 Ill. 185; Alexandria, etc., R. Co. v. Brown, 17 Wall. (U. S.) 445, 3 Am. Ry. Rep. 413; Decuir v. Benson, 27 La. Ann. 1; Louisville, etc., R. Co. v. Crayton, 69 Miss. 152; Logwood v. Memphis, etc., R. Co., 23 Fed. 318; Murphy v. Western, etc., R. Co., 23 Fed. 637; The Sue, 22 Fed. 843;

Central R. Co. v. Green, 86 Pa. St. 421; Britton v. Atlanta, etc., R. Co., 88 N. C. 536, 43 Am. Rep. 749.

19. Day v. Owen, 5 Mich. 520, 72 Am. Dec. 62; Chesapeake, etc., R. Co. v. Wells, 85 Tenn. 613; Chilton v. St. Louis, etc., R. Co., (Mo.) 21 S. W. 457, 19 L. R. A. 269; Smith v. Chamberlain, (S. C.) 17 S. E. 371, 32 Am. L. Reg. 747, 19 L. R. A. 710; Rose v. Louisville, etc., R. Co., 70 Miss. 725, 12 So. 825.

20. Purcell v. Richmond, etc., R. Co., 108 N. C. 414, 47 Am. & Eng. R. Cas. 457.

21. Chicago, etc., R. Co. v. Fisher, 31 Ill. App. 36; Chicago, etc., R. Co. v. Carroll, 5 Ill. App. 201.

the number permitted by law has been received for passage, the carrier is not liable for a refusal to receive further applicants.²²

§ 17. When refusal to transport must be made.—If a carrier has reasonable ground for refusing to receive and carry persons or property applying, he is bound to make the objections at the time the application is made. If the carrier, without making the objection, receives the person or property for transportation, its liability is the same as though no ground for refusal existed.²³ In the case of a vessel the refusal should be made before the sailing of the ship, and the master cannot lawfully stop a returning vessel, put the passenger aboard, and send him back to the port of departure, notwithstanding he may be a person whom he had a right to refuse passage in the first instance.²⁴

§ 18. Duty to carry passengers on freight and special trains.—Railroad companies, like other common carriers, have a right to make regulations, as to the management of their business. While they may if they see fit have the freight and passenger business carried on upon a single train, under one management, they may also completely separate their transactions by arranging them in distinct departments, and may make regulations that passengers shall not be carried on freight trains, in which case they have a right to refuse to accept and transport passengers in such trains.²⁵ They may also prescribe the conditions on which passengers may ride on freight trains, if they see fit to accept and carry them on such trains.²⁶ The conveyance of such passengers as succeed in

22. The Strathairly, 124 U. S. 558; Schwerin v. North Pac. C. R. Co., 36 Fed. 710, 13 Sawy. (U. S.) 507, this statute has no application to a steam ferry boat regularly licensed as such, while employed as an excursion boat.

23. Hannibal, etc., R. Co. v. Swift, 12 Wall. (U. S.) 262.

24. Pearson v. Duane, 4 Wall. (U. S.) 605.

25. Eaton v. Delaware, etc., R. Co., 57 N. Y. 382, 15 Am. Rep. 513; Cleveland, etc., R. Co. v. Bartram, 11 Ohio St. 457; Western, etc., R. Co. v. Turner, 72 Ga. 292, 28 Am. & Eng.

R. Cas. 455; Arnold v. Illinois Cent. R. Co., 83 Ill. 273, 25 Am. Rep. 386; Illinois Cent. R. Co. v. Nelson, 59 Ill. 110; Chicago, etc., R. Co., v. Randolph, 53 Ill. 510; Houston, etc., R. Co. v. Moore, 49 Tex. 31, 30 Am. Rep. 98; Louisville, etc., R. Co. v. Turner, 100 Tenn. 213, 47 S. W. 223.

26. Greenfield v. Detroit, etc., R. Co. (Mich.), 10 Detroit Leg. N. 256; Burlington, etc., R. Co. v. Rose, 11 Neb. 177, 1 Am. & Eng. R. Cas. 253; McCook v. Northup, 65 Ark. 225, 45 S. W. 547; Randall v. Chicago, etc., R. Co., 113 Mich. 115, 71 N. W. 450, 39 L. R. A. 666.

getting on a freight train, on the receipt of fare from them, does not render it a passenger train, nor impose on the carrier the duty of making a convenient mode of access to it.²⁷ But if a railroad company admits passengers to a freight train, or is accustomed to do so, notwithstanding a rule to the contrary, and takes the customary fare, it incurs the same liability for their safety as if they were on the regular passenger trains.²⁸ And the same rule applies to a passenger allowed to ride in a special train, whether he pays fare or not.²⁹ A railroad company may waive a rule that a person without a permit cannot ride as a passenger on a freight train by a long continued disregard thereof.³⁰ To refuse wrongfully to carry a passenger is an actionable tort.³¹

§ 19. Duty of carrier to protect passengers.—It has been steadily maintained by the courts that it is the absolute duty of a

27. Dillaye v. New York Cent. R. Co., 2 Alb. L. J. (N. Y.) 356, revg. 56 Barb. (N. Y.) 30.

28. Edgerton v. New York, etc., R. Co., 39 N. Y. 227; Dunn v. Grand Trunk R. Co., 58 Me. 187, 4 Am. Rep. 267; Lake Shore, etc., R. Co. v. Brown (Ill.), 14 N. E. 492; Lucas v. Milwaukee, etc., R. Co., 33 Wis. 41, 14 Am. Rep. 735; McGee v. Missouri Pac. R. Co., 92 Mo. 208; Cross v. Lake Shore, etc., R. Co. (Mich.), 37 N. W. 361; Creed v. Pennsylvania R. Co., 86 Pa. St. 139, 27 Am. Rep. 693; Indianapolis, etc., R. Co. v. Beaver, 41 Ind. 497; Whitehead v. St. Louis, etc., R. Co., 99 Mo. 263, 11 S. W. 1151, where a passenger was permitted by the conductor to ride without payment of fare, although he was forbidden to carry passengers on that train; Burke v. Missouri Pac. R. Co., 15 Mo. App. 491; Illinois Cent. R. Co. v. Johnson, 67 Ill. 312; Hazard v. Chicago, etc., R. Co., 1 Biss. (U. S.) 503; Mobile, etc., R. Co. v. McArthur, 43 Miss. 180; Chicago, etc., R. Co. v. Flagg, 43 Ill. 364, 92

Am. Dec. 133; Kansas Pac. R. Co. v. Kessler, 18 Kan. 523.

29. Wagner v. Missouri Pac. R. Co., 97 Mo. 512.

30. Greenfield v. Detroit, etc., R. Co., (Mich.). 10 Detroit Leg. N. 256, 95 N. W. 546.

31. Lake Erie, etc., R. Co. v. Acres, 108 Ind. 548, 28 Am. & Eng. R. Cas. 112; Chicago, etc., R. Co. v. Griffin, 68 Ill. 499; North Chicago, etc., R. Co., v. Olds, 40 Ill. App. 421. A railroad company is not bound to receive passengers on a train consisting of an engine and freight car, made up to meet an emergency caused by a wreck on the line and one who, with knowledge thereof, by permission of the conductor, takes passage on such train, cannot recover damages for a refusal of the railroad company to give him a return passage on the same train, the refusal being due entirely to the existence of the emergency referred to. Louisville, etc., R. Co. v. Du Bose, 120 Ga. 339, 47 S. E. 917.

carrier of passengers to protect them, in so far as this can be done by the exercise of the highest degree of care, from the negligence, willful misconduct, violence, insult, and ill treatment of its servants, while performing the contract of carriage, and from the violence and insults of their fellow passengers and strangers, so far as practicable; and whether this duty arises from contract or from the nature of the employment becomes unimportant, since the duty goes with the carrier's contract, however made, whereby the relation of carrier and passenger is established. The law seems to be now well settled that the carrier is obliged to protect its passenger from violence and insult, from whatever source arising. It is not regarded as an insurer of its passenger's safety against every possible source of danger, but it is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make its passenger's journey safe and comfortable.³² The relation between a carrier and its passengers is more than a mere contract

32. *N. Y.*—Gillespie v. Brooklyn Heights R. Co., 178 N. Y. 347, 70 N. E. 857; Dwinelle v. New York Cent., etc., R. Co., 120 N. Y. 117, 17 Am. St. Rep. 611; Stewart v. Brooklyn, etc., R. Co., 90 N. Y. 588, 43 Am. Rep. 185; Weed v. Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474; McLeod v. New York, etc., R. Co., 72 App. Div. (N. Y.) 116, 76 N. Y. Supp. 347; Wells v. New York Cent., etc., R. Co., 25 App. Div. (N. Y.) 365.

U. S.—New Jersey Steamboat Co. v. Brockett, 121 U. S. 637; Gallena v. Hot Springs R. Co., 13 Fed. 116; Pendleton v. Kinsley, 3 Cliff. (U. S.) 416.

Ala.—Lampkin v. Louisville, etc., R. Co., 160 Ala. 287.

Conn.—Flint v. Norwich, etc., Transportation Co., 34 Conn. 554.

Ill.—Chicago, etc., R. Co. v. Barrett, 16 Ill. App. 17; Chicago, etc., R. Co. v. Pillsbury, 123 Ill. 9, 5 Am. St. Rep. 483.

Kan.—Southern Kansas R. Co. v. Rice, 38 Kan. 398, 5 Am. St. Rep.

766; Missouri, etc., R. Co. v. Weaver, 16 Kan. 456.

Ky.—Winnegar v. Central Pass. R. Co., 85 Ky. 547, 4 S. W. 237; Shelley v. Billings, 8 Bush (Ky.) 147, 8 Am. Rep. 451.

La.—La. Fitte v. New Orleans, etc., R. Co., 43 La. Ann. 24, 8 So. 701.

Me.—Goddard v. Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39; Hanson v. European, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404.

Mass.—Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 39.

Mo.—Eads v. Metropolitan R. Co., 43 Mo. App. 536; Farber v. Missouri Pac. R. Co., 116 Mo. 81.

N. C.—White v. Norfolk, etc., R. Co., 115 N. C. 631, 44 Am. St. Rep. 489.

Tex.—Dillingham v. Anthony, 73 Tex. 47, 11 S. W. 139, 3 L. R. A. 634, 15 Am. St. Rep. 753; St. Louis, etc., R. Co. v. Mackie, 71 Tex. 491, 9 S. W. 451, 1 L. R. A. 667.

W. Va.—Gillingham v. Ohio River R. Co., 35 W. Va. 588, 29 Am. St. Rep. 827.

relation, as it may exist in the absence of any contract, and once the relation of carrier and passenger established, the latter is entitled to protection by the carrier, and any breach of its duty in that respect is in the nature of a tort and recovery may be had in an action of tort or negligence as for a breach of duty, as well as for a breach of the contract.³³

§ 20. Acts or omissions of carrier's employes.—Although the generally accepted doctrine of the courts in many cases, which seem to have been determined mainly from the responsibilities attaching to the relation of principal and agent or master and servant, has been that a carrier of passengers is liable for the tortious acts of its servants, even when willful or malicious, if done within the scope of their employment,³⁴ in the latest and best con-

33. Chicago, etc., R. Co. v. Barrett, 16 Ill. App. 17; 2 Sedgwick Dam. 637.

34. U. S.—Philadelphia, etc., R. Co. v. Derby, 14 How. (U. S.) 468; McGuire v. Steamship Golden Gate, 1 McAll. (U. S.) 104; Heenrich v. Pullman Palace Car Co., 20 Fed. 100, 18 Am. & Eng. R. Cas. 379.

Ala.—Louisville, etc. R. Co. v. Whitman, 79 Ala. 328.

Ill.—Chicago, etc., R. Co. v. Bryan, 90 Ill. 126; The steamboat F. X. Aubury, 28 Ill. 412, 81 Am. Dec. 292; St. Louis, etc., R. Co. v. Dalby, 19 Ill. 363.

Ind.—Citizens St. R. Co. v. Willoby, 134 Ind. 563; Wabash R. Co. v. Savage, 110 Ind. 156; Pittsburgh, etc., R. Co. v. Theobald, 51 Ind. 247; Indianapolis, etc., R. Co. v. Anthony, 43 Ind. 183; Jeffersonville R. Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103; Louisville, etc., R. Co. v. Kelly, 92 Ind. 371, 47 Am. Rep. 149, 13 Am. & Eng. R. Cas. 1.

Iowa.—McKinley v. Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748.

Kan.—Atchison, etc., R. Co. v.

Henry, 55 Kan. 715; Southern Kansas R. Co. v. Hinsdale, 38 Kan. 507.

La.—Williams v. Pullman Palace Car Co., 40 La. Ann. 417, 8 Am. St. Rep. 538; Block v. Bannerman, 10 La. Ann. 1.

Md.—Baltimore, etc., R. Co. v. Blocher, 27 Md. 277.

Mass.—Krulevitz v. Eastern R. Co., 140 Mass. 573, 143 Mass. 228; Coleman v. New York, etc., R. Co., 106 Mass. 160; Ramsden v. Boston, etc., R. Co., 104 Mass. 117, 6 Am. Rep. 200.

Minn.—Cain v. Minneapolis, etc., R. Co., 39 Minn. 297.

Mo.—Brown v. Hannibal, etc., R. Co., 60 Mo. 589; Travers v. Kansas Pac. R. Co., 63 Mo. 421; Perkins v. Missouri, etc., R. Co., 55 Mo. 201; McGinnis v. Missouri Pac. R. Co., 21 Mo. App. 399.

Mont.—Taillon v. Mears, 29 Mont. 161, 74 Pac. 421.

Nev.—Quigley v. Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

Ohio.—Passenger R. Co. v. Young, 21 Ohio St. 518, 8 Am. Rep. 78; Atlantic, etc., R. Co. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; Pittsburg,

sidered cases and writings upon this subject the distinctions which attend the doctrine of *respondeat superior* are held to be unimportant in view of the absolute nature of the carrier's duty to protect the passenger from the assaults and insult of its own servants during the transit, or, if considered, are applied with a very strong bias against the master, even where the servant's acts appear to be aggressive, wanton, and malicious.³⁵ The more acceptable rule now seems to be that a common carrier is liable to any one sustaining the relation of passenger to it for an injury resulting from any acts of its servants or employes, whether willful and malicious or not, and even though such acts are not done in the course or within the scope of the servants' or agents' employment; the rule that the master is not liable for injury resulting from the willful and malicious acts of his agents, not done within the scope of their employment, is not applicable when the injury is inflicted upon a passenger by the carrier's agents or servants. The carrier is liable in such cases because the act is violative of the duty and a breach of the obligation it owes through the servant to the passenger, and not upon the idea that the act is incident to a duty within the scope of the servant's employment; and it is manifestly immaterial that the act may have been of private retribution on the part of the servant, actuated by personal malice toward the passenger and having no attribute of service to the carrier in it.³⁶

etc., R. Co. v. Slusser, 19 Ohio St. 157.

Pa.—Pennsylvania R. Co. v. Vandiver, 42 Pa. St. 365, 82 Am. Dec. 520.

Tex.—Galveston, etc., R. Co. v. Donahoe, 56 Tex. 162.

Wis.—Fick v. Chicago, etc., R. Co., 68 Wis. 469, 60 Am. Rep. 878; Bass v. Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495, 39 Wis. 636; 42 Wis. 654; Milwaukee, etc., R. Co. v. Finney, 10 Wis. 388.

35. *Gillespie v. Brooklyn Heights R. Co.*, 178 N. Y. 347, 70 N. E. 857; *Thompson, Neg.* § 3186; *Schouler, Balm.* § 644; *Nellis St. Rd. Acct. Law*, 143-152. See also cases cited in next following note.

36. *Ala.*—Birmingham Ry., etc.,

Co. v. Baird, 130 Ala. 334, 30 So. 456, 54 L. R. A. 752; Birmingham Ry., etc., Co. v. Mason, 1 St. Ry. Rep. 1, (Ala.) 34 So. 270.

Ind.—Citizens St. R. Co. v. Clark (Ind. App.), 71 N. E. 53; Indianapolis Union R. Co. v. Cooper, 6 Ind. App. 202.

Ill.—Hanson v. Urbana, etc., R. Co., 75 Ill. App. 474; Chicago, etc., R. Co. v. Flexman, 9 Ill. App. 250; Chicago, etc., R. Co. v. Barrett, 16 Ill. App. 17; Coggins v. Chicago, etc., R. Co., 18 Ill. App. 620; Wabash, etc., R. Co. v. Rector, 104 Ill. 296.

Ga.—Central of Georgia Ry. Co. v. Brown, 113 Ga. 414, 38 S. E. 989.

Kan.—Missouri Pac. R. Co. v. Divinney, 66 Kan. 776, 71 Pac. 855.

Ky.—See cases cited § 19, note 32.

The rule in England and in some of the States in this country is to the contrary, however, and it is held that no liability is incurred by the carrier for an injury to a passenger by the willful or malicious tort of its servant, unless the act was done while he was acting within the scope of his employment.³⁷ A street railway is bound to use reasonable care, considering the nature of its business and the responsibilities attaching to the carrying of human beings, to prevent any accident by which a passenger may be injured.³⁸ Where defendant was pushing its train, with the cars in

La.—See cases cited § 19, note 32.

Me.—See cases cited § 19, note 32.

Mass.—See cases cited § 19, note 32, and § 20, note 34.

Minn.—Conger v. St. Paul, etc., R. Co., 45 Minn. 207.

Mo.—Randolph v. Hannibal, etc., R. Co., 18 Mo. App. 609; Malecek v. Tower Grove, etc., R. Co., 57 Mo. 17. See also cases cited § 19, note 32.

N. C.—Rose v. Wilmington, etc., R. Co., 106 N. C. 170, 11 S. E. 526. See also cases cited § 19, note 32.

Tenn.—Knoxville Tract. Co. v. Lane, 103 Tenn. 376, 53 S. W. 557; Springer Transp. Co. v. Smith, 16 Lea (Tenn.) 498.

Tex.—Texas, etc., R. Co. v. Tott, 20 Tex. Civ. App. 335, 50 S. W. 193; International, etc., R. Co. v. Kentle (Tex.), 16 Am. & Eng. R. Cas. 337; Houston, etc., R. Co. v. Washington (Tex. Civ. App.), 30 S. W. 719.

Wis.—Masterson v. Railway Co., 102 Wis. 571; Craker v. Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504.

W. Va.—Gillingham v. Ohio River R. Co., 35 W. Va. 588, 29 Am. St. Rep. 827; Ricketts v. Chesapeake, etc., R. Co., 33 W. Va. 433, 25 Am. St. Rep. 901.

U. S.—Pendleton v. Kinsley, 3 Cliff. (U. S.) 416.

37. Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep.

373; Cunningham v. Seattle Elec. R. Co., 3 Wash. 471.

Eng.—Bayley v. Manchester, etc., R. Co., L. R. 8 C. P. 148, 42 L. J. C. P. 78, 28 L. T. N. S. 366; Moore v. Metropolitan R. Co., L. R. 8 Q. B. 36; Eastern Counties R. Co. v. Brown, 6 Exch. 314. See § 21, as to rule in New York.

38. Frank v. Metropolitan St. R. Co., 91 App. Div. (N. Y.) 485, 86 N. Y. Supp. 1018. Where, after a conductor of a street car had given directions to transfer to another line, the car stopped, but not for the purpose of enabling the passengers desiring to transfer to alight, it was the duty of the conductor to warn the passengers to keep their seats till he should give further directions. United Rys. & Electric Co. v. Woodbridge (Md.), 55 Atl. 444. The fact that the motorman left the car on which plaintiff was riding, and that the conductor took his place and became acting motorman in sole charge of the car, was not of itself such negligence as would render the company liable for injuries received in alighting from the car. Root v. Des Moines Ry. Co. (Iowa), 98 N. W. 291. In the absence of any duty devolving on a railway company to provide at its stations a place where its patrons may sleep while awaiting the arrival or departure of

front, over a trestle, over which it knew intending passengers were passing with intent to enter the train, and it kept a lookout on the back of the car, and he saw the danger of the persons on the trestle and warned them to run, but made no effort to stop the train or signal the engineer, and persons on the trestle were injured thereby, the railroad company was liable.³⁹ Where a switching crew, employed to do yard work for one railroad, and paid by it, performed similar services at a connecting point for defendant, who paid the other company one-half the cost, and there was no evidence of the terms of the contract between the two companies concerning their joint business at that point, the crew were equally the servants of both companies, and defendant was liable for their acts to the same extent as if it had employed them.⁴⁰

§ 21. The New York rule.—Some of the earlier cases in New York, applying the principles of the law of agency to the relation of the carrier and its servants, maintained the rule that the carrier was responsible for the wrongful act of its servant causing injury to a passenger, whether the act was one of negligence or positive misfeasance, provided the servant was at the time acting for the carrier, and within the scope of the business intrusted to him. And, under this rule, the carrier was held responsible when the servant through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, went beyond the strict line of his duty or authority and inflicted an unjustifiable injury upon a passenger. But the carrier was not held responsible for a willful act of its servant done outside of his duty and his master's business.⁴¹

a train, a regulation forbidding going to sleep in its waiting rooms or lying down on the benches is not in a legal sense unreasonable. Central of Georgia Ry. Co. v. Motes, 117 Ga. 923, 43 S. E. 990.

39. Chicago Terminal Trans. Co. v. Kotoski, 199 Ill. 383, 65 N. E. 350, affd. 101 Ill. App. 300.

40. Gulf, etc., R. Co. v. Shelton (Tex.), 70 S. W. 359, 72 S. W. 165.

41. Hibbard v. New York, etc., R. Co., 15 N. Y. 455; Sanford v. Eight Ave. R. Co., 23 N. Y. 343, 80 Am.

Dec. 286; Higgins v. Watervliet Turnpike, etc., Co., 46 N. Y. 23, 7 Am. Rep. 293; Jackson v. Second Ave. R. Co., 47 N. Y. 247, 7 Am. Rep. 448; Schultz v. Third Ave. R. Co., 46 N. Y. Super. Ct. 211, 89 N. Y. 242; Flynn v. Central Park, etc., R. Co., 49 N. Y. Super. Ct. 81; Parker v. Erie R. Co., 5 Hun (N. Y.) 57; Isaacs v. Third Ave. R. Co., 47 N. Y. 122, 7 Am. Rep. 418, overruled in Rounds v. Delaware, etc., R. Co., 64 N. Y. 120, 21 Am. Rep. 597; Molloy v. New York Cent., etc., R. Co., 10

The later cases have held that a common carrier by its undertaking of safe carriage undertakes to protect its passengers against any injury arising from the negligence or wilful misconduct of its servant when engaged in the performance of a duty which the carrier owes to the passenger, and that it is immaterial whether a breach of contract results from the negligence or wilfulness of the carrier's agent. The rule relieving a master from liability for a malicious injury inflicted by a servant upon a person to whom the master owed no duty does not apply to the case of such an injury committed upon a passenger by a servant intrusted with the execution of a contract of a common carrier.⁴² But to warrant a recovery of damages alleged to have been caused by a breach of the undertaking, the negligence or willful misconduct must not only be shown, but it must also appear that the servant was acting at the time in the course of his employment.⁴³

§ 22. Carrier's liability for assaults by servants.—An unjustifiable or willful assault upon a passenger by an employe of the carrier, who owes him the duty of protection, renders the carrier responsible for the injuries caused thereby; and it matters not that the act of the employe was malicious and wanton, if done in the course of the discharge of his duties to his employers, which relate

Daly (N. Y.) 453; Peck v. New York Cent., etc., R. Co., 70 N. Y. 587.

42. Gillespie v. Brooklyn Heights R. Co., 3 St. Ry. Rep. 694, 178 N. Y. 347, 70 N. E. 857; Stewart v. Brooklyn, etc., R. Co., 90 N. Y. 588, 43 Am. Rep. 185; Weed v. Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474; Dwinelle v. New York Cent., etc., R. Co., 120 N. Y. 117, 17 Am. St. Rep. 611; Palmeri v. Manhattan R. Co., 133 N. Y. 261, 28 Am. St. Rep. 632; Simonin v. New York, etc., R. Co., 36 Hun (N. Y.) 214; Lyons v. Broadway, etc., R. Co., 32 St. Rep. (N. Y.) 232; Smith v. Manhattan R. Co., 45 St. Rep. (N. Y.) 865; Hepworth v. Union Ferry Co., 62 Hun (N. Y.) 257; Mott v. Consumers' Ice Co., 73 N. Y. 543; Hamilton v. Third Ave. R. Co., 53 N. Y.

25; Thorpe v. New York Cent., etc., R. Co., 76 N. Y. 402, 32 Am. Rep. 325; Parsons v. New York Cent., etc., R. Co., 113 N. Y. 355, 10 Am. St. Rep. 456; Hart v. Metropolitan St. R. Co., 34 Misc. Rep. (N. Y.) 531, 69 N. Y. Supp. 906.

The same rule has been applied and the carrier held liable for an assault of its conductor, upon a boy attempting to steal a ride on a street car. Hewson v. Interurban St. Ry. Co., 95 App. Div. (N. Y.) 112, 88 N. Y. Supp. 816, 1 St. Ry. Rep. 725 and notes.

43. Mulligan v. New York, etc., R. Co., 129 N. Y. 512, 26 Am. Rep. 539, 14 L. R. A. 701; Palmeri v. Manhattan R. Co., *supra*; Carpenter v. Boston, etc., R. Co., 97 N. Y. 500.

to the passenger.⁴⁴ Where authority is conferred to act for another without special limitation, it carries with it by implication authority to do all things necessary to its execution; and when it involves the exercise of the discretion of the servant, or the use of force towards or against another, the use of such discretion or force is a part of the thing authorized, and when exercised becomes as to

44. *N. Y.*—Willis v. Metropolitan St. Ry. Co., 76 App. Div. (N. Y.) 340, 78 N. Y. Supp. 478; Schwartzman v. Brooklyn Heights R. Co., 84 App. Div. (N. Y.) 608, 82 N. Y. Supp. 890; Moritz v. Interurban St. Ry. Co., 84 N. Y. Supp. 162; Palmeri v. Manhattan R. Co., 133 N. Y. 261, 28 Am. St. Rep. 632; Stewart v. Brooklyn, etc., R. Co., 90 N. Y. 588, 43 Am. Rep. 185, 30 N. E. 1001, 16 L. R. A. 136; Peck v. New York Cent., etc., R. Co., 70 N. Y. 587; Higgins v. Watervliet Turnpike, etc., Co., 46 N. Y. 23, 7 Am. Rep. 293; Simonin v. New York, etc., R. Co., 36 Hun (N. Y.), 214; Fisher v. Metropolitan El. R. Co., 34 Hun (N. Y.), 433; Flynn v. Central Park, etc., R. Co., 49 N. Y. Super. Ct. 81; Priest v. Hudson River R. Co., 40 How. Pr. (N. Y.) 456; Franklin v. Third Ave. R. Co., 52 App. Div. (N. Y.) 512, 65 N. Y. Supp. 434; Lyons v. Broadway, etc., R. Co., 32 St. Rep. (N. Y.) 232, 10 N. Y. Supp. 237; Pinder v. Brooklyn Heights R. Co., 65 App. Div. (N. Y.) 521, 72 N. Y. Supp. 1082.

Colo.—Wright v. Chicago, etc., R. Co., 4 Colo. App. 102, 35 Pac. 196.

Ga.—Central, etc., R. Co. v. Brown, 113 Ga. 414, 38 S. E. 989.

Ill.—Springfield Consol. R. Co. v. Flynn, 55 Ill. App. 600; St. Louis, etc., R. Co. v. Dalby, 19 Ill. 353.

Ind.—Evansville, etc., R. Co. v. Darting, 6 Ind. App. 375, 33 N. E. 636; Terre Haute, etc., R. Co. v. Jackson, 81 Ind. 19.

Kan.—Atchison, etc., R. Co. v. Henry, 55 Kan. 715, 29 L. R. A. 465, 2 Am. & Eng. R. Cas. N. S. 418, 41 Pac. 952.

Ky.—Kinney v. Louisville, etc., R. Co., 99 Ky. 59, 34 S. W. 1066; Louisville, etc., R. Co. v. McEwan, 17 Ky. L. Rep. 406, 31 S. W. 465; Louisville, etc., R. Co. v. Finn, 16 Ky. L. Rep. 57.

La.—Clerc v. Morgan's L. & T. R. Co., 107 La. 370, 31 So. 886; Williams v. Pullman Palace Car Co., 40 La. Ann. 417, 8 Am. St. Rep. 538; Block v. Bannerman, 10 La. Ann. 1.

Mass.—Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 311. A carrier is liable where plaintiff, after a street car had stopped for the purpose of receiving passengers, and while still, or slowly moving, attempted to get on, and was violently and without provocation assaulted by the conductor, causing plaintiff to fall from the car, whereby he sustained injuries. Strauss v. St. Louis Transit Co., 102 Mo. App. 644, 77 S. W. 156.

Minn.—Lucy v. Chicago, etc., R. Co., 64 Minn. 7, 65 N. W. 944, 31 L. R. A. 551; Rosted v. Railway Co., 76 Minn. 123.

Miss.—Illinois Cent. R. Co. v. Minor (Miss.), 16 L. R. A. 627.

Mo.—Robinson v. St. Louis, etc., R. Co. (Mo. App.), 77 S. W. 493; Mueller v. St. Louis Transit Co., 3 St. Ry. Rep. 567, 108 Mo. App. 325, 83 S. W. 270; O'Donnell v. St. Louis Transit Co., 3 St. Ry. Rep. 568, 107 Mo. App. 34, 80 S. W. 315; Tanger

third persons the discretion and act of the master, and this although the servant departed from the private instructions of the master, provided he was engaged at the time in doing his master's business and was acting within the general scope of his employment. In most cases where the master has been held liable for the tortious act of the servant, the servant acted not only without express authority to do the wrong, but in violation of his duty to the master.⁴⁵ The weight of authority holds that a passenger upon the vehicle of a common carrier is entitled to be safely transported, and that any act on the part of the carrier's servants in carrying out its contract, whether carelessly done or done with personal malice on the part of the servant, which results in injury to the plaintiff, must charge the carrier with liability, and that the cause of action, whether for the assault or for negligence, is properly maintainable against the carrier.⁴⁶ But the act of the employe complained of must be while he is in the discharge of his duty or

v. South West Mo. El. Ry. Co., 85 Mo. App. 28; O'Donnell v. St. Louis Transit Co. (Mo. App.), 80 S. W. 315.

Ohio.—Passengers R. Co. v. Young, 21 Ohio St. 518, 8 Am. Rep. 78; Pittsburg, etc., R. Co. v. Slusser, 19 Ohio St. 157.

Mich..—Johnson v. Detroit, etc., R. Co. (Mich.), 90 N. W. 274, 9 Det. Leg. N. 123.

Pa..—Sharrer v. Paxson, 171 Pa. St. 26.

Tenn..—West Memphis Packet Co. v. White, 99 Tenn. 256, 41 S. W. 283, 38 L. R. A. 427; Springer Transp. Co. v. Smith, 16 Lea (Tenn.), 498.

Tex..—St. Louis, etc., R. Co. v. Johnson (Tex.), 68 S. W. 58; Texas, etc., R. Co. v. Edmond (Tex. Civ. App.) 29 S. W. 518; Dillingham v. Anthony, 73 Tex. 47; Galveston, etc., R. Co. v. La Prelle (Tex. Civ. App.), 65 S. W. 488.

Va..—Connell v. Chesapeake, etc., R. Co., 93 Va. 44, 24 S. E. 467.

Wis..—Fick v. Chicago, etc., R. Co., 68 Wis. 469, 60 Am. Rep. 878, as-

sault by one acting temporarily as agent of a railroad company.

Wash..—Cunningham v. Seattle Elec. etc., R. Co., 3 Wash. 471.

W. Va..—Smith v. Norfolk, etc., R. Co. (W. Va.), 35 S. E. 834.

U. S..—St. Louis, etc., R. Co. v. Meyer, 40 U. S. App. 554, 77 Fed. 150, 23 C. C. A. 100; See also cases cited in notes to § 19, *ante*.

45. Nowack v. Metropolitan St. Ry. Co., 166 N. Y. 433; Rounds v. Delaware, etc., R. Co., 64 N. Y. 129, 21 Am. Rep. 597.

46. Willis v. Metropolitan St. Ry. Co., 76 App. Div. (N. Y.) 340, 78 N. Y. Supp. 478; McCann v. Sixth Ave. R. Co., 117 N. Y. 505, 23 N. E. 164, 15 Am. St. Rep. 539; Stewart v. Brooklyn & C. R. Co., 90 N. Y. 588, 592, 593, 43 Am. Rep. 185, and authorities there cited: Dwinelle v. New York Cent., etc., R. Co., 120 N. Y. 117, 122, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; Palmeri v. Manhattan Ry. Co., 133 N. Y. 261, 265, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632; Hart v. Metro-

within the line of his employment.⁴⁷ The rule that the carrier is responsible for the willful acts of its employes while in the line of the discharge of their duty does not apply to a case where a passenger provokes an assault by acts or threats of personal violence,⁴⁸ or commences an altercation with the carrier's employe, using abusive and insulting language, and thus provokes an as-

politan St. Ry. Co., 65 App. Div. (N. Y.) 493, 495, 72 N. Y. Supp. 797, and authorities there cited; Lake Shore, etc., Ry. Co. v. Prentice, 147 U. S. 101, 109, 13 Sup. Ct. 261, 37 L. Ed. 97, and authorities there cited; Mulligan v. New York, etc., R. Co., 129 N. Y. 506, 512, 29 N. E. 952, 14 L. R. A. 791, 26 Am. St. Rep. 539; Magar v. Hammond, 54 App. Div. (N. Y.) 532, 67 N. Y. Supp. 63; and authorities cited; Nowack v. Metropolitan St. Ry. Co., 166 N. Y. 433, 440, 60 N. E. 32, 54 L. R. A. 592, 82 Am. St. Rep. 691. See also Ray v. United Tract. Co., 3 St. Ry. Rep. 715, 96 App. Div. (N. Y.) 48, 89 N. Y. Supp. 49.

47. Palmer v. Winston-Salem Ry. & Elec. Co., 131 N. C. 250, 42 S. E. 604; McGilvray v. West End St. R. Co. (Mass.), 41 N. E. 116, where the assault by the employe was upon one waiting in the street in front of the carrier's carhouse to take a car, and was unauthorized and unratified by the carrier; La Fitte v. New Orleans, etc., Co. (La.), 12 L. R. A. 337, 8 So. 701; Central Ry. Co. v. Peacock, 69 Md. 257, 14 Atl. 709, where the assault was committed by the driver just as the passenger left the car and had reached the sidewalk for the purpose of making a complaint at the company's office; and it was held that the company was not responsible, although the assault was prompted by a quarrel between the driver and the passenger before the

latter left the car, although it was suggested by the court that if, while the car stopped momentarily before the office, the passenger stepped out for the special purpose of making complaint, intending to return and resume his journey, to the knowledge of the company's servants in charge of the car, he might still have retained the relation of a passenger and be entitled to all legal rights as fully as if he had remained in the car; Keokuk North. Line, etc., Co. v. True, 88 Ill. 608; Jeffersonville, etc., Co. v. Riley, 39 Ind. 568; State v. Grand' Trunk Ry. Co., 58 Me. 176; Goodloe v. Memphis & C. R. Co., 170 Ala. 233, 29 L. R. A. 729, 18 So. 168, 41 Cent. L. J. 325, where an employe struck a passenger while making a playful attempt to strike another employe. But where the assault was committed by the conductor while the passenger was in the car and repeated shortly afterwards at the office of the company whither the passenger had gone to make complaint to the superintendent, and it was impossible to determine from the evidence where the most serious wounds had been inflicted, the company was held liable, Savannah St. R. Co. v. Bryan, 86 Ga. 312, 12 S. E. 307. But see Missouri Pac. R. Co. v. Divinney, 66 Kan. 776, 71 Pac. 855. See also § 20, note 36, *ante*.

48. Weber v. Brooklyn, etc., R. Co., 45 App. Div. (N. Y.) 306, 62 N. Y. Supp. 1.

sault by the employe.⁴⁹ But the rule has been held otherwise in a number of cases.⁵⁰ The carrier is never liable for an injury done to a passenger by an employe while acting in self-defense or to save himself from bodily harm.⁵¹ But the fact that an employe

49. Scott v. Central Park, etc., R. Co., 53 Hun (N. Y.), 414, 24 St. Rep. (N. Y.) 754, 6 N. Y. Supp. 382; James v. Metropolitan St. Ry. Co., 80 App. Div. (N. Y.) 364, 80 N. Y. Supp. 710, where an assault on a passenger by a conductor was provoked by the passenger's violence; Harrison v. Fink, 42 Fed. 787; Peavey v. Georgia R. etc., Co., 81 Ga. 485; Eads v. Metropolitan R. Co., 43 Mo. App. 536; Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 337; Wise v. Covington, etc., St. R. Co., 91 Ky. 537, 34 S. W. 894; Georgia R., etc., Co. v. Hopkins, 108 Ga. 324, 33 S. E. 965; Central, etc., R. Co. v. Motes, 117 Ga. 923, 43 S. E. 990.

50. Abusive language or opprobrious epithets alone are insufficient to justify the commission of an assault by a conductor on a passenger. Birmingham Ry., etc., Co. v. Mullen, 138 Ala. 614, 35 So. 701; Birmingham Ry., etc., Co. v. Baird, 130 Ala. 350, 30 So. 456, 89 Am. St. Rep. 43, 54 L. R. A. 752. See also Weber v. Brooklyn, etc., R. Co., 47 App. Div. (N. Y.) 306, 62 N. Y. Supp. 1; Coggins v. Chicago, etc., R. Co., 18 Ill. App. 620; Wise v. Railway Co., 17 Ky. Law Rep. 1359, 34 S. W. 894; Haman v. Omaha Ry. Co., 35 Neb. 74, 52 N. W. 830; Chicago, etc., R. Co. v. Flexman, 103 Ill. 546; Baltimore, etc., R. Co. v. Barger, 80 Md. 23, 45 Am. St. Rep. 319; Gallena v. Hot Springs R. Co., 13 Fed. 116; East Tennessee, etc., R. Co. v. Fleetwood, 90 Ga. 23, sneers, looks and contumacious gestures will not justify an as-

sault by a conductor on a passenger; see also Texas, etc., R. Co. v. Williams, 62 Fed. 440; Bryan v. Chicago, etc., R. Co., 63 Iowa, 464, 16 Am. & Eng. R. Cas. 335.

Provocation may be considered in mitigation of compensatory damages: Freedman v. Metropolitan St. Ry. Co., 2 St. Ry. Rep. 802, 89 App. Div. (N. Y.) 486, 85 N. Y. Supp. 986. *Contra:* Mahoning Valley R. Co. v. De Pascale, 3 St. Ry. Rep. 737, 70 Ohio, 179, 71 N. E. 633.

51. New Orleans, etc., R. Co. v. Jopes, 142 U. S. 18, 35 L. Ed. 919, 11 Ry. & Corp. L. J. 41, 12 Sup. Ct. Rep. 190, wherein the court said: "There is no misconduct when the conductor uses force and does injury in simple self-defense; and the rules that determine what is self-defense are of universal application and are not affected by the character of the employment in which the party is engaged. Indeed, while the courts hold that the liability of a common carrier to its passengers for the assaults of its employes is of a most singular character, far greater than that of ordinary employers for the actions of their employes, yet they all limit the liability to cases in which the assault and injury are wrongful; Wise v. South Covington, etc., R. Co., 17 Ky. L. Rep. 1359, 34 S. W. 894, wherein it was held that a passenger on a street car cannot recover for abusive language addressed to him by the conductor, or for the act of the latter in knocking him down after he had left the car, where the offensive language was used and the blow

who assaulted a passenger honestly and mistakenly supposed that he was justified would not exempt the carrier from liability, where such was not the case.⁵² The mere fact that a passenger is intoxicated does not authorize the employes of the carrier to treat him with personal violence;⁵³ nor does the fact that he has violated the rule of the company operate as a license to such employes to maltreat a passenger, nor relieve the carrier from responsibility for such violence or assault.⁵⁴

§ 23. Liability for insult and abuse by servants.—A common carrier is liable in damages to a passenger for an injury to his feelings caused by the insulting, indecent, or abusive language, or indecent, or insulting conduct, of its employes, whether conductors, motormen, ticket agents, or other employes, upon the ground of a breach of its contract which obligates it not only to safely transport the passenger, but to accord to him respectful and courteous treatment, and to protect him from insult from strangers and its own employes.⁵⁵ And the rule applies, although the car-

struck in response to abuse and assault by the passenger, who was the aggressor; *Texas & P. R. Co. v. Williams*, 10 C. A. 463, 62 Fed. 440, but the insult and wrong to justify the act of the employe must be real and not fancied; *Baltimore & O. R. Co. v. Barger*, 80 Md. 23, 26 L. R. A. 220, 30 Atl. 560, and an assault by him is not excused, or the liability of the carrier defeated, by the fact that the passenger had used grossly profane and abusive language to the conductor without provocation; *St. Louis S. W. R. Co. v. Berger*, 64 Ark. 613, 44 S. W. 809, 39 L. R. A. 784, and if he beat the passenger who slaps his face with his hand, and in so doing uses force greatly exceeding that which would appear to a reasonable man necessary to repel the assault, the carrier is liable; *Galveston, H. S. Ry. Co. v. La Prelle* (Tex. Civ. App.), 65 S. W. 488.

52. *Birmingham Ry., etc., Co. v. Mullen*, 138 Ala. 614, 35 So. 701.

53. *Illinois Cent. R. Co. v. Sheehan*, 29 Ill. App. 90; *Texas, etc., R. Co. v. Edmond* (Tex. Civ. App.), 29 S. W. 518.

54. *Smith v. Manhattan R. Co.*, 45 St. Rep. (N. Y.) 865, 18 N. Y. Supp. 759; *Hanson v. European, etc., R. Co.*, 62 Me. 84, 16 Am. Rep. 404.

55. *Gillespie v. Brooklyn Heights R. Co.*, 3 St. Ry. Rep. 694, 178 N. Y. 347, 70 N. E. 857; *Palmeri v. Manhattan R. Co.*, 133 N. Y. 261, 28 Am. St. Rep. 632; *Texas, etc., R. Co. v. Tarkington* (Tex. Civ. App.), 66 S. W. 137; *San Antonio Tract. Co. v. Crawford* (Tex. Civ. App.), 71 S. W. 306; *La Fitte v. New Orleans, etc., R. Co.*, 43 La. Ann. 24, 8 So. 701; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *McGinnis v. Missouri Pac. R. Co.*, 21 Mo. App. 399; *Malecek v. Tower Grove, etc., R. Co.*, 57 Mo. 17; *Chicago, etc., R. Co. v. Griffin*, 68 Ill. 499; *Dawson v. Louisville, etc., R. Co. (Ky.)*, 11 Am. & Eng. R. Cas. 134; *Bryan v. Chicago, etc., R. Co.*

rier did not authorize or ratify such conduct, and was not negligent in selecting the employe.⁵⁶ In the case of female passengers the carrier's obligation is further extended so as to require that they shall be protected against obscene conduct, lascivious behavior, and every immodest and libidinous approach.⁵⁷

§ 24. Liability for expulsion by servants.—Though a passenger renders himself liable to be expelled from the car or other vehicle of a carrier, on account of refusal to pay fare, disorderly conduct, or otherwise, if the carrier's employes use excessive or unnecessary force, and violence in expelling him, the carrier will be liable.⁵⁸ And it has been held that if an employe of the carrier uses insulting and abusive language to a passenger while putting him off its vehicle of transportation, the latter may recover damages.⁵⁹ A person cannot be ejected from a car in rapid motion

63 Iowa, 464, 16 Am. & Eng. R. Cas. 335; Baltimore, etc., R. Co. v. Blocher, 27 Md. 277; Louisville, etc., R. Co. v. Patterson, 69 Miss. 421; Block v. Bannerman 10 La. Ann. 1. See Sweeney v. Railway Co., 150 Mo. 385; Southern Ry. Co. v. Wideman, 119 Ala. 565; Central, etc., R. Co. v. Price, 106 Ga. 170; Haver v. Railroad Co., 62 N. J. L. 282; Texas, etc., R. Co. v. Humphries, 20 Tex. Civ. App. 28; Nelson v. Southern Pac. Co., 18 Utah, 244. See also Birmingham Ry. & Elec. Co. v. Mason, 1 St. Ry. Rep. 1, 34 So. 270.

56. Knoxville Tract. Co. v. Lane, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549. But mere rudeness or brusqueness of manner will not render the carrier liable. Rose v. Wilmington, etc., R. Co., 106 N. C. 168, 11 S. E. 526; Daniels v. Florida Central, etc., R. Co., 62 S. C. 11, 39 S. E. 762; New York, etc., R. Co. v. Bennett, 50 Fed. 496.

57. Nieto v. Clark, 1 Cliff. (U. S.) 145; Chamberlain v. Chandler, 3 Mason (U. S.), 242; Craker v. Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504; Louisville, etc., R. Co. v. Bal-

lard, 85 Ky. 307, 3 S. W. 530, 7 Am. St. Rep. 600; Keene v. Lizardi, 5 La. 431, 25 Am. Dec. 197.

58. Peck v. New York, etc., R. Co., 70 N. Y. 587; Philadelphia, etc., R. Co. v. Anthony, 43 Ind. 183; Jeffersonville R. Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103; Chicago, etc., R. Co. v. Bryan, 90 Ill. 126; Coleman v. New York, etc., R. Co., 106 Mass. 160; Moore v. Fitchburg R. Corp., 4 Gray (Mass.), 465, 64 Am. Dec. 83; Jardine v. Cornell, 50 N. J. L. 485; Brokaw v. New Jersey R., etc., Co., 32 N. J. L. 328, 90 Am. Dec. 659; Pennsylvania R. Co. v. Vandiver, 42 Pa. St. 335; Brown v. Hannibal, etc., R. Co., 66 Mo. 589; Perkins v. Missouri, etc., R. Co., 55 Mo. 201; Fordyce v. Beecher, 2 Tex. Civ. App. 29, 21 S. W. 179; Seymour v. Greenwood, 7 H. & N. 355; Bayley v. Manchester, etc., R. Co., L. R. 8 C. P. 148, 42 L. J. C. P. 78, 28 L. T. N. S. 366; McKinley v. Chicago, etc., R. Co., 44 Iowa, 314. See also Ejection of passengers chap. 21, *post*.

59. McGinnis v. Missouri Pac. R. Co., 21 Mo. App. 399; Southern Kansas R. Co. v. Hinsdale, 38 Kan. 507.

without imminent danger to life, and although liable to expulsion, he may lawfully resist such an attempt to expel him.⁶⁰ While a passenger who refuses to pay his fare, or is disorderly, may be expelled from a car or other vehicle in a proper manner, he cannot lawfully be expelled while the car is in motion, and if he be expelled under these circumstances and be injured, the carrier is liable.⁶¹ Nor can a trespasser be ejected so long as the train is moving at a rate which renders the ejection dangerous to life and limb.⁶² If an employe of the carrier pushes a trespasser, or compels him to jump from a moving train, to his injury, the carrier will be liable.⁶³

§ 25. Liability for false arrest of passenger.—There can be no doubt that a conductor,, ticket agent, or other like agent of a carrier of passengers, who has them in his charge and under his care, may violate the duty which he owes to them by directing an arrest without cause, for which his principal may be held liable. Where an employe of a carrier, while engaged in the business of the carrier, whether willfully and maliciously, or in consequence of what he considers a duty, ill treats a passenger so far as to wrongfully cause his arrest, the carrier is liable for it. If the detention is wrongful and unlawful and the charges false, and the employe is acting within the scope of his employment, the carrier will be liable for false imprisonment.⁶⁴ Thus, when passengers have

60. *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343, 80 Am. Dec. 286.

61. *English v. Delaware, etc., Canal Co.*, 66 N. Y. 454, 23 Am. Rep. 69; *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 28; *Oppenheimer v. Manhattan R. Co.*, 18 N. Y. Supp. 411; *Louisville, etc., R. Co. v. Whitman*, 79 Ala. 328; *Mykleby v. Chicago, etc., R. Co.*, 39 Minn. 54, 34 Am. & Eng. R. Cas. 387; *Cain v. Minneapolis, etc., R. Co.*, 39 Minn. 297.

62 *Rounds v. Delaware, etc., R. Co.*, 64 N. Y. 138; *Hughes v. New York, etc., R. Co.*, 36 N. Y. Super. Ct. 226.

63. *Wabash R. Co. v. Savage*, 110 Ind. 156; *Kansas City, etc., R. Co. v.*

Kelly, 36 Kan. 655; *Gallena v. Hot Springs R. Co.*, 13 Fed. 116.

64. *Palmeri v. Manhattan R. Co.*, 133 N. Y. 261, 28 Am. St. Rep. 632, 30 N. E. 1001, 16 L. R. A. 136, 40 St. Rep. (N. Y.) 894; *Mulligan v. New York Cent., etc., R. Co.*, 129 N. Y. 506, 26 Am. St. Rep. 539, 42 St. Rep. (N. Y.) 83, 14 L. R. A. 791; *Stewart v. Brooklyn, etc., R. Co.*, 90 N. Y. 588; *Shea v. Manhattan R. Co.*, 27 St. Rep. (N. Y.) 33, 7 N. Y. Supp. 497, affd. 15 Daly (N. Y.), 528, 8 N. Y. Supp. 332, 29 St. Rep. (N. Y.) 313; *McLeod v. New York, etc., R. Co.*, 72 App. Div. (N. Y.) 116, 76 N. Y. Supp. 347; *Atchison, etc., R. Co. v. Henry*, 55 Kan. 715, 2 Am. & Eng. R. Cas. N. S. 418, 41 Pac. 952, 29 L. R. A. 465; *Hoffman v. New York*

been arrested or detained by direction of the carrier's agents upon a false charge of not having paid their fare, or of attempting to evade the payment of fare, the carrier has been held liable.⁶⁵ A

Cent., etc., R. Co., 87 N. Y. 25; White v. Twenty-third St. R. Co., 20 Week. Dig. (N. Y.) 510; Rown v. Christopher, etc., R. Co., 34 Hun (N. Y.), 471; Corbett v. Twenty-third St. R. Co., 42 Hun (N. Y.), 587; Hamel v. Brooklyn, etc., Ferry Co., 53 Hun (N. Y.), 634, 6 N. Y. Supp. 102, 25 St. Rep. (N. Y.) 153, affd. 125 N. Y. 707.

In the first case cited above (133 N. Y. 261) a ticket agent, who followed a woman who had bought a ticket out upon the platform and charged her with having given him counterfeit money, with demand for other money in its stead, and on her refusal, insulted her by slandering her character, and put his hand upon her, telling her not to stir until he got a policeman to arrest and search her, and then let her go when he failed to get an officer, was held to be acting within the scope of his employment, and the carrier liable for false imprisonment and slander.

In the second case cited (129 N. Y. 506) a ticket agent who directed the arrest, by police officers, of a person in the railroad station, who was suspected of passing counterfeit bills, and had just purchased a ticket tendering a five dollar bill, which the agent took supposing it to be counterfeit, but which was subsequently found to be good, was held not to be acting within the line of his duty, but to perform a supposed service to the community by procuring the arrest for a criminal whom he knew the authorities were endeavoring to apprehend and, therefore, the carrier was not liable for the neglect of any

duty growing out of the relation of passenger and carrier.

As to passing counterfeit money in payment of fare, however, see La Fitte v. New Orleans, etc., R. Co., 43 La. Ann. 34, where the arrest by a street car driver was held not to be within the scope of the agent's employment; Central R. Co. v. Brown, 78 Md. 394, 27 L. R. A. 63, where the carrier was held not liable unless the agent was authorized to make the arrest; Galveston, etc., R. Co. v. Donahoe, 56 Tex. 162, where it was held to be a question for the jury whether the agent was acting within the scope of his employment.

65. Lynch v. Metropolitan Elev. R. Co., 90 N. Y. 77, 43 Am. Rep. 141; Rown v. Christopher, etc., St. R. Co., 34 Hun (N. Y.), 471; Toomey v. Delaware, etc., R. Co., 2 Misc. Rep. (N. Y.) 82, 4 Misc. Rep. (N. Y.) 392; Corbett v. Twenty-third St. R. Co., 42 Hun (N. Y.), 587; Corwin v. Long Island R. Co., 2 N. Y. City Ct. Rep. 106, carrier held not liable where arrest was made after passenger had left the carrier's premises; Southern Pac. R. Co. v. Hamilton, 54 Fed. 468; Murdock v. Boston, etc., R. Co., 133 Mass. 15, 43 Am. Rep. 480; Standish v. Narragansett Steamship Co., 111 Mass. 512, 15 Am. Rep. 66; Goff v. Great Northern R. Co., 3 El. & El. 672, 107 E. C. L. 672; Moore v. Metropolitan R. Co., L. R. 8 Q. B. 36. But the arrest of a street car passenger by a policeman called by the conductor of the car to arrest and take him off, on the charge of riding without payment of fare, does not

railroad company which employs a detective officer with general authority, actual or apparent, either expressly or by general usage and consent, to arrest in behalf of the company, is liable for the wrong arrest of a passenger without a warrant, although no express authority to make arrests in that manner is given such officer.⁶⁶ But if the circumstances are such as to justify the careful conclusion on the part of the officer that the passenger has either committed a felony or is about to commit a felony, then he is excused for making the arrest and the carrier is not liable although it turns out that the suspicion was unfounded.⁶⁷ In a number of cases it has been held that the carrier was not liable for the false arrest or imprisonment of a passenger at the instance of its servant for alleged non-payment of fare, or for disorderly conduct, or other offense, for the reason that the act was not within the scope of his authority, express or implied, or subsequently ratified by the carrier.⁶⁸ On the other hand, it has been held that a statute giving a conductor all the power of a conservator of the peace while in charge of a car or train does not relieve the carrier from liability for false imprisonment of a passenger made or caused to be made by him.⁶⁹ A steamboat company is liable for wrongs and injuries to a passenger accused of not having paid his fare by the

render the carrier liable for false imprisonment, when the conductor had been authorized only to put delinquent passengers off the car. Little Rock, etc., R. Co. v. Walker, 64 Ark. 144, 45 S. W. 57, 40 L. R. A. 473.

66. Duggan v. Baltimore, etc., R. Co., 159 Pa. St. 248, 25 Pittsb. L. J. N. S. 13, 33 W. N. C. 381, 28 Atl. 182, 39 Am. St. Rep. 672; Harris v. Louisville, etc., R. Co., 35 Fed. 116.

67. Newman v. New York, etc., R. Co., 54 Hun (N. Y.), 335, 7 N. Y. Supp. 560.

68. Lezinsky v. Metropolitan St. R. Co., 88 Fed. 437, 59 U. S. App. 588, 31 Chic. Leg. N. 42; Cunningham v. Seattle Electric R., etc., Co., 3 Wash. 471, 28 Pac. 745; Carter v. Howe Machine Co., 51 Md. 290, 34 Am. Rep. 311; Eastern Counties R. Co. v. Broom, 6 Exch. 314; Poulton

v. London & S. W. R. Co., L. R. 2 Q. B. 534; Edwards v. London & N. W. R. Co., L. R. 5 C. P. 445; Allen v. London & S. W. R. Co., L. R. 6 Q. B. 65; Roe v. Birkenhead, etc., R. Co., 7 Exch. 36; See Mali v. Lord, 39 N. Y. 381, 100 Am. Dec. 448; Vanderbilt v. Richmond Turnp. Co., 2 N. Y. 479, 51 Am. Dec. 315; Brokaw v. New Jersey, etc., Co., 32 N. J. L. 328, 90 Am. Dec. 659; Pressley v. Mobile, etc., R. Co., 15 Fed. 199.

69. Gillingham v. Ohio River R. Co., 35 W. Va. 588, 29 Am. St. Rep. 827, 15 Am. & Eng. R. Cas. 222, 14 S. E. 243, 14 L. R. A. 798; Krulevitz v. Eastern R. Co., 143 Mass. 228, 9 N. E. 613; King v. Illinois Cent. R. Co., 69 Miss. 245, 10 So. 42; Moore v. Metropolitan R. Co., L. R. 8 Q. B. 36.

captain, who arrested the passenger and chained him to a post on the lower deck, and subsequently ejected him from the boat, although the injuries were willfully or wantonly inflicted.⁷⁰ Unless the arrest in such cases is followed by some sort of a judicial proceeding, there can be no malicious prosecution, and the plaintiff must seek his remedy in an action for false imprisonment.⁷¹

§ 26. Liability for acts of fellow-passengers or other third persons.—There is no such privity between a common carrier of passengers and a disorderly passenger as to make the former liable for the acts of the latter on the principle of *respondeat superior*. But a carrier has the power of refusing to receive as a passenger, or to expel, any one who is drunk, disorderly, or riotous, or who so demeans himself as to endanger the safety, or interfere with the reasonable comfort and convenience of other passengers, and may exercise all necessary power and means to eject from its conveyance any one so imperiling the safety of or annoying others; and this police power the conductor, or other servant of the company in charge of the vehicle, is bound to exercise with all the means he can command whenever occasion requires. If this duty is neglected without good cause, and a passenger receive injury, which might have been reasonably anticipated or naturally expected, from one who is improperly received or permitted to continue as a passenger, the carrier is liable.⁷² The carrier must exercise the highest diligence reasonably practicable to protect pas-

70. Trabing v. California Nav., etc., Co., 121 Cal. 137, 53 Pac. 644, 8 Am. & Eng. Corp. Cas. N. S. 695; Rounds v. Delaware, etc., R. Co., 64 N. Y. 129, 21 Am. Rep. 597; Lothrop v. Adams, 133 Mass. 471, 43 Am. Rep. 528; Lake Shore, etc., R. Co. v. Prentice, 147 U. S. 109, 37 L. Ed. 102.

71. Barry v. Third Ave. R. Co., 51 App. Div. (N. Y.) 385, 64 N. Y. Supp. 615.

72. Carpenter v. Boston, etc., R. Co., 97 N. Y. 494; Putnam v. Broadway, etc., R. Co., 55 N. Y. 108, 15 Abb. Pr. N. S. (N. Y.) 383, 14 Am. Rep. 190; Koch v. Brooklyn Heights

R. Co., 75 App. Div. (N. Y.) 282, 78 N. Y. Supp. 99; Pittsburgh, etc., R. Co. v. Hinds, 53 Pa. St. 512, 91 Am. Dec. 224; Flint v. Norwich, etc., Transp. Co., 34 Conn. 554; Mullan v. Wisconsin Cent. Co., 46 Minn. 474, 47 Am. & Eng. R. Cas. 649; Spohn v. Missouri Pac. R. Co., 87 Mo. 74, 101 Mo. 417, 26 Am. & Eng. R. Cas. 252; Winnegar v. Central Pass. R. Co., 85 Ky. 547; Gillingham v. Ohio River R. Co., 35 W. Va. 588, 14 L. R. A. 798. See also note on Passengers injured by acts of fellow passengers and third persons, 3 St. Ry. Rep. 783, citing all recent cases.

sengers from assault, abuse, or injury at the hands of fellow-passengers or third persons, and the carrier is responsible to a passenger for a wrong inflicted by an intruder, stranger, or fellow-passenger, if the conductor, or other servant, knew, or ought to have known, or ought to have reasonably anticipated, that it was threatened or was reasonably to be apprehended, and it could, with the assistance of employes and other willing passengers, have prevented it, but failed to do so.⁷³ But a street railway company is not, as to its passengers, guilty of negligence in attempting to operate its cars during a strike of its employes, unless the conditions are such that it ought to know, or ought to reasonably anticipate, that it can not do so and at the same time guard from violence, by the exercise of the utmost care on its part, those who accept its implied invitation to become passengers; and where a passenger was struck and injured by a missile thrown by a member of a mob of striking employes of the street car company, the failure to pull down the blinds of the car in which the injured person was riding, or stretch a heavy canvas over the outside of the car, was not negligence, justifying a recovery against the street car company.⁷⁴ So the unusual, rude and hasty act of a

73. *Ga.*—Savannah, etc., R. Co. v. Boyle, 115 Ga. 836, 42 S. E. 242; *Holly v. Atlanta St. R. Co.*, 61 Ga. 215, 34 Am. Rep. 97.

Ind.—Louisville, etc., Ferry Co. v. Nolan, 135 Ind. 60.

Ill.—Springfield Consol. R. Co. v. Flynn, 55 Ill. App. 600.

Kan.—Southern, etc., R. Co. v. Rice, 38 Kans. 398.

Ky.—Louisville, etc., R. Co. v. McEwan (Ky.), 31 S. W. 465; Sherley v. Billings, 8 Bush (Ky.), 147, 8 Am. Rep. 451.

Me.—Libby v. Maine Cent. R. Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812.

Mass.—Simmons v. New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99.

Miss.—Illinois Cent. R. Co. v. Minor, 69 Miss. 710; Royston v. Illinois Cent. R. Co., 67 Miss. 376; New

Orleans, etc., R. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689.

N. J.—Partridge v. Woodland S. Co. (N. J.), 49 Atl. 726.

Pa.—Pittsburgh, etc., R. Co. v. Pillow, 76 Pa. St. 510; Rommel v. Schambacher, 120 Pa. 519.

Tex.—Galveston, etc., R. Co. v. Johnson, 2 Tex. App. Civ. Cas. § 186; International, etc., R. Co. v. Miller, 9 Tex. Civ. App. 104; Dillingham v. Anthony, 73 Tex. 47.

U. S.—King v. Ohio, etc., R. Co., 22 Fed. 413, 18 Am. & Eng. R. Cas. 386; Meyer v. St. Louis, etc., R. Co., 54 Fed. 116, 58 Am. & Eng. R. Cas. 111, where the carrier was held liable for the act of an insane passenger in shooting and killing a fellow passenger, his insanity being known to the agents of the carrier.

74. Fewings v. Mendenhall, 83 Minn. 237, 86 N. W. 96, 93 N. W.

stranger in rushing through the door of a car, thereby violently striking a person on the other side, does not render the company liable;⁷⁵ nor the pushing of a passenger off the platform by a crowd hurrying to get to a transfer point, where the passenger with a knowledge of the conditions had forced himself into the crowd for the purpose of alighting.⁷⁶ But where a child was compelled by the conductor of a horse car to stand upon the crowded platform, and while there was thrown from the car by the hasty and careless exit of another passenger, the company was liable.⁷⁷ The carrier is not liable for an injury to one of its passengers by the conduct of the other passengers unless it was unusual and disorderly and could have been prevented by those who had charge of the car at the time, as, for illustration, where a passenger able to travel without attendant, was jostled and pushed and her dress stepped on by another passenger as she was alighting, the conductor at the time assisting a child in her care to alight;⁷⁸ or where a lady passenger's light summer dress was ignited on an open car by a match carelessly thrown by another passenger after lighting a cigarette, unless it appears that the servant in charge of the car had reason to believe that the act would be done.⁷⁹ But the carrier may be liable for injuries inflicted by one passenger upon another where he is jostled and thrown from the car by others in their haste to leave it, when the conductor fails to take proper precau-

127. See also *Missimer v. Railroad Co.*, 17 Phila. 172, and it is charged with ordinary care and prudence only to guard against the lawless acts of third persons not under its direction or control; *Bosworth v. Union Ry. Co.*, 3 St. Ry. Rep. 783, 25 R. I. 202, 58 Atl. 982. But see *Chicago, etc., R. Co. v. Pillsbury*, 123 Ill. 9, 5 Am. St. Rep. 483, 31 Am. & Eng. R. Cas. 24, where it was held that the danger might have been reasonably anticipated and the injury prevented by taking extraordinary precautionary measures.

75. *Graeff v. Phila. & R. Co.*, 161 Pa. St. 230, 23 L. R. A. 606, 34 W. N. C. 384, 28 Atl. 1107, 25 Pittsb. L. J. N. S. 37. But it may be a question for the jury as to whether a

carrier is not liable for an injury to a passenger by being kicked by another passenger attempting to enter a car through the window. *Grogan v. Brooklyn H. R. Co.*, 3 St. Ry. Rep. 712, 97 App. Div. (N. Y.) 413, 89 N. Y. Supp. 1027.

76. *Chicago City R. Co. v. Considine*, 50 Ill. App. 471.

77. *Sheridan v. Brooklyn, etc., R. Co.*, 36 N. Y. 39, 34 How. Pr. (N. Y.) 217.

78. *Randall v. South Frankford, etc., R. Co.*, 139 Pa. St. 464, 22 Atl. 639; *Ferguson v. Citizens St. R. Co.*, 16 Ind. App. 171, 44 N. E. 936.

79. *Sullivan v. Jefferson Ave. R. Co.*, 133 Mo. 1, 32 L. R. A. 167, 34 S. W. 566.

tions to prevent such accidents.⁸⁰ If the conductor know or have reason to believe that a passenger is a dangerous lunatic, it is his first duty to take proper action at once for the security and protection of the other passengers against his violence, and failing to discharge such duty, to communicate to the other passengers the facts within his knowledge, showing or tending to show that they are riding in a car with a violently insane man, under no guard or restraint, to the end that they themselves may take suitable precautions for their safety.⁸¹ But a railway company whose conductor informs a passenger that the train does not stop at her destination, and that she will have to get off at another station and wait for another train, and assents upon a male passenger offering to see her to a hotel, is not liable because such passenger decoyed her to a saloon where he deliberately abused and ravished her, where the station where she got off was not an improper or dangerous one, and the conductor had no suspicion of her escort's intention.⁸²

§ 27. Liability for assaults by passengers or other third persons.—The carrier is liable for an unprovoked assault of a passenger by a fellow-passenger or intruder, when, by the exercise of proper care, the acts of violence might have been foreseen and prevented.⁸³ But no recovery can be had where the carrier's servants were attending to their proper duties and had no knowledge of the assault, or of threats to make it, or conduct showing such inten-

80. Sheridan v. Brooklyn, etc., R. Co., 36 N. Y. 39, 34 How. Pr. (N. Y.) 217; Kreusen v. Forty-second St., etc., R. Co., 13 N. Y. Supp. 588; Lott v. New Orleans City, etc., R. Co., 37 La. Ann. 337.

81. St. Louis, etc., R. Co. v. Meyer, 77 Fed. 150, 40 U. S. App. 554, 23 C. C. A. 100.

82. Sira v. Wabash R. Co., 115 Mo. 127, 21 S. W. 905. A railroad company is not liable for assault committed by a negro on a white female passenger alone in a lighted coach while the train was stopping at a station, and while the company's employes were absent from the coach.

Segal v. St. Louis, etc., R. Co. (Tex. Civ. App.), 80 S. W. 233.

83. Hendricks v. Sixth Ave. R. Co., 12 J. & Sp. (N. Y.) 8, 44 N. Y. Super. Ct. 8; Murphy v. Western, etc., R. Co., 23 Fed. 637; Wright v. Chicago, etc., R. Co., 4 Colo. App. 102; Flannery v. Baltimore, etc., R. Co., 4 Mackey (D. C.), 111; Evansville, etc., R. Co. v. Darting, 6 Ind. App. 375; Richmond, etc., R. Co. v. Jefferson, 89 Ga. 554, 32 Am. St. Rep. 87; Britton v. Atlanta, etc., R. Co., 88 N. C. 536, 43 Am. Rep. 749; Spohn v. Missouri Pac. R. Co., 101 Mo. 417, 87 Mo. 74, 26 Am. & Eng. R. Cas. 252; International, etc., R. Co. v. Miller, 9 Tex. Civ. App. 104.

tion,⁸⁴ or rendered proper protection to the assaulted passenger.⁸⁵ Where two passengers on defendant's boat engaged in a quarrel while the captain was in the same room, and one of them withdrew from the room, and there was no reasonable ground to believe that he would return to use a deadly weapon, and he did return with a pistol, and attacked his adversary, and the captain, on being apprised of the resumption of the difficulty, immediately interposed, before a blow was struck, and did all in his power to stop the difficulty, but the pistol was fired and injured another passenger, defendant was not liable for such injury, since the carrier does not insure the absolute safety of a passenger against assaults by a fellow-passenger, but is only required to use all availing means to prevent such injury.⁸⁶ A railroad company owes to a passenger not only the duty of protecting him from assaults of others, but also owes to him the duty of warning him, when in the act of alighting, of the dangers arising from persons armed with pistols engaged in an altercation immediately after having left the train at a station.⁸⁷ A railroad company is not a guarantor of the safety of its passengers under all circumstances, but is required only to exercise requisite care, and it cannot be held responsible for an assault by one passenger on another, which its servants had no reason to anticipate.⁸⁸ A railroad company is

84. Royston v. Illinois Cent. R. Co., 67 Miss. 376; Pounder v. North Eastern R. Co., 1 Q. B. 385; Felton v. Chicago, etc., R. Co., 69 Iowa, 577, 27 Am. & Eng. R. Cas. 229; Connell v. Chesapeake etc., R. Co., 93 Va. 44.

85. Kinney v. Louisville, etc., R. Co. (Ky.), 34 S. W. 1066.

86. Tall v. Baltimore Steam Packet Co., 90 Md. 248, 47 L. R. A. 120, 44 Atl. 1007. See also Steamboat Co. v. Brochett, 121 U. S. 645, 7 S. Ct. 1039, 30 L. Ed. 1049; Connell's Ex'rs v. Railway Co., 93 Va. 44, 24 S. E. 467, 32 L. R. A. 792; Houston, etc., R. Co. v. Perkins, 21 Tex. Civ. App. 508.

87. Penny v. Atlantic Coast Line R. Co., 133 N. C. 221, 45 S. E. 563, 63 L. R. A. 497. Where a street railway owning a park reached by its

lines, and maintaining attractions for the public there, has knowledge that there is a conspiracy on the part of certain persons to assault any colored person visiting the park, and knows of acts of violence committed pursuant to such design, but it transported colored persons there without warning them of the danger, and they are assaulted, pursuant to the conspiracy, the company's employes making no attempt to interfere, the railway company is liable for the injuries. Indianapolis St. Ry. Co. v. Dawson, 31 Ind. App. 605, 68 N. E. 909.

88. Stutsky v. Brooklyn Heights R. Co., 88 N. Y. Supp. 358. It is not liable if it does not appear that, knowing of the assault, the train crew, in the exercise of reasonable

bound to exercise reasonable care to protect its passengers, while in the depot and its passageways preparatory to taking a train, from injury from third persons.⁸⁹ It is the duty of the railroad company to exercise the strictest diligence to protect passengers from misconduct and assault of fellow-passengers, not only while such passengers remain on the train, but after they have alighted at their destination, whenever the company might have anticipated that the threatened injury would occur.⁹⁰ A carrier is liable for injuries to a passenger, though the injuries were due to the concurring negligence of the carrier and another.⁹¹ While a railroad company is bound to use extraordinary diligence to protect a passenger from violence or injury by third persons, it is under no duty to inquire into the legality of his arrest by an officer of the law.⁹²

care, could have prevented it, or that they were called on, and refused help and protection, to which he was entitled. *Lake Erie, etc., R. Co. v. Arnold* (Ind. App.), 59 N. E. 394. Where, while the crew of a train which had stopped at a regular meal station were eating their dinner, a passenger, who had remained in the car, was assaulted by an intruder and another passenger, the company was not liable, as the leaving of the train with no one in charge while the crew were taking their meals was a reasonable regulation, and the assault one which could not reasonably have been anticipated by them. *Thweatt v. Houston, etc., R. Co. (Tex. Civ. App.)*, 71 S. W. 976. But where plaintiff alleged that he was a passenger on defendant's train, and that defendant ran its car on a side track, and, while it stood there with plaintiff therein, defendant allowed and caused one A., who maintained a rifle range near the track, to shoot his rifle towards and into the car, by reason of which plaintiff was injured, defendant and A. were jointly liable for the negligence whereby plaintiff was injured. *Dufur v. Boston & M.*

R. Co. (Vt.), 53 Atl. 1068.

89. *Exton v. Central R. Co. of New Jersey*, 63 N. J. L. 356, 46 Atl. 1099, affg. 62 N. J. L. 7, 42 Atl. 486. A railroad company is liable for injuries to a passenger in going to the baggage room to get his baggage checked, though the dangers arose from the acts of intruders or strangers, where the acts were so notorious that the servants of the company in charge of the depot and the passageways thereof, devoted to the use of passengers, knew, or should have known, of such acts and the dangers therefrom. *Id.* See *Wood v. Railroad company*, 101 Ky. 703.

90. *Spangler v. St. Josephs, etc., Ry. Co. (Kan.)*, 74 Pac. 607, 63 L. R. A. 634.

91. *Louisville & E. Mail Co. v. Barnes' Adm'r.*, 25 Ky. L. Rep. 2036, 79 S. W. 261, 64 L. R. A. 574.

92. *Brunswick, etc., R. Co. v. Ponder*, 117 Ga. 63, 43 S. E. 430. That a conductor on defendant's railroad pointed out a passenger traveling in one of its cars to a sheriff, who arrested him at the instance of a sheriff of an adjoining State, did not render defendant liable therefor,

§ 28. Indecent language and conduct of fellow-passengers or intruders.—A railroad company cannot subject passengers, even in a second class car, to noxious influences not necessarily or ordinarily incident to such travel, such as hearing rough, profane, and obscene language, and witnessing acts of violence and drunkenness which the company, by the exercise of proper care and due regard for the welfare of passengers, could prevent, and where a man with his family, is compelled to ride in such a car, whereby they are humiliated and injured, he can recover for the physical and mental injuries which they sustained.⁹³ A carrier of passengers is under an implied obligation to exercise ordinary care in protecting its passengers from insults and injury while in its depots, and where those in charge of a carrier's depot knew, or by the exercise of ordinary care could have known, of wanton injuries being inflicted on a passenger in its depot, and could by such care have protected the passenger, the carrier was liable.⁹⁴ With or without a ticket, the passenger has no right to remain in a train and be carried when he is disorderly or uses any obscene, profane or vulgar language, and the carrier is justified in ejecting him.⁹⁵

§ 29. Duty to protect from acts of drunken passengers.—The fact that an individual may have drank to excess will not, in every case, justify his expulsion from a public conveyance. It is rather the degree of intoxication, and its effect upon the individual, and the fact that by reason of the intoxication, he is dangerous or annoying to the other passengers, that gives the right and imposes the duty of expulsion. If there is anything in the condition, conduct, appearance or manner of an intoxicated person from which it might be reasonably expected or anticipated that he

where its servant took no part in such arrest, though the sheriff acted without authority or probable cause. *Owens v. Wilmington & W. R. Co.* (N. C.), 35 S. E. 259.

93. *St. Louis, etc., R. Co. v. Mackie*, 71 Tex. 491, 9 S. W. 451, 1 L. R. A. 667, 10 Am. St. Rep. 766, 37 Am. & Eng. R. Cas. 94.

94. *Tate v. Illinois Cent. R. Co.*, 26 Ky. Law Rep. 309, 81 S. W. 256. But a railroad company is not liable in damages at the suit of a female

passenger, on account of obscene and profane language, indecent exposure of the person, and other disorderly conduct by intruders at the station while plaintiff was awaiting the arrival of a train, when it is not shown that the company had notice of any facts which justified the expectation of such an outrage. *Batton v. South, etc., Alabama R. Co.*, 77 Ala. 591, 54 Am. Rep. 80.

95. *Peavy v. Georgia R. Co. (Ga.)*, 8 S. E. 70.

would cause injury or annoyance to other passengers, either while upon the car or in the act of leaving, it is the duty of the servants of the carrier to eject him before he has committed any overt act of injury or violence. The rule is that for any neglect or omission of duty in the preservation of order and the removal of dangerous and offensive persons by the owner of a public conveyance for the transportation of passengers, or his servants or agents, the carrier is liable for any injury to other passengers which might reasonably be anticipated, or naturally be expected to occur in view of all the circumstances, and of the number and character of the persons on board. But it does not follow and cannot be presumed that because a man is drunk, and is in that condition offensive to others, as well by his demeanor as in his appearance, that he is a dangerous man, and that his presence imperils the safety of others; that because he is drunk he may violently assault or murder others without provocation.⁹⁶ Insult to and abuse of a passenger by a drunken and disorderly fellow-passenger, which the conductor permits to continue in his presence without interference, renders the carrier liable for damages.⁹⁷ And it is negligence in the carrier if its servants permit a drunken and disorderly passenger once ejected from a car to re-enter and remain in the car, although the conductor had no reason to suppose that he would again assault a passenger.⁹⁸ A railroad conductor does not, as matter of law, exercise proper diligence in protecting a passenger, where, after being informed that another passenger, who

96. Thompson v. Manhattan R. Co., 75 Hun (N. Y.), 548, 27 N. Y. Supp. 608; Putnam v. Broadway, etc., R. Co., 55 N. Y. 108, 15 Abb. Pr. N. S. (N. Y.) 383; Flint v. Norwich, etc., Transp. Co., 34 Conn. 554; Pittsburgh, etc., R. Co. v. Hinds, 53 Pa. St. 512, 91 Am. Dec. 224; Galveston, etc., R. Co. v. Long (Tex. Civ. App.), 36 S. W. 485. See also Louisville, etc., R. Co. v. Logan, 88 Ky. 232, 21 Am. Rep. 332; Railway Co. v. Vallely, 32 Ohio St. 345, 30 Am. Rep. 601; Lemont v. Washington, etc., R. Co., 1 Mackey (D. C.), 180, 47 Am. Rep. 238.

97. Lucy v. Chicago G. W. R. Co., 64 Minn. 7, 31 L. R. A. 551, 65 N. W.

944. But the carrier is not liable to a passenger for injuries received by reason of being tripped or jostled by a drunken passenger who is being ejected from the car by the conductor exercising due care. Coff v. Boston El. Ry. (Mass.), 60 N. E. 476; Vinton v. Middlesex R. Co., 11 Allen (Mass.), 304, 87 Am. Dec. 714; Sullivan v. Old Colony R. Co., 148 Mass. 119, 18 N. E. 78, 1 L. R. A. 513; Spade v. Lynn, etc., R. Co., 172 Mass. 488, 52 N. E. 747, 43 L. R. A. 832. And see Kinney v. Louisville & N. R. Co., 99 Ky. 59, 17 Ky. L. Rep. 1405, 34 S. W. 1066.

98. United Ry., etc., Co. v. State (Md.), 49 Atl. 925.

is intoxicated, has assaulted the former and threatens to repeat the assault, he does not take steps to prevent further assaults.⁹⁹ Where a carrier permitted a person in a drunken condition to enter its waiting room, and he used indecent language, and while armed with a knife made an assault on plaintiff, a female passenger, the company was liable for damages sustained thereby.¹ And a quarrel by a guard on an elevated railroad train with an intoxicated passenger, upon a crowded platform, by which a crowd is caused to jostle a passenger on the platform so as to lead him to seize the railing, whereby his arm is caught between the railings of two cars and injured, has been held to be negligence rendering the company liable.²

§ 30. Duty of the carrier to sick passengers.—Although a common carrier of passengers owes obligations to its well passengers as well as to those who are sick, and is bound to protect the rights of both, and although when the condition of one passenger, from sickness or otherwise, is such as to be inconsistent with the safety, health, or even reasonable comfort of his fellow-passengers, regard for the rights of the latter will authorize the carrier to terminate the carriage by excluding him, yet this right cannot be exercised arbitrarily or inhumanely, or without due care and provision for the safety and well-being of the ejected passenger.³ A carrier has a right to remove from a train a passenger who breaks out with eruption which from the best medical advice that can be obtained is believed to be smallpox, although such belief may afterwards turn out to be mistaken.⁴ Where an unattended passenger on a railroad train is suffering from delirium tremens so as to annoy the other passengers, the carrier should remove him, and is not liable if it turns him over to the overseer of the poor of a town having sufficient accommodations for caring for him.⁵ False representations by a steamship company to a passenger, that the vessel would not carry steerage passengers from an infected port, constitute a proximate cause of injury to such passenger by deten-

99. Blain v. Canadian Pac. Ry. Co. (Can.), 5 Ont. Law Rep. 334.

1. Houston, etc., R. Co. v. Phillo (Tex.), 69 S. W. 994, 59 L. R. A. 392.

2. Graham v. Manhattan Ry. Co., 166 N. Y. 336.

3. Connolly v. Crescent City R. Co., 41 La. Ann. 57, 5 So. 259, 3 L. R. A. 133.

4. Paddock v. Atchison, etc., R. Co., 37 Fed. 841, 4 L. R. A. 231.

5. Atchison, etc., R. Co. v. Weber, 33 Kans. 543, 52 Am. Rep. 543.

tion at quarantine, where disease broke out among the steerage passengers, although it was also present among the crew and second cabin passengers, and the same detention would have resulted from that cause.⁶

§ 31. Protection from accidental Injuries.—A street railroad company is not liable for injuries to a passenger caused by the premature starting of the car in consequence of a signal given to the motorman by another passenger, or some one not in the employ of the railroad company.⁷ Nor is it liable to a passenger who is injured by being pushed or jostled by other passengers when getting on or off the cars, when it appears that the pushing or jostling was not caused by the crowded condition of the cars.⁸ In an action against an electric railway company by a passenger, who jumped or was thrown from the car as a result of a stampede of the passengers following the blowing out of a fuse box, the jury should be instructed that, while the company was not an insurer of its passengers, it was bound to use the utmost skill and vigilance in avoiding such an accident.⁹ Where a railroad company places a car on one of its tracks in the hands of parties who are not its employes, and who do not appreciate the danger of doing

6. *The Normannia* (D. C. S. D. N. Y.), 62 Fed. 469.

7. *McDonough v. Third Ave. R. Co.*, 95 App. Div. (N. Y.) 311, 88 N. Y. Supp. 609; *Krone v. Southwest Missouri Electric Ry. Co.*, 97 Mo. App. 609, 71 S. W. 712.

8. *Glyn v. New York, etc., R. Co.*, 85 Hun (N. Y.), 408, 32 N. Y. Supp. 1020; *Furgason v. Citizens St. R. Co.* (Ind. App.), 44 N. E. 936. See *Lehr v. Steinway, etc., R. Co.*, 118 N. Y. 556, 23 N. E. 889; *Saltsman v. Brooklyn City R. Co.*, 73 Hun (N. Y.), 567, 26 N. Y. Supp. 311, where the cars were over-crowded. Also *Randall v. Frankford, etc., R. Co.*, 139 Pa. St. 464; *Ellinger v. Philadelphia, etc., R. Co.*, 153 Pa. St. 213, 24 Am. St. Rep. 697, where the carriers were held not to be liable unless the conduct of the passengers was

unusual and disorderly and could have been prevented by the persons having charge of the car. See *Stern v. Westchester Elec. R. Co.*, 3 St. Ry. Rep. 713, 99 App. Div. (N. Y.) 491, 90 N. Y. Supp. 870, where a passenger was injured during the disturbance and confusion resulting from the breaking of a span wire attached to a trolley way, by involuntarily jumping from the car.

9. *Kight v. Metropolitan R. Co.*, 21 App. D. C. 494. See *Williams v. New York, etc., R. Co.*, 3 St. Ry. Rep. 713, 97 App. Div. (N. Y.) 133, 89 N. Y. Supp. 659, as to application of the principle of *res ipsa loquitur* to an injury to a passenger by the explosion of a fuse. See also *Dorff v. Brooklyn H. R. Co.*, 3 St. Ry. Rep. 714, 95 App. Div. (N. Y.) 82, 88 N. Y. Supp. 463.

certain acts, it is responsible for the negligent acts of those in whose hands it permitted the car on its tracks to pass.¹⁰ A railroad company, having contracted to transport the mails and a postal clerk in accordance with United States postal regulations, is not liable for an injury to such clerk while remaining in the postal car, which had been switched onto a side track in a union depot at the termination of its journey, by reason of the negligence of the servants of another corporation in backing another car onto such track.¹¹ Though a railroad company is not liable to a passenger for the negligent throwing of a mail sack against him by a postal clerk under the exclusive jurisdiction of the United States while performing his duties on the train, yet if such clerk has actually been guilty of reckless conduct likely to cause injuries to passengers, of which the railroad company had notice, or might have ascertained and prevented, it is liable.¹²

§ 32. Care of carrier in the carriage of passengers.—The courts with varying phraseology have stated the degree of care required of the carrier in the conveyance of its passengers to be the utmost care and foresight to prevent injury, the highest degree of care it can render under the circumstances, extraordinary care, the greatest possible care and diligence, the utmost care and skill which prudent and cautious men are accustomed to use under like circumstances, the highest degree of care of very prudent and cautious persons, the highest practicable care, caution and diligence which capable, skillful and practical railroad operatives would exercise, all that human care, vigilance, and foresight can reasonably do consistently with the mode of conveyance and the practical operation of the road, more than ordinary care and diligence, the highest practicable care, etc.¹³ Without attempting to

10. *Clerc v. Morgan's L. & T. R. Co.*, 107 La. 370, 31 So. 886.

11. *Stoddard v. New York, etc., R. Co.*, 181 Mass. 422, 63 N. E. 927.

12. *St. Louis, etc., R. Co. v. Waggoner*, 90 Ill. App. 556.

Passenger injured by ticket punch falling from pocket of conductor.—See *Cheyne v. Van Brunt St., etc., R. Co.*, 3 St. Ry. Rep. 713, 97 App. Div. (N. Y.) 56, 89 N.

Y. Supp. 627, wherein the carrier was held not liable.

13. Cases in which one or another of the different expressions in the text have been used to define the degree of care required are here cited and must be consulted to get a full understanding of the meaning of the court and the reasons for the language used in its statement of the rule as applied to particular cases.

reconcile the distinctions made, it may be stated generally that while a common carrier is not an insurer of the absolute safety of its passengers, it is the duty of a common carrier of passengers,

U. S.—Philadelphia, etc., R. Co. v. Derby, 14 How. (U. S.) 486; Maury v. Talmadge, 2 McLean (U. S.), 157; Indianapolis, etc., R. Co. v. Horst, 93 U. S. 291; Secord v. St. Paul, etc., R. Co., 5 McCrary (U. S.), 515; Hazard v. Chicago, etc., R. Co., 1 Biss (U. S.), 503; Ladd v. Foster, 12 Sawy. (U. S.) 547; Stokes v. Saltonstall, 13 Pet. (U. S.) 181; Pennsylvania Co. v. Roy, 102 U. S. 451; Washington, etc., R. Co. v. Yarnell, 98 U. S. 479; Pendleton v. Kinsley, 3 Cliff. (U. S.) 420; The Oriflamme, 3 Sawy. (U. S.) 397; Mackoy v. Missouri Pac. R. Co., 18 Fed. 236; Curtis v. Central R. Co., 6 McLean (U. S.), 401; Seymour v. Chicago, etc., R. Co., 3 Biss. (U. S.) 43; Reber v. Boad, 38 Fed. 822; Meyer v. St. Louis, etc., R. Co., 54 Fed. 116, 68 Am. & Eng. R. Cas. 111.

N. Y.—Palmer v. Delaware, etc., Canal Co., 120 N. Y. 170, 17 Am. St. Rep. 629; Carroll v. Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221; Klinger v. United Tract Co., 92 App. Div. (N. Y.) 100, 87 N. Y. Supp. 864; Stiner v. Metropolitan St. Ry. Co., 84 N. Y. Supp. 285; Kelly v. Metropolitan St. Ry. Co., 89 App. Div. (N. Y.) 159, 89 N. Y. Supp. 842; Barrett v. Third Ave. R. Co., 45 N. Y. 628; Dlabola v. Manhattan R. Co., 134 N. Y. 585; Ganiard v. Rochester City, etc., R. Co., 50 Hun (N. Y.), 22; Oliver v. New York, etc., R. Co., 1 Edm. S. C. (N. Y.) 589; Caldwell v. Murphy, 1 Duer (N. Y.), 233; Bowen v. New York Cent. R. Co., 18 N. Y. 408, 72 Am. Dec. 529; Maverick v. Eighth Ave. R. Co., 36 N. Y. 378; Brockway v. Lascala, 1 Edm. Sel. Cas. (N. Y.)

135; Taber v. Delaware, etc., R. Co., 71 N. Y. 489; Brown v. New York Cent. R. Co., 34 N. Y. 404.

Ala.—Birmingham Ry., etc., Co. v. Bynum, 3 St. Ry. Rep. 6, 139 Ala. 389, 36 So. 736.

Ark.—George v. St. Louis, etc., R. Co., 34 Ark. 613; St. Louis, etc., R. Co. v. Sweet, 57 Ark. 287, 60 Ark. 550; Arkansas Midland R. Co. v. Canman, 52 Ark. 517; Little Rock, etc., R. Co. v. Miles, 40 Ark. 298, 48 Am. Rep. 10, 13 Am. & Eng. R. Cas. 10.

Cal.—Nagle v. California Southern R. Co., 88 Cal. 86; Jamison v. San Jose, etc., R. Co., 55 Cal. 593; Wheaton v. North Beach, etc., R. Co., 36 Cal. 590; Treadwell v. Whittier, 80 Cal. 574; Franklin v. So. California, etc., Co., 85 Cal. 63; Fisher v. Southern Pac. R. Co., 89 Cal. 399.

Colo.—Atchison, etc., R. Co. v. Shean, 18 Colo. 368, 58 Am. & Eng. R. Cas. 360; Denver, etc., R. Co. v. Hodgson, 18 Colo. 117.

Conn.—Fuller v. Naugatuck R. Co., 21 Conn. 557; Hall v. Connecticut River S. Co., 13 Conn. 319; Derwort v. Loomer, 21 Conn. 245.

D. C.—Kight v. Metropolitan R. Co., 21 App. D. C. 494.

Fla.—Florida Southern R. Co. v. Hirst, 30 Fla. 1, 32 Am. St. Rep. 17, 52 Am. & Eng. R. Cas. 109.

Ga.—Alabama Midland R. Co. v. Guilford, 119 Ga. 523, 46 S. E. 655; Central R. Co. v. Freeman, 75 Ga. 331; Central R., etc., Co. v. Perry, 58 Ga. 461; Georgia R. Co. v. Homer, 73 Ga. 251, 27 Am. & Eng. R. Cas. 156; Central R. Co. v. Thompson, 76 Ga. 770; Chattanooga, etc., R. Co. v. Huggins, 89 Ga. 497, 52 Am. & Eng.

in consideration of the great danger to human life consequent upon its neglect of duty, to use the highest degree of care, vigilance and foresight that can reasonably be exercised compatible

R. Cas. 73; Brunswick, etc., R. Co. v. Gale, 56 Ga. 322.

Ill.—Burke v. Chicago, etc., R. Co., 108 Ill. App. 565; Illinois Southern R. Co. v. Hubbard, 106 Ill. App. 462; Chicago Union Tract. Co. v. Mommesen, 107 Ill. App. 353; Winheim v. Field, 107 Ill. App. 145; Chicago, etc., R. Co. v. Carroll, 5 Ill. App. 201; Chicago, etc., R. Co. v. Lewis, 145 Ill. 67, 58 Am. & Eng. R. Cas. 126; Chicago, etc., R. Co. v. Arnol, 144 Ill. 261, 58 Am. & Eng. R. Cas. 411; Chicago, etc., R. Co. v. George, 19 Ill. 510, 71 Am. Dec. 239; Chicago, etc., R. Co. v. Gretzner, 46 Ill. 74; Chicago City R. Co. v. Engel, 35 Ill. App. 490; West Chicago St. R. Co. v. Martin, 47 Ill. App. 610; Chicago, etc., R. Co. v. Pillsbury, 123 Ill. 9, 5 Am. St. Rep. 483; North Chicago St. R. Co. v. Cook, 145 Ill. 551.

Ind.—Indianapolis St. Ry. Co. v. Brown, 32 Ind. App. 130, 69 N. E. 407; Crump v. Davis (Ind. App.), 70 N. E. 886; Louisville, etc., R. Co. v. Pedigo, 108 Ind. 481, 27 Am. & Eng. R. Cas. 310; Jeffersonville R. Co. v. Hendricks, 26 Ind. 228; Thayer v. St. Louis, etc., R. Co., 22 Ind. 26, 85 Am. Dec. 409; Gillenwater v. Madison, etc., R. Co., 5 Ind. 339, 61 Am. Dec. 101; Louisville, etc., R. Co. v. Snyder, 117 Ind. 435, 10 Am. St. Rep. 60, 37 Am. & Eng. R. Cas. 137; Terre Haute, etc., R. Co. v. Buck, 96 Ind. 346, 49 Am. Rep. 168; Grand Rapids, etc., R. Co. v. Ellison, 117 Ind. 234, 39 Am. & Eng. R. Cas. 480; Grand Rapids, etc., R. Co. v. Boyd, 65 Ind. 526.

Iowa.—Fitch v. Mason City, etc., Tract. Co. (Iowa), 100 N. W. 618;

Kellow v. Central Iowa R. Co., 68 Iowa, 470, 56 Am. Rep. 858, 21 Am. & Eng. R. Cas. 485; Moore v. Des Moines, etc., R. Co., 69 Iowa, 491, 27 Am. & Eng. R. Cas. 315; Bonce v. Dubuque St. R. Co., 53 Iowa, 278, 36 Am. Rep. 221; Raymond v. Burlington, etc., R. Co., 65 Iowa, 152, 18 Am. & Eng. R. Cas. 217.

Kan.—Chicago, etc., R. Co. v. Fisher, 49 Kan. 460.

Ky.—Chesapeake, etc., R. Co. v. Jordan, 25 Ky. Law Rep. 574, 76 S. W. 145; Louisville City R. Co. v. Weams, 80 Ky. 420; Sherley v. Billings, 8 Bush (Ky.), 147, 8 Am. Rep. 451; Louisville Southern R. Co. v. Minogue, 90 Ky. 369, 29 Am. St. Rep. 378.

La.—Lehman v. Louisiana Western R. Co., 37 La. Ann. 705.

Me.—Libby v. Maine Cent. R. Co., 85 Me. 34, 58 Am. & Eng. R. Cas. 81; Knight v. Portland, etc., R. Co., 56 Me. 234, 96 Am. Dec. 449.

Md.—Baltimore, etc., Turnpike Co. v. Leonhardt, 66 Md. 449, 12 Am. & Eng. R. Cas. 149; Philadelphia, etc., R. Co. v. Anderson, 72 Md. 519, 20 Am. St. Rep. 483, 44 Am. & Eng. R. Cas. 345; Baltimore, etc., R. Co. v. Breinig, 25 Md. 378, 90 Am. Dec. 49; Baltimore, etc., R. Co. v. State, 63 Md. 135, 21 Am. & Eng. R. Cas. 202; Stockton v. Frey, 4 Gill (Md.), 406, 45 Am. Dec. 138.

Mass.—White v. Fitchburg R. Co., 136 Mass. 321, 18 Am. & Eng. R. Cas. 140; Dodge v. Boston, etc., Steamship Co., 148 Mass. 207, 12 Am. St. Rep. 541; McElroy v. Nashua, etc., R. Co., 4 Cush. (Mass.) 400, 50 Am. Dec. 794.

Mich.—Grand Rapids, etc., R. Co.

with the character and mode of conveyance and the practicable operation of the road and existing conditions to safely carry and deliver its passengers, and for injuries resulting from a failure of

v. Huntley, 38 Mich. 537, 31 Am. Rep. 321; Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.

Minn.—Purcell v. St. Paul City R. Co., 48 Minn. 134; Oviatt v. Dakota Cent. R. Co., 43 Minn. 300.

Miss.—Chicago, etc., R. Co. v. Scurr, 59 Miss. 456, 42 Am. Rep. 373; Southern R. Co. v. Kendrick, 40 Miss. 374, 90 Am. Dec. 332.

Mo.—Magrane v. St. Louis, etc., R. Co., 183 Mo. 119, 81 S. W. 1158; Heyde v. St. Louis Transit Co., 102 Mo. App. 537, 77 S. W. 127; Tillman v. St. Louis Transit Co., 102 Mo. App. 553, 77 S. W. 320; Luckel v. Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035; Smith v. Chicago, etc., R. Co., 108 Mo. 243, 52 Am. & Eng. R. Cas. 483; O'Connell v. St. Louis Cable, etc., R. Co., 106 Mo. 482; Furnish v. Missouri Pac. R. Co., 102 Mo. 438, 22 Am. St. Rep. 781; Gilson v. Jackson Country H. R. Co., 76 Mo. 282; Leslie v. Wabash, etc., R. Co., 88 Mo. 50, 26 Am. & Eng. R. Cas. 229; Sawyer v. Hannibal, etc., R. Co., 37 Mo. 241, 90 Am. Dec. 382; Willmott v. Corrigan Consol. St. R. Co., 106 Mo. 535; Smith v. St. Louis, etc., R. Co., 69 Mo. 32, 33 Am. Rep. 434; Lemon v. Chanslor, 68 Mo. 340, 30 Am. Rep. 799; Huelsenkamp v. Citizens R. Co., 37 Mo. 537, 90 Am. Dec. 399; Waller v. Hannibal, etc., R. Co., 83 Mo. 608.

Mont.—Taillon v. Mears, 29 Mont. 161, 74 Pac. 421; Ryan v. Gilmer, 2 Mont. 518, 25 Am. Rep. 744.

Neb.—Spellman v. Lincoln Rapid Trans. Co., 36 Neb. 890, 38 Am. St. Rep. 753, 58 Am. & Eng. R. Cas. 297, 55 N. W. 270, 20 L. R. A. 316.

N. H.—Taylor v. Grand Trunk R.

Co., 48 N. H. 304, 2 Am. Rep. 229; Bennet v. Dutton, 10 N. H. 481; Moses v. Boston, etc., R. Co., 24 N. H. 71, 55 Am. Dec. 222.

N. J.—Delaware, etc., R. Co. v. Daily, 37 N. J. L. 256; Klein v. Jewett, 26 N. J. Eq. 474, 27 N. J. Eq. 550.

N. C.—Lambeth v. North Carolina R. Co., 66 N. C. 494, 8 Am. Rep. 508.

Pa.—Fredericks v. Northern Cent. R. Co., 157 Pa. St. 103, 58 Am. & Eng. R. Cas. 91; Laing v. Colder, 8 Pa. St. 479, 49 Am. Dec. 533; Comroy v. Pennsylvania R. Co., 1 Pittsb. (Pa.) 440; New York, etc., R. Co. v. Dougherty, 11 W. N. C. (Pa.) 437, 6 Am. & Eng. R. Cas. 139; Pennsylvania R. Co. v. Peters, 116 Pa. St. 206; Philadelphia, etc., R. Co. v. Anderson, 94 Pa. St. 351, 39 Am. Rep. 787.

Ohio.—Cleveland, etc., R. Co. v. Manson, 30 Ohio St. 451.

R. I.—Boss v. Providence, etc., R. Co., 15 R. I. 149, 21 Am. & Eng. R. Cas. 364.

S. C.—Renneker v. South Carolina R. Co., 20 S. C. 219.

Tenn.—East Tennessee, etc., R. Co. v. Mitchell, 11 Heisk. (Tenn.) 400.

Tex.—Houston Electric R. Co. v. Nelson (Tex. Civ. App.), 77 S. W. 978; Hardin v. Fort Worth, etc., R. Co. (Tex. Civ. App.), 77 S. W. 431; Missouri, etc., R. Co. v. Mitchell (Tex. Civ. App.), 79 S. W. 94; Tyler v. Texas, etc., R. Co. (Tex. Civ. App.), 79 S. W. 1075; International, etc., R. Co. v. Shuford (Tex. Civ. App.), 81 S. W. 1189; International, etc., R. Co. v. Welch, 86 Tex. 203, 40 Am. St. Rep. 829; International, etc.,

duty in this regard it is liable.¹⁴ It would seem that a complete statement of the degree of care required must contain the elements

R. Co. v. Halloren, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744; Texas Pac. R. Co. v. Buckelew, 3 Tex. Civ. App. 272; Levy v. Campbell, (Tex.), 19 S. W. 438; Galveston City R. Co. v. Hewitt, 67 Tex. 473, 60 Am. Rep. 32; St. Louis, etc., R. Co. v. Finley, 79 Tex. 85; Texas, etc., R. Co. v. Davidson, 3 Tex. Civ. App. 542.

Va.—Richmond Tract. Co. v. Williams (Va.), 46 S. E. 292; Richmond City R. Co. v. Scott, 86 Va. 902, 44 Am. & Eng. R. Cas. 418; Farish v. Reigle, 11 Gratt. (Va.) 697, 62 Am. Dec. 666.

Wash.—Johnson v. Seattle Electric Co., 35 Wash. 382, 77 Pac. 677; Foster v. Seattle Electric Co., 35 Wash. 177, 76 Pac. 995; Denham v. Washington Water Power Co., 3 St. Ry. Rep. 879, and note, (Wash.) 80 Pac. 546.

W. Va.—Fisher v. West Virginia, etc., R. Co., 39 W. Va. 366, 58 Am. & Eng. R. Cas. 337; Gillingham v. Ohio River R. Co., 35 W. Va. 588, 29 Am. St. Rep. 827, 51 Am. & Eng. R. Cas. 222; Searle v. Kanawha, etc., R. Co., 32 W. Va. 370.

Eng.—Jackson v. Tollett, 2 Stark. 37, 3 E. C. L. 307; Crofts v. Waterhouse, 3 Bing. 319, 11 E. C. L. 119.

14. Keegan v. Third Ave. R. Co., 34 App. Div. (N. Y.) 297, 54 N. Y. Supp. 391, affd. 165 N. Y. 622, 59 N. E. 1124; Koehne v. New York, etc., R. Co., 32 App. Div. (N. Y.) 419, 52 N. Y. Supp. 1088, affd. 165 N. Y. 603, 58 N. E. 1089; Coddington v. Brooklyn, etc., R. Co., 102 N. Y. 66, 5 N. E. 797; Piper v. New York Cent., etc., R. Co., 156 N. Y. 224, 50 N. E. 851, 41 L. R. A. 724; Moseland v. Boston, etc., R. Co., 141 Mass.

31, 6 N. E. 225; Ingalls v. Bills, 9 Metc. (Mass.) 1; Metropolitan St. R. Co. v. Hanson, 1 St. Ry. Rep. 234, (Kan.) 72 Pac. 775; Citizens' St. Ry. Co. v. Merl, 134 Ind. 609, 33 N. E. 1014; Choquette v. Southern Elec. R. Co., 80 Mo. App. 515; West Chicago St. R. Co. v. Johnson, 180 Ill. 285, 54 N. E. 334; West Chicago St. R. Co. v. Nash, 64 Ill. App. 548; Citizens' Ry. Co. v. Craig (Tex. Civ. App.), 69 S. W. 239; Lincoln St. R. Co. v. McClelland, 54 Neb. 672, 74 N. W. 1074; North Chicago St. R. Co. v. Polkey, 1 St. Ry. Rep. 94, 203 Ill. 225, 67 N. E. 993; Topeka City R. Co. v. Higgs, 38 Kan. 375, 16 Pac. 667; Meier v. Pennsylvania R. Co., 64 Pa. St. 225; Bosqui v. Sutro Ry. Co., 131 Cal. 390, 63 Pac. 682; Houston, etc., R. Co. v. Iseo (Tex. Civ. App.), 60 S. W. 313; Chicago City R. Co. v. Morse, 98 Ill. App. 662, affd. 197 Ill. 327, 64 N. E. 304; West Chicago St. R. Co. v. Kromshinskey, 185 Ill. 92, 56 N. E. 1110; Kane v. Cicero, etc., R. Co., 100 Ill. App. 181; Hansen v. New Jersey St. Ry. Co., 64 N. J. L. 686, 46 Atl. 718; Holmes v. Ashtabula R. T. Co., 10 O. C. D. 638; Grace v. St. Louis R. Co., 156 Mo. 295, 56 S. W. 1121; Central of Georgia Ry. Co. v. Lippman, 110 Ga. 665, 36 S. E. 202; Mayor v. Oregon Short Line Co., 21 Utah, 141, 59 Pac. 522; Galligan v. Old Colony St. R. Co., 182 Mass. 211, 65 N. E. 48; Smedley v. Hestonville, etc., R. Co., 184 Pa. St. 620, 39 Atl. 544, 9 Am. & Eng. R. Cas. (N. S.) 649, 42 W. N. C. 169; Baltimore City Pass. R. Co. v. Nugent, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161; Scott v. Bergen Co. Tract. Co., 64 N. J. L. 362, 48 Atl. 1118, affd. 63 N. J. L. 407, 43 Atl.

of reasonableness and practicability, and have reference to the subject matter, to permit of general application.¹⁵ This rule is applicable, not only with respect to those results which are naturally to be apprehended from unsafe roadbeds, defective machinery, im-

1060; East Omaha St. Ry. Co. v. Godola, 50 Neb. 960, 70 N. W. 491, 7 Am. & Eng. R. Cas. (N. S.) 300; Illinois Cent. R. Co. v. Davidson, 76 Fed. 517, 46 U. S. App. 360, 22 C. C. A. 306; Parker v. Metropolitan St. R. Co., 69 Mo. App. 54; Payne v. Spokane St. R. Co., 15 Wash. 522, 46 Pac. 1054; Posch v. Southern El. R. Co., 76 Mo. App. 601, 2 Mo. App. Rep. 10; McCurrier v. Southern Pac. R. Co., 122 Cal. 558, 5 Am. Neg. Rep. 117, 55 Pac. 324, 12 Am. & Eng. R. Cas. (N. S.) 170; Reynolds v. Richmond & M. R. Co., 92 Va. 400, 23 S. E. 770; Texas & P. R. Co. v. Orr (Tex. Civ. App.), 31 S. W. 696; Louisville R. Co. v. Parke, 96 Ky. 580, 29 S. W. 455; O'Connell v. St. Louis Cable, etc., R. Co., 106 Mo. 482, 17 S. W. 494; Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 45 Am. & Eng. R. Cas. 500, 9 So. 722; Central R. Co. v. Smith, 74 Md. 212, 21 Atl. 706; Montgomery El. R. Co. v. Mallett, 92 Ala. 209, 9 So. 363; Southern Kansas R. Co. v. Walsh, 45 Kan. 653, 4 Am. R. Corp. Rep. 231, 47 Am. & Eng. R. Cas. 493, 26 Pac. 45; Citizens' St. R. Co. v. Twiname, 111 Ind. 587, 13 N. E. 55; Holley v. Atlanta St. Ry. Co., 61 Ga. 215; Wanzer v. Chippewa Val. Elec. R. Co., 108 Wis. 319, 84 N. W. 423.

They are liable for an injury caused by the failure to exercise such care, although the negligence or misconduct of another passenger in ringing the bell as a signal for starting the car contributed to the injury. Nichols v. Lynn & B. R. Co., 163 Mass. 528, 47 N. E. 427; Pray v. Omaha St. Ry. Co., 5 Am. Electl. Cas.

407, 44 Neb. 167, 11 Am. R. & Corp. Rep. 522, 48 Am. St. Rep. 717, 62 N. W. 447. See also as to rule stated in the text, Carli v. Interstate Consol. St. R. Co. (R. I.), 51 Atl. 305; King v. Same (R. I.), 51 Atl. 301; Le Blanc v. Sweet, 107 La. 355, 31 So. 766; Davis v. Paducah Ry. & L. Co., 24 Ky. L. Rep. 135, 68 S. W. 140; Citizens St. R. Co. v. Jolly, 1 St. Ry. Rep. 157, (Ind.) 67 N. E. 935.

But carriers of passengers are not required to make it impossible for passengers to expose themselves to danger, nor is the company required to adopt any particular method of construction; and whether the manner of construction is proper or not is not a question to be submitted to a jury. Merchant v. South Chicago City Ry. Co., 104 Ill. App. 122.

Operators of elevators.—The Supreme Court of Rhode Island, in Edwards v. Manufacturing Building Company (R. I.), 61 Atl. 646, follows the decision of the New York Court of Appeals in Griffin v. Manice, 166 N. Y. 197, that a landlord who maintains an elevator in his private building for the use of tenants and their employees and customers is not a common carrier, nor bound to the same degree of care as that imposed upon a common carrier, but is bound only to exercise reasonable care for the safety of those who enter upon his premises and use the elevator. See chap. 2, § 42.

15. West Chicago St. R. Co. v. Winters, 107 Ill. App. 221; Unger v. Forty Second St., etc., R. Co., 51 N. Y. 497.

perfect cars, and other conditions endangering the success of the undertaking, but also to the selection of its employes by the company and to the conduct of the agents and servants of the corporation in the operation of the road.¹⁶ In the use of motive power like electricity, power of such dangerous possibilities, it should be a very high degree of care.¹⁷ The carrier and its servants in any case are bound to use a degree of care commensurate with the circumstances of the case, as they appear or can be observed with the use of ordinary care, or such care and foresight as is reasonably practicable.¹⁸ They must use a high degree of care to protect their passengers from dangers that should be anticipated in the absence of due care.¹⁹ The exposure of a passenger to danger

16. Stierle v. Union R. Co., 156 N. Y. 70, 5 N. Y. Ann. Cas. 326, 50 N. E. 419, 156 N. Y. 684; Dallas Consol. Elec. R. Co. v. Broadhurst, 68 S. W. 315, 28 Tex. Civ. App. 630; Hansberger v. Sedalia El., etc., Co., 82 Mo. App. 566; Bosqui v. Sutro R. Co., 131 Cal. 390, 63 Pac. 682; Macon Consol. St. R. Co. v. Barnes, 113 Ga. 212, 38 S. E. 756; Kird v. New Orleans & N. W. R. Co., 105 La. Ann. 226, 29 So. 729; Chicago & A. R. Co. v. Dumser, 161 Ill. 190, 43 N. E. 698; Hamilton v. Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860; Levy v. Campbell (Tex.), 19 S. W. 438; McAllister v. People's Ry. Co. (Del.), 54 Atl. 743. If the injury would not have occurred if two men instead of one had managed the car, the company has been held liable. Redfield v. Oakland Consol. St. R. Co., 110 Cal. 277, 42 Pac. 822, 1063.

A livery stable keeper, who lets a conveyance for a special journey, and furnishes a driver therefor, is merely a private carrier for hire, and is bound only to exercise that degree of care and skill in the selection of a vehicle, team and driver which a prudent man would bestow in such a matter, and is not liable for in-

juries caused to a person in the vehicle by negligent driving. McGregor v. Gill (Tenn.), 86 S. W. 318. Livery stable keepers are not within the rule that common carriers of passengers are bound to exercise extraordinary care for the safety of their passengers. Stanley v. Steele (Conn.), 69 L. R. A. 561, 60 Atl. 640.

17. Leonard v. Brooklyn Heights R. Co., 57 App. Div. (N. Y.) 125, 67 N. Y. Supp. 985; Denver Tramway Co. v. Reid, 4 Am. Electl. Cas. 332, 4 Colo. App. 53, 35 Pac. 269.

18. Regensburg v. Nassau Elec. R. Co., 69 N. Y. Supp. 147, 58 App. Div. (N. Y.) 566; Feary v. Metropolitan St. Ry. Co., 62 S. W. 452, 162 Mo. 75; Freeman v. Metropolitan St. R. Co., 95 Mo. App. 94, 314, 68 S. W. 452, 1057; Merrill v. Metropolitan St. Ry. Co. (N. Y.), 73 App. Div. 401, 77 N. Y. Supp. 122. In approaching any place of danger as in attempting to run its cars through a mob, it is the duty of a common carrier to use the utmost care to protect its passengers from injury, Bosworth v. Union R. Co., 1 St. Ry. Rep. 757, 55 Atl. 490.

19. Hansen v. North Jersey St. R. Co., 46 Atl. 718, 64 N. J. L. 686.

which the exercise of reasonable foresight would have anticipated, and due care have avoided, is negligence on the part of the carrier.²⁰ The degree of care required in any case must have reference to the conditions existing. It has been held that the utmost care and diligence which human skill and foresight suggest are required of a street railway company for the protection of its passengers, when the conditions are such as call for that degree of care and diligence.²¹ The situation and circumstances surrounding the car at different times and places, the amount of traffic on the streets and on the cars, the danger to be encountered in operating the cars over the particular route or place, the rate of speed, and the motive power in use, are all to be taken into consideration. The fact that, except in boarding the car, alighting therefrom, and in taking and occupying a place therein, the passenger is unable to look out for himself, is also among the circumstances to be considered.²² The care and skill required in the operation of street cars drawn by horses is not as great as that required in the management of electric or cable cars propelled at a much higher rate of speed.²³ A horse railroad company must, however, use reason-

20. Reem v. St. Paul City Ry. Co.,
77 Minn. 503, 80 N. W. 638.

21. Keegan v. Third Ave. R. Co.,
34 App. Div. (N. Y.) 297, 54 N. Y. Supp. 391; as, for example, where the car is followed at a distance of a very few feet by a truck proceeding rapidly and confined to the car track by the presence of vehicles on either side, the conductor of the car is bound to exercise a high degree of care in requiring a passenger to leave it, Maverick v. Eight Ave. R. Co., 36 N. Y. 378; Faris v. Brooklyn City & N. R. Co., 46 App. Div. (N. Y.) 231, 61 N. Y. Supp. 670; Schenkel v. Pittsburg & B. Tract. Co., 194 Pa. St. 182, 44 Atl. 1072; or, where it is approaching a steam railroad crossing, Coddington v. Brooklyn C. T. R. Co., 102 N. Y. 66, 5 N. E. 797; or, at a street crossing where a runaway team might have been seen, Regensburg v. Nassau Elec. R. Co., 58 App. Div. (N. Y.) 566, 59 N. Y.

Supp. 147; West Chicago St. R. Co. v. Manning, 170 Ill. 417, 48 N. E. 958, 9 Am. & Eng. R. Cas. (N. S.) 364; Knauff v. San Antonio Tract. Co. (Tex. Civ. App.), 70 S. W. 1011; Osgood v. Los Angeles Tract. Co., 137 Cal. 280, 70 Pac. 169, California Civ. Code declares that a carrier of persons must use the "utmost" care and diligence for their carriage, but it is not error to charge that they must use "the highest degree of care."

22. Palmer v. Winona Ry. & Light Co., 80 N. W. 869, 78 Minn. 138; Seelig v. Metropolitan St. Ry. Co., 18 Misc. Rep. (N. Y.) 383, 41 N. Y. Supp. 656.

23. Cogswells v. West. St., etc., Elec. R. Co., 4 Am. Electl. Cas. 412, 5 Wash. 46, 52 Am. & Eng. R. Cas. 500, 31 Pac. 411; Stierle v. Union Ry. Co., 156 N. Y. 70, 684, 50 N. E. 419, 834; Dickert v. Salt Lake City R. Co., 20 Utah 394, 59 Pac. (Utah) 95.

able care in selecting horses, and must take reasonable steps to ascertain whether the horses are safe for such use.²⁴ The employes of a street car company are bound to exercise greater care where a passenger is forced to ride upon the step of the car, because he cannot find a seat in the car.²⁵ A carrier does not owe to every passenger precisely the same care, without respect to age, sex, or bodily infirmity.²⁶ If a passenger is evidently crippled, infirm, or very young, the duty of the carrier towards him must be performed with due regard to such apparent condition.²⁷ A sick or aged person, a delicate woman, a lame man, or a child, is entitled to more attention and care from a carrier than one in good health and under no disability. They are entitled to more time in which to get on and off the car; they are entitled to more consideration when crossing a street, to the end that the cars shall not run over them. All these classes are entitled to use the street and to ride in the cars; and such haste in starting up, or such speed in running the car as would be reasonable care toward others, might well be carelessness and negligence toward them.²⁸ The fact that a passenger is intoxicated will not excuse a carrier from using the same degree of care towards him as towards other passengers; that is only to be considered on a question of his contributory negligence.²⁹ But the carrier is not required to exercise that high degree of care which is required of it in the actual transportation of the passenger in respect to all incidents connected therewith, but only reasonable care, to be measured by the circumstances surrounding each case, is all that is demanded. For example, in the case of injury to a passenger caused by the falling upon him of

24. *Noble v. St. Joseph, etc., St. R. Co.*, 98 Mich. 249, 57 N. W. 126.

25. *Kinkade v. Atlantic Ave. R. Co.*, 9 Misc. Rep. (N. Y.) 275, 29 N. Y. Supp. 724.

26. *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266; *Cleveland, etc., R. Co. v. Manson*, 30 Ohio St. 451.

27. *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 283, 14 S. W. 760.

28. *Sheridan v. Brooklyn City, etc., R. Co.*, 36 N. Y. 39, 93 Am. Dec. 490; *Willetts v. Buffalo, etc., R. Co.*,

14 Barb. (N. Y.) 585; *Louisville, etc., R. Co. v. Fleming*, 14 Lea (Tenn.) 128, 18 Am. & Eng. R. Cas. 347; *East Line, etc., R. Co. v. Rushing*, 69 Tex. 306, 34 Am. & Eng. R. Cas. 367.

29. *Milliman v. New York Cent., etc., R. Co.*, 4 Hun (N. Y.) 409, 6 T. & C. (N. Y.) 585, affd. 66 N. Y. 642; *Strand v. Chicago, etc., R. Co.*, 67 Mich. 380, 31 Am. & Eng. R. Cas. 54; *Fisher v. West Virginia, etc., R. Co.*, 39 W. Va. 366, 58 Am. & Eng. R. Cas. 337.

an article placed in a rack over his seat by another passenger;³⁰ an injury caused to a passenger by being jostled and thrown down, when he was about to leave the car, by other passengers who were entering;³¹ and in duties touching the convenience or accommodation of passengers while awaiting the departure of trains at the station or usual places of departure.³² When an injury occurs from causes beyond the control of the carrier and to which neither the negligence of the carrier, nor those employed by it contributed, by reason of inevitable accident, *vis major*, or an act of God, the carrier is relieved from responsibility.³³

§ 23. Management of conveyance —Sudden jerks and jolts.—The sudden jerking of a train backward or forward while passengers are rightfully passing out of the cars is evidently liable to produce accidents, and under such circumstances is a negligent act.³⁴ The sudden stoppage of a train with such violence as to throw a passenger through an open door is *prima facie* negligence.³⁵ But while it is the duty of a carrier operating a passenger or mixed train to use the highest degree of care practicable in the operating of such trains, it is not responsible for injuries to a passenger from jerks and bumpings of the cars, usually incidental to such trains when operated with such care.³⁶ A passenger

30. Morris v. New York Cent., etc., R. Co., 106 N. Y. 678, 11 St. Rep. (N. Y.) 204.

31. Buck v. Manhattan R. Co., 15 Daly (N. Y.) 550.

32. Central R., etc., Co. v. Perry, 58 Ga. 461.

33. Carroll v. Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221; Kansas Pac. R. Co. v. Miller, 2 Colo. 442; Higgins v. Cherokee R. Co., 73 Ga. 149; Murphy v. Atlanta, etc., R. Co., 89 Ga. 832; Topeka City R. Co. v. Higgs, 38 Kan. 375, 5 Am. St. Rep. 754, 34 Am. & Eng. R. Cas. 529; Gillespie v. St. Louis, etc., R. Co., 6 Mo. App. 454.

34. Sauter v. New York Cent., etc., R. Co., 66 N. Y. 50, 23 Am. Rep. 18; Milliman v. New York Cent., etc., R. Co., 66 N. Y. 643; Wood v. Lake

Shore, etc., R. Co., 49 Mich. 370; Smith v. Chicago, etc., R. Co., 108 Mo. 243, 52 Am. & Eng. R. Cas. 483; Detroit, etc., R. Co. v. Curtis, 23 Wis. 152, 99 Am. Dec. 141; Kentucky, etc., Bridge Co. v. Quinkert, 2 Ind. App. 244; Nance v. Carolina Cent. R. Co., 94 N. C. 619; Cincinnati, etc., R. Co. v. Cooper, 120 Ind. 469; Ilges v. St. Louis Transit Co., 102 Mo. App. 529, 77 S. W. 93.

35. Moorman v. Atchison, etc., R. Co. (Mo. App.), 78 S. W. 1089; Condy v. St. Louis, etc., R. Co., 13 Mo. App. 588, 85 Mo. 79.

36. Illinois Cent. R. Co. v. Vinson, 25 Ky. L. Rep. 38, 652, 74 S. W. 671, 76 S. W. 167; Saxton v. Missouri Pac. R. Co., 98 Mo. App. 494, 72 S. W. 717; Portuchek v. Wabash R. Co. (Mo. App.), 74 S. W. 368; Erwin v.

who voluntarily seeks to be transported on a freight train takes the risk of the usual and necessary jolts and jars which occur in the operation of such train, but the carrier is not relieved from the use of the highest diligence to prevent unusual and unnecessary jolts and jars.³⁷ A street railway company is not chargeable with negligence, where a passenger falls off the car as it was passing in its ordinary motion, jolting over another railroad track at a cross street.³⁸ But where plaintiff took passage on a street car which was so crowded that he was compelled to stand on the rear platform and hold on by the hand rail and the conductor accepted his fare while in this position, and, without notice to plaintiff, the car was driven around a curve in the track without slackening speed, in violation of a rule of the company requiring the speed to be reduced one-half in rounding curves, and plaintiff was violently thrown from the car and injured, such facts were sufficient to establish negligence on the part of the carrier entitling plaintiff to recover for his injuries.³⁹ In the management of a street car a sudden and violent stopping of such car, unless it is unusual in

Kansas, etc., R. Co. (Mo. App.), 68 S. W. 88. As to freight trains see Southern R. Co. v. Vandergriff (Tenn.), 64 S. W. 481; Wait v. Omaha, etc., R. Co., 165 Mo. 612, 65 S. W. 1028; Cincinnati, etc., R. Co. v. Jackson, 22 Ky. L. Rep. 630, 58 S. W. 526, a sudden movement of the train does not evidence negligence, in the absence of any thing to show that the movement was unusual, or was caused by any unnecessary force applied to the brakes.

37. Central of Ga. R. Co. v. Lippman, 110 Ga. 665, 36 S. E. 202; Garland v. Southern R. Co., 111 Ga. 852, 36 S. E. 595. Where plaintiff was injured by being thrown from an engine where he had been directed to ride by a brakeman to whom he had paid a sum less than the fare for such privilege, and claimed that the engineer had invited him to climb over the tender into the cab, and that he was thrown by reason of the engineer's negligent act in causing the jerk of

the engine, the engineer was bound, if he saw plaintiff, and knew his perilous position, to use ordinary care to avoid doing any act which would probably result in injury to plaintiff, though such act was usual in the operation of the train. Claiborne v. Missouri, etc., R. Co., 21 Tex. Civ. App. 648, 57 S. W. 336. See also Macon, etc., R. Co. v. Moore, 108 Ga. 84; Currie v. Mendenhall, 77 Minn. 179; Scott v. Bergen Co. Tract. Co., 63 N. J. L. 407.

38. Barry v. Union Tract. Co., 194 Pa. St. 576, 45 Atl. 321. See Birmingham Ry., etc., Co. v. James, 121 Ala. 120; Kennon v. Railroad Co., 51 La. Ann. 1599; Bartley v. Railway Co., 148 Mo. 124.

39. Gaten v. Metropolitan St. R. Co., 89 App. Div. (N. Y.) 311, 85 N. Y. Supp. 967. See also Lynn v. Southern Pac. R. Co., 103 Cal. 7, 24 L. R. A. 710, 36 Pac. 1018; Brusch v. Railway Co., 52 Minn. 510, 55 N. W. 57.

degree and caused by some defect in the car or in the track, or by some unusual or dangerous rate of speed, furnishes no evidence of negligence on the part of the company.⁴⁰ A passenger on a street car, who was injured by being thrown to the ground by the lurch of the car in passing from the main track to a switch track, cannot recover therefor where there is no evidence that the injury was due to any defect in the car or the track, or that the speed was unusual or dangerous, or that the jar was unusual, since such motion of the car is not sufficient to show negligence.⁴¹ Where a street car passenger, intending to alight, leaves his seat and places himself on the step while the car is in motion and slowing up as if about to stop to let off passengers at a crossing, and while the conductor is in the front part of the car collecting fares and in such a position as not to see the passenger, and he is thrown off and injured by the sudden increase of the speed of the car before he had indicated to the conductor that he intends to alight, such acceleration of speed unaccompanied by any other fact except that the conductor, in order to perform his duty of collecting fares, has placed himself in a position where he cannot see the passenger as he intends to alight, is not a foundation for a charge of actionable negligence, and, when nothing more is alleged or claimed in plaintiff's opening statement the complaint is properly dismissed.⁴² Where a passenger on a street car was thrown off by the sudden stopping of the car in an effort to avoid a collision, and by the shock of the collision which was not brought about by the negligence of the defendant, it was *damnum absque injuria*.⁴³ Where

40. Chicago City Ry. Co. v. Morse, 98 Ill. App. 662, aff'd 64 N. E. 304, 197 Ill. 327. See also Hoffman v. Third Ave. R. Co., 45 App. Div. (N. Y.) 568, 61 N. Y. Supp. 590.

41. Byron v. Lynn & B. R. Co., 177 Mass. 303, 58 N. E. 1015, such motions of street cars are of common and frequent occurrence and are to be expected to a greater or less degree whenever the car passes from one track to another, and so are of the class of usual unavoidable incidents to the use of cars upon the street.

42. Sims v. Metropolitan St. Ry.

Co., 65 App. Div. (N. Y.) 270, 72 N. Y. Supp. 835. The mere fact that while a street car is rounding a curve a passenger is injured by reason of another passenger being thrown upon her is insufficient, in the absence of excessive speed or of the application of more power than necessary to round the curve, to justify a recovery against the company for the injuries thus received. Merrill v. Metropolitan St. Ry. Co., 77 N. Y. Supp. 122, 73 App. Div. (N. Y.) 401.

43. Cleveland City Ry. Co. v. Osborn, 66 Ohio St. 45, 63 N. E. 604.

plaintiff, two years and nine months old, was thrown down by the starting of a street car before she had time to be seated, and while for the moment out of the reach of her attendant, it was not error to refuse to charge that the starting of the car before a passenger is seated is not negligence.⁴⁴ But a street railway may be held negligent where the driver, without warning, struck his horses, a spirited team, starting the car with a sudden jerk, causing a passenger on the crowded front platform to lose his hold, and throwing him to the ground.⁴⁵ In order to recover from a cable railroad it is not enough to show that there was a jerk, but it must affirmatively appear that the jerk was an extraordinary or unusual one, or attributable to a defect in the track, an imperfection in the car or apparatus, or to a dangerous rate of speed, or to unskillful handling of the car by the gripman.⁴⁶ It has been held, however, that the occurrence of a sudden lurch or jerk of a street car, of sufficient violence to throw a passenger off the platform, who was there preparing to alight, and awaiting the stoppage of the car for that purpose, justified an inference of a breach of duty upon the part of those operating the car, within the maxim "*Res ipsa loquitur.*"⁴⁷ Where the testimony of the plaintiff is to the effect that he was injured in attempting to alight from a trolley car

44. *Herbich v. North Jersey St. Ry. Co.*, 67 N. J. L. 574, 52 Atl. 357. See also *Harty v. New York, etc., R. Co.*, 3 St. Ry. Rep. 712, 95 App. Div. (N. Y.) 119, 88 N. Y. Supp. 422, as to passengers thrown down by sudden lurch of car.

45. *Eberhardt v. Metropolitan St. Ry. Co.*, 69 App. Div. (N. Y.) 560, 75 N. Y. Supp. 46, affd. 174 N. Y. 522, 66 N. E. 1107.

46. *Bartley v. Metropolitan St. Ry. Co.*, 148 Mo. 124, 49 S. W. 840. See also *Adams v. Washington & G. R. Co.*, 9 App. D. C. 34; *Weaver v. Washington & G. R. Co.*, 3 App. D. C. 436; *Hayes v. Forty-second St., etc., R. Co.*, 97 N. Y. 259; *Stager v. Ridge Ave. R. R. Co.*, 119 Pa. St. 70, 17 Atl. 821; *Mitchell v. Railway Co.*, 51 Mich. 236; *Holland v. West End Ry. Co.*, 155 Mass. 387, 29 N. Y. 622;

Stewart v. Railroad Co., 146 Mass. 605, 16 N. E. 466. The car upon which the plaintiff was riding was moving along in an ordinary way when the speed slackened, and the plaintiff who was standing near the edge of the rear platform, not holding on to anything, and with one hand in his pocket, was thrown from the car and sustained the injuries complained of. It was held that the negligence of the defendant was not proved, in the absence of proof of a defect in the car or in the rails, *Timms v. Old Colony St. Ry. Co.*, 1 St. Ry. Rep. 301, (Mass.) 66 N. E. 797.

47. *Scott v. Bergen Co. Tract. Co.*, (N. J.), 48 Atl. 1118, affg. 63 N. J. L. 407, 43 Atl. 1060; *Consol. Tract. Co. v. Thalheimer*, 59 N. J. L. 474, 37 Atl. 132.

which had suddenly started and threw him to the ground, and on the other hand witnesses for the defendant testified that the conductor in charge carefully assisted the plaintiff to the ground, and that after he had alighted he staggered and fell into the gutter, it is for the jury to determine which theory as to how the accident occurred was true.⁴⁸

§ 34. Duty of carrier to announce stations.—It has been held in New York that, although a different custom may prevail on rapid transit or elevated railroads, it has never been understood to be the duty of a steam surface railroad company to expressly warn its passengers of the starting or of the stopping of trains.⁴⁹ But other authorities have expressly held that when a railroad, as a common carrier, for compensation, receives a person on its passenger train as a passenger, it thereby assumes the obligation of active vigilance and great care to safely transport such passenger to his place of destination, and, when he arrives there, it is the duty of the railroad to announce that fact in the car in which he is, or to give him personal notice of the fact.⁵⁰ The same rule is maintained in other States, where it is held that the liability of a railroad company, as a common carrier, for the safety of passengers ceases after they have been made aware of their arrival at their place of destination, and have had a reasonable time to get off the train, and the company is liable for actual damages for failing to announce or give notice in some way of the station, and to stop its train long enough for a passenger to get off with safety.⁵¹

48. Miller v. South Covington & C. St. Ry. Co., 1 St. Ry. Rep. 246, 25 Ky. L. Rep. 207, 74 S. W. 747.

49. Mearns v. Central R. Co., 163 N. Y. 108, *distinguished* in Willis v. Metropolitan St. Ry. Co., 63 App. Div. (N. Y.) 332, 71 N. Y. Supp. 554; Lobsenz v. Metropolitan St. Ry. Co., 72 App. Div. (N. Y.) 181, 76 N. Y. Supp. 411, in applying the proposition to street railroads.

50. Mahar v. New York Cent., etc., R. Co., 5 App. Div. (N. Y.) 22, 39 N. Y. Supp. 63; Dickens v. New York Cent. R. Co., 1 Keyes (N. Y.) 23, 1 Abb. App. Dec. (N. Y.) 504;

Keller v. New York Cent. R. Co., 2 Abb. App. Dec. (N. Y.) 480.

51. Houston, etc., R. Co. v. Kohn, 22 Tex. Civ. App. 11, 53 S. W. 698, but it need not give passengers personal notice that their station is reached; Imhoff v. Chicago, etc., R. Co., 20 Wis. 344; Dorrah v. Illinois Cent. R. Co., 65 Miss. 14, 7 Am. St. Rep. 629, 3 So. 36; Louisville, etc., R. Co. v. Mask, 64 Miss. 738; Dawson v. Louisville, etc., R. Co. (Ky.) 11 Am. & Eng. R. Cas. 134; Lehman v. Louisiana Western R. Co., 37 La. Ann. 705; Southern R. Co. v. O'Bryan, 115 Ga. 659, 42 S. E. 42. A rail-

The announcement by the conductor or brakeman of the station the train is approaching is the customary warning to passengers that the train is nearing the station, in order that they may get ready to alight. When a station is called the passengers have a right to infer that the first stop of the train will be at such station,⁵² and when the train is stopped it is an invitation to the passengers to alight, and the carrier is thereby charged with the duty of using due care to provide a proper place and safe means for the passengers to alight, and for a failure to do so the carrier will be liable for any injury caused thereby.⁵³ Where a brakeman or conductor has announced the name of the station on the approach of a train, and the train makes its next stop short of or beyond the station, such fact should be announced before the passengers at-

road company is not negligent as a matter of law, in failing to announce the arrival of trains at stations in the absence of a statute requiring it. Houston, etc., R. Co. v. Goodyear (Tex. Civ. App.), 66 S. W. 862,

52. Lent v. New York Cent., etc., R. Co., 120 N. Y. 467, 24 N. E. 653; McDonald v. Long Island R. Co., 116 N. Y. 546, 22 N. E. 1068; Taber v. Delaware, etc., R. C., 71 N. Y. 489; Central R. Co. v. Van Horn, 38 N. J. L. 133; Mitchell v. Chicago, etc., R. Co., 51 Mich. 236, 47 Am. Rep. 566, 18 Am. & Eng. R. Cas. 176; Smitson v. Southern Pac. R. Co. (Or.), 60 Pac. 910; Memphis, etc., R. Co. v. Stringfellow, 44 Ark. 322, 51 Am. Rep. 598, 21 Am. & Eng. R. Cas. 374; Ross v. Railroad Co., 15 R. I. 149, 1 Atl. 9; McDonald v. Railroad Co. (Iowa), 55 N. W. 102; Columbus, etc., R. Co. v. Farrell, 31 Ind. 408; Smith v. Georgia Pac. R. Co., 88 Ala. 538, 41 Am. & Eng. R. Cas. 143, 7 So. 119, 7 L. R. A. 323; Chicago, etc., R. Co. v. Arnol, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313; Devine v. Railroad Co. (Iowa), 69 N. W. 1042; Ward v. Railroad Co. (Ill. Sup.), 46 N. E. 365; Philadelphia, etc., R. Co. v. Mc-

Cormick, 124 Pa. St. 427; Blitch v. Central R. Co., 76 Ga. 333.

53. Boyce v. Manhattan Ry. Co., 118 N. Y. 314; McNulta v. Ensch, 134 Ill. 46; Taber v. Delaware, etc., R. Co., 71 N. Y. 489; McGee v. Missouri Pac. R. Co., 92 Mo. 218, 1 Am. St. Rep. 706; Pennsylvania R. Co. v. White, 88 Pa. St. 327; Philadelphia, etc., R. Co. v. Edelstein, 23 W. N. C. (Pa.) 342; Whittaker v. Manchester, etc., R. Co., L. R. 5 C. P. 464, note 3; Bridges v. North London R. Co., L. R. 6 Q. B. 377, L. R. 7 H. L. 213; Petty v. Great Western R. Co., L. R. 5 C. P. 461, note 1; Weller v. London, etc., R. Co., L. R. 9 C. P. 126. In some of the cases cited it was held to be a question for the jury whether there was an invitation to alight. But see Mitchell v. Chicago, etc., R. Co., 51 Mich. 236, 47 Am. Rep. 566; Minock v. Detroit, etc., R. Co., 97 Mich. 425, where a railroad company was held not liable for negligence in stopping, as required by law, a train approaching a station where there was a crossing of railroad tracks, before proceeding to cross the track, although the name of the station had just been called.

tempt to leave the train, and failure to do so is a neglect of duty, rendering the carrier liable for resulting injuries.⁵⁴

§ 35. Duty of carrier to stop at stations.—When a person purchases a ticket or boards a train, he should ascertain before getting on, whether such train will only stop at the principal stations or all of them or when, where, and how he can go and stop by such train, and if he boards one that is not accustomed to stop at the station to which he desires to go, and for which his ticket calls, he has no right to insist, in the absence of an agreement to stop, on the carrier changing the course of its business for his accommodation or convenience.⁵⁵ But it is gross disregard of the duty it owes a passenger for a railroad company not to bring a train to a full stop at a regular station to which it has sold a ticket, and give the passenger ample time and opportunity to alight,⁵⁶ or not to stop at each station advertised as a place for receiving and discharging passengers, and for or at which the carrier has sold a ticket, a sufficient length of time to receive and let off passengers with safety.⁵⁷ Mere checking of speed is not sufficient.⁵⁸ Passen-

54. Englehardt v. Erie R. Co., 209 Pa. 182, 58 Atl. 154. See also cases cited in last preceding note. Ellis v. Chicago, etc., R. Co., 120 Wis. 645, 98 N. W. 942.

55. Chicago, etc., R. Co. v. Randolph, 53 Ill. 510, 5 Am. Rep. 60; Beauchamp v. International, etc., R. Co., 56 Tex. 239, 9 Am. & Eng. R. Cas. 307; Lake Shore, etc., R. Co. v. Pierce, 47 Mich. 277, 3 Am. & Eng. R. Cas. 340; Martindale v. Kansas City, etc., R. Co., 50 Mo. 508; Gadsden, etc., R. Co. v. Causler, 97 Ala. 235, 58 Am. & Eng. R. Cas. 258; Texas, etc., R. Co. v. Ludlam, 57 Fed. 481; Little Rock, etc., R. Co. v. Miles, 40 Ark. 298, 48 Am. Rep. 10, 13 Am. & Eng. 10; Pittsburgh, etc., R. Co. v. Nuzum, 50 Ind. 141, 333, 3 Am. & Eng. R. Cas. 478; St. Louis, etc., R. Co. v. Rosenberry, 45 Ark. 256; St. Louis, etc., R. Co. v. Atchison, 47 Ark. 74; Ohio, etc., R.

Co. v. Applewhite, 52 Ind. 540; Atchison, etc., R. Co. v. Gants, 38 Kan. 608, 5 Am. St. Rep. 780, 34 Am. & Eng. R. Cas. 290; Duling v. Philadelphia, etc., R. Co., 66 Md. 120; Plott v. Chicago etc., R. Co., 63 Wis. 511; Logan v. Hannibal, etc., R. Co., 77 Mo. 663; Chicago, etc., R. Co. v. Bills, 104 Ind. 13.

56. Bucher v. New York Cent., etc., R. Co., 98 N. Y. 128; Filer v. New York Cent. R. Co., 49 N. Y. 51, 10 Am. Rep. 327; Raben v. Central Iowa R. Co., 73 Iowa, 579, 5 Am. St. Rep. 708; Texas, etc., R. Co. v. Bingham, 2 Tex. Civ. App. 278.

57. Wabash, etc., R. Co. v. Rector, 104 Ill. 296; Indianapolis, etc., R. Co. v. Birney, 71 Ill. 391; Sears v. Eastern R. Co., 14 Allen (Mass.) 433, 92 Am. Dec. 780; Poole v. Georgia R., etc., Co., 89 Ga. 320; Hawcroft v. Great Northern R. Co., 8 Eng. L. & Eq. 362, 16 Jur. 196; Denton v. Great

gers have a right to rely, until differently informed, on the information received by them from ticket agents as to the stoppages of trains,⁵⁹ but the carrier will not be bound by the statements of a ticket agent that the train will be stopped at a station which is not a regular stopping place for the train.⁶⁰ The carrier is not responsible if unable to stop its train at a station by reason of storms and tempests without the intervention of human agency, or other unavoidable accident.⁶¹ A railroad company is not required to stop a train at a station at which it is not scheduled to stop, or at a station where under its rules the train does not usually stop, in the absence of an agreement so to do.⁶² But it is negligence on the part of the railroad not to stop at a station where the regulations of the company require it to stop,⁶³ and it is not liable for not stopping at a station where under the rule the train is not required to stop.⁶⁴ A passenger failing to notify the conductor of his desire to get off at a flag station at which trains do not stop unless signaled cannot recover for being carried to the next station,⁶⁵ before

Northern R. Co., 5 El. & Bl. 860, 85 E. C. L. 860, 34 Eng. L. & Eq. 154.

The crowded condition of a train of cars for which the company alone is responsible is not a legal or just excuse for failure to stop the train at a station called for by the ticket of a passenger, for fear that still more passengers will get on board. *Hoyt v. Cleveland, etc., R. Co., 112 Mich. 638, 4 Det. L. N. 142, 71 N. W. 172, 29 Chic. L. N. 330, 9 Am. & Eng. R. Cas. N. S. 818.*

58. Montgomery, etc., R. Co. v. Stewart, 91 Ala. 421; Georgia R., etc., Co. v. McCurdy, 45 Ga. 288, 12 Am. Rep. 577.

59. Lake Shore, etc., R. Co. v. Pierce, 47 Mich. 277, 3 Am. & Eng. R. Cas. 340.

60. Pittsburgh, etc., R. Co. v. Nuzum, 60 Ind. 533; Marshall v. St. Louis, etc., R. Co., 78 Mo. 610; Ohio, etc., R. Co. v. Hatton, 60 Ind. 12.

61. Compton v. Long Island R. Co., 1 St. Rep. (N. Y.) 554; Freeman v. Detroit, etc., R. Co., 56 Mich.

577; Fitzgerald v. Midland R. Co., 34 L. T. N. S. 771.

62. Louisville, etc., R. Co. v. Miles, 100 Ky. 84, 18 Ky. L. Rep. 580, 37 S. W. 486; Evansville, etc., R. Co. v. Wilson, 20 Ind. App. 5, 50 N. E. 90; Atchison, etc., R. Co. v. Gants, 38 Kan. 608, 5 Am. St. Rep. 780, 34 Am. & Eng. R. Cas. 290; Plott v. Chicago, etc., R. Co., 63 Wis. 511, 22 Am. & Eng. R. Cas. 319; Sira v. Wabash R. Co., 115 Mo. 127, 37 Am. St. Rep. 386, 58 Am. & Eng. R. Cas. 538; Columbus, etc., R. Co. v. Powell, 40 Ind. 37.

63. Parker v. White, 27 New Bruns. 442; Burnett v. Great North, etc., R. Co., L. R. 10 App. 147, 54 L. J. Q. B. Div. 531, 53 L. T. N. S. 507, 24 Am. & Eng. R. Cas. 647.

64. Ohio, etc., R. Co. v. Applewhite, 52 Ind. 540; Wells v. Alabama, etc., R. Co., 67 Miss. 24; Turner v. London, etc., R. Co., L. R. 17 Eq. 561, 43 L. J. Ch. 430; Hood v. North Eastern R. Co., 19 W. R. 523.

65. Gulf, etc., R. Co. v. Ryan, 4

being called upon to exhibit his ticket.⁶⁶ A passenger in North Carolina who presents himself at a flag station a reasonable time before the arrival of the train for the purpose of procuring passage and by reason of the absence of the agent and the failure of the engineer to see his signal the train does not stop for him, is entitled to recover the actual damages sustained.⁶⁷ A railroad company is under no legal obligation to stop at a flag station short of the destination named in the ticket.⁶⁸ A railroad company is bound by an agreement made with its agent, having real or apparent authority to do so, to stop a train at a particular station,⁶⁹ or to stop at a point where there is no station.⁷⁰ And when the company so stops a train, a passenger taking or leaving the train has a right to assume that the company will not expose him to unnecessary danger and will provide him a safe passage to and from the train the same as at a regular station.⁷¹ But the fact that passengers have at different times taken advantage of the statutory stop at the crossing of another road to leave the train, without the direction or supervision of the company's agents will not bind the company to conduct and manage its trains at the crossing as at a station.⁷² Under statutes providing that all regular passenger trains shall stop at county seats, it has been held that a through express was a regular passenger train and that the statute is valid as a proper exercise of the police power of the State,⁷³ but the

Tex. App. Civ. Cas. § 305, 18 S. W. 866. But see St. Louis, etc., R. Co. v. Berryhill, 3 Tex. App. Civ. Cas., § 319.

66. Chattanooga, etc., R. Co. v. Lyon, 89 Ga. 16, 15 S. E. 24, 15 L. R. A. 857, 32 Am. St. Rep. 72, 52 Am. & Eng. R. Cas. 307.

67. Thomas v. Southern R. Co., 122 N. C. 1005, 30 S. E. 343.

68. Matthews v. Charleston, etc., R. Co., 38 S. C. 429, 37 Am. St. Rep. 773.

69. Louisville, etc., R. Co. v. Stacker, 86 Tenn. 343, 6 Am. St. Rep. 840; East Tennessee, etc., R. Co. v. Massengill, 15 Lea (Tenn.) 328. And see Humphries v. Illinois Cent. R. Co., 70 Miss. 453.

70. Western R. Co. v. Young, 51

Ga. 489, 7 Am. Ry. Rep. 352; Georgia R., etc., Co. v. McCurdy, 45 Ga. 288, 12 Am. Rep. 577; Louisville, etc., R. Co. v. Johnston, 79 Ala. 436; Hull v. East Line, etc., R. Co., 66 Tex. 619; Columbus, etc., R. Co. v. Powell, 40 Ind. 37; Wells v. Alabama, etc., R. Co., 67 Miss. 24.

71. Brassell v. New York Cent., etc., R. Co., 84 N. Y. 241; Pennsylvania R. Co. v. White, 88 Pa. St. 327; Baltimore, etc., R. Co. v. Kane (Md.), 17 Atl. 1032.

72. Louisville, etc., R. Co. v. Johnson, 44 Ill. App. 56.

73. Illinois Cent. R. Co. v. People, 143 Ill. 434; Chicago, etc., R. Co. v. People, 105 Ill. 657, 13 Am. & Eng. R. Cas. 42; People v. Louisville, etc., R. Co., 120 Ill. 48; Gladson v.

United States courts have held them to be ineffective to burden or impede interstate commerce.⁷⁴ A passenger who took a train which he should have known did not stop at his destination, and was carried by and compelled to pay fare for the additional distance, has no right of action against the company by reason of the conductor having taken up and punched his ticket after having told him that the train would not stop at the point named on the ticket.⁷⁵

§ 36. Warning of departure of trains.—To put a train in motion, without signal, whilst passengers are getting on and off, is an act of negligence whether such motion is in a backward or forward direction.⁷⁶ It is the duty of a railway professing to provide rapid transit, and making short stops at its stations, to give to intending passengers, for their safety, clear and intelligible signals indicating when it ceases to be safe or prudent to board the train.⁷⁷ Passengers are not bound to get on board until the call "All on board" is given, and it is the conductor's duty, after the call, to give the passengers a reasonable opportunity of getting into the cars before starting the train.⁷⁸ A call of "All aboard" given prematurely or before it is entirely safe to do so, or other misleading announcement to board the cars before they are ready, may be treated as an invitation to board the cars which justifies the imputation of negligence on the part of the carrier.⁷⁹

State (Minn.), 17 Sup. Ct. Rep. 627, 57 Minn. 385.

74. Illinois Cent. R. Co. v. Illinois, 163 U. S. 142; Smith v. Alabama, 124 U. S. 465; Stone v. Farmer's L. & T. Co., 116 U. S. 308; Dubuque, etc., R. Co. v. Richmond, 19 Wall. (U. S.) 584.

75. Trotlinger v. East Tennessee, etc., R. Co., 11 Lea (Tenn.) 533. But see Caldwell v. Richmond, etc., R. Co., 89 Ga. 550, 15 S. E. 678, holding that failure of a conductor to stop his train and let a passenger off at a station to which he collects her fare, with knowledge that she intends to get off there, is a tort as well as a breach of contract.

76. Keating v. New York Central

R. Co., 3 Lans. (N. Y.) 469, affd. 49 N. Y. 673; Andrist v. Union Pac. R. Co., 30 Fed. 345; Milliman v. New York, etc., R. Co., 4 Hun (N. Y.) 409, 6 T. & C. (N. Y.) 585; Perry v. Central R. Co., 66 Ga. 746; Mitchell v. Western, etc., R. Co., 30 Ga. 22; State v. Grand' Trunk R. Co., 58 Mo. 176, 4 Am. Rep. 258; Doss v. Missouri, etc., R. Co., 59 Mo. 27, 21 Am. Rep. 371; Imhoff v. Chicago, etc., R. Co., 22 Wis. 681.

77. McQuade v. Manhattan R. Co., 53 Super. Ct. (N. Y.) 91, affd. 109 N. Y. 636, 15 St. Rep. (N. Y.) 932.

78. Hall v. McFadden, 19 New Bruns. 340.

79. Lent v. New York Cent., etc., R. Co., 120 N. Y. 467, 44 Am. & Eng.

§ 37. Duty to provide safe means of ingress and egress.—It is the duty of a common carrier of passengers to provide a safe place and suitable and safe accommodations for its passengers to embark upon and depart from its trains or cars, or boats, at such points as the carrier receives or discharges passengers.⁸⁰ It is

R. Cas. 373; *Flint, etc., R. Co. v. Stark*, 38 Mich. 714. And a premature signal to start given by an unauthorized person will render the company liable, if its servants in charge of the car, by the exercise of due care and diligence, could have prevented its running so as to avoid injury. *North Chicago St. R. Co. v. Cook*, 145 Ill. 551. In Texas it is held that it will not be an act of negligence *per se* to put the train in motion without giving signals, after a sufficient and reasonable time to leave the train has elapsed. *Gulf, etc., R. Co. v. Williams*, 70 Tex. 159.

80. N. Y.—*Loftus v. Union Ferry Co.*, 84 N. Y. 455; *Hulbert v. New York Cent. R. Co.*, 40 N. Y. 145; *Redner v. Lehigh, etc., R. Co.*, 73 Hun (N. Y.) 582, 26 N. Y. Supp. 1050, an inadequate passageway; *Onderdonk v. New York, etc., R. Co.*, 74 Hun (N. Y.) 42, 26 N. Y. Supp. 310; *Van Ostran v. New York Cent., etc., R. Co.*, 35 Hun (N. Y.) 590, affd. 104 N. Y. 683; *Hazman v. Hoboken, etc., Co.*, 2 Daly (N. Y.) 130; *Liscomb v. New Jersey, etc., R. Co.*, 6 Lans. (N. Y.) 75, hole in the floor of the depot.

U. S.—*Lauterer v. Manhattan R. Co.*, 128 Fed. 540, 63 C. C. A. 38; *Post v. Koch*, 30 Fed. 208; *Seymour v. Chicago, etc., R. Co.*, 3 Biss. (U. S.) 43, platform unsafe because of ice.

Ga.—*Atlanta, etc., R. Co. v. Holcombe*, 88 Ga. 9.

Ill.—*Illinois Cent. R. Co. v. Kegan*, 210 Ill. 150, 71 N. E. 321; *Chicago, etc., R. Co. v. Coss*, 73 Ill. 394.

Ind.—*Harris v. Pittsburg, etc., R. Co.*, 32 Ind. App. 600, 70 N. E. 407; *Louisville, etc., R. Co. v. Lucas*, 119 Ind. 583; *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168.

Iowa.—*Cotant v. Boone Suburban Ry. Co. (Iowa)*, 59 N. W. 115; *Al-lender v. Chicago, etc., R. Co.*, 43 Iowa, 276.

Mich.—*Lemon v. Grand Rapids, etc., R. Co.*, 11 Det. L. N. 151, 100 N. W. 22.

Mo.—*Newcomb v. New York Cent., etc., R. Co.*, 182 Mo. 687, 81 S. W. 1069.

La.—*Moses v. Louisville, etc., R. Co.*, 39 La. Ann. 649, 4 Am. St. Rep. 231; *Lehman v. Louisiana Western R. Co.*, 37 La. Ann. 705.

Me.—*State v. Grand Trunk R. Co.*, 58 Me. 176, 4 Am. Rep. 258.

Miss.—*Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 481, 7 Am. Rep. 699.

N. J.—*Falk v. New York, etc., R. Co.*, 56 N. J. L. 380, 58 Am. & Eng. R. Cas. 191; *Delaware, etc., R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Am. St. Rep. 442.

Pa.—*Dunn v. Pennsylvania R. Co.*, 20 Phila. (Pa.) 258.

Tex.—*Texas, etc., R. Co. v. Woods*, 15 Tex. Civ. App. 612, 40 S. W. 846; *Missouri Pac. R. Co. v. Long*, 81 Tex. 253, 26 Am. St. Rep. 811; *Missouri Pac. R. Co. v. Northern*, 73 Tex. 27; *Texas, etc., R. Co. v. Miller*, 79 Tex. 78, 23 Am. St. Rep. 308.

Wis.—*Ellis v. Chicago, etc., R. Co.*, 82 Wis. 246, a defective footstool.

the duty of a railroad company to provide reasonably safe and sufficient platforms at its stations to enable passengers to descend from the cars without danger and to stop its cars alongside such platforms so that prudent persons may safely alight.⁸¹ But that a train runs beyond the usual stopping place at the station before coming to a standstill is not negligence *per se*. This may happen from the condition of the track, through the failure of the air-brakes, or other cause, without the fault of the managers of the train, and of itself, it does not expose a passenger to danger. Nor is a delay, after the train is brought to a stop, for a period necessary to reverse the motion, so as to back the train to the usual stopping place, of itself negligence. But the circumstances attending such an occurrence may be such as to require that the carrier should give notice to passengers desiring to alight at the station, that the train had not come to a final stop and that it would back up, in order to relieve itself from liability for negligence in case of injury to a passenger.⁸² Where a railroad train passes a platform or overshoots a station and the carrier requires a passenger to alight without assistance in an unusual and unsafe place, it will be liable for any injury resulting therefrom.⁸³ It

A railroad company is entitled to designate certain doors and steps by which its passengers shall leave its train, and is not liable for injuries to a passenger, caused by his seeking an unusual mode of egress. *Ratterel v. Galveston, etc., R. Co. (Tex. Civ. App.),* 81 S. W. 566.

81. *Boyce v. Manhattan Ry. Co.*, 118 N. Y. 319; *Garneau v. Illinois Cent. R. Co.*, 109 Ill. App. 169; *Eddy v. Wallace*, 49 Fed. 801, 52 Am. & Eng. R. Cas. 265; *St. Louis, etc., R. Co. v. Cantrell*, 37 Ark. 519, 40 Am. Rep. 105, 8 Am. & Eng. R. Cas. 198; *Hemmingway v. Chicago, etc., R. Co.*, 72 Wis. 42, 7 Am. St. Rep. 823; *Delamatyr v. Milwaukee, etc., R. Co.*, 24 Wis. 578; *Columbus, etc., R. Co. v. Farrell*, 31 Ind. 408; *Adams v. Missouri Pac. R. Co.*, 100 Mo. 555, 41 Am. & Eng. R. Cas. 105; *Whitaker v. Manchester, etc., R. Co.*, L. R. 5

C. P. 464, 22 L. T. N. S. 545; *Praeger v. Bristol, etc., R. Co.*, 24 L. T. N. S. 105.

82. *Taber v. Delaware, etc., R. Co.*, 71 N. Y. 489; *Porter v. Chicago, etc., R. Co.*, 80 Mich. 156, 20 Am. St. Rep. 511; *Smith v. Georgia, etc., R. Co.*, 88 Ala. 538, 16 Am. St. Rep. 63; *Louisville, etc., R. Co. v. Daney*, 97 Ala. 338; *Reed v. Duluth, etc., R. Co.*, 100 Mich. 507, 58 Am. & Eng. R. Cas. 77; *Sherwood v. Railroad Co. (Mich.)*, 46 N. W. 776; *Lewis v. London, etc., R. Co.*, 43 L. J. Q. B. 8, L. R. 9 Q. B. 66, 22 W. R. 153, 29 L. T. N. S. 397.

83. *N. Y.—Filer v. New York Cent. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Flanagan v. New York, etc., R. Co.*, 55 Hun (N. Y.) 611, 5 Silv. Sup. Ct. (N. Y.) 495, 8 N. Y. Supp. 744, affd. 125 N. Y. 773, 36 St. Rep. (N. Y.) 1011.

may be a question for the jury to determine whether an undue and improper opening between a station platform and car platform exists without any necessity therefor, and whether, assuming that its existence is a necessity in the practical operation of the road, the carrier is negligent in failing to properly guard and light it.⁸⁴ The maintenance of a stepping block at the side of its track, instead of the use of removable stools, at a station, to enable passengers to board and alight from trains, does not constitute negligence on the part of the railroad company.⁸⁵ The maintenance of ticket chopping boxes and a chain across the stairway at the foot of the stairway to an elevated railroad, is not an act of negligence, although these barriers, securely placed, are overridden and unlawfully crushed down by the mob, and an intending passenger injured.⁸⁶ When a railroad train is stopped at or near a station, it is the duty of the conductor, on the request of any passenger who may desire to alight at such station, to move the train back-

Cal.—Franklin v. Southern California, etc., R. Co., 85 Cal. 63.

Mich.—Cartwright v. Chicago, etc., R. Co., 52 Mich. 606, 50 Am. Rep. 274, 16 Am. & Eng. R. Cas. 321.

Iowa.—McDonald v. Chicago, etc., R. Co., 26 Iowa, 124, 96 Am. Dec. 114.

Miss.—Memphis, etc., R. Co. v. Whitfield, 44 Miss. 466, 7 Am. Rep. 699; Thompson v. New Orleans, etc., R. Co., 50 Miss. 315, 19 Am. Rep. 12.

Mo.—Warden v. Missouri Pac. R. Co., 35 Mo. App. 631.

N. C.—Lambeth v. North Carolina R. Co., 66 N. C. 499, 8 Am. Rep. 508.

N. H.—Foss v. Boston, etc., R. Co., 66 N. H. 256, 47 Am. & Eng. R. Cas. 566.

Tex.—Galveston, etc., R. Co. v. Crispi, 73 Tex. 236; Texas, etc., R. Co. v. Pollard, 2 Tex. App. Civ. Cas. § 481.

Wis.—Hartwig v. Chicago, etc., R. Co., 49 Wis. 358.

Eng.—Foy v. London, etc., R. Co., 18 C. B. N. S. 228, 114 E. C. L. 228,

13 W. R. 293, 11 L. T. N. S. 606. A railroad company admitting passengers to a freight train incurs the same liability to transport and land them safely as if on a passenger train. New York, etc., R. Co. v. Doane, 115 Ind. 435, 7 Am. St. Rep. 451, 37 Am. & Eng. R. Cas. 87; Hays v. Wabash R. Co., 51 Mo. App. 438; Hemmingway v. Chicago, etc., R. Co., 67 Wis. 668.

84. Ryan v. Manhattan R. Co., 121 N. Y. 126, 23 N. E. 1131; Boyce v. Manhattan R. Co., 118 N. Y. 314, 23 N. E. 304; Laffin v. Buffalo, etc., R. Co., 106 N. Y. 136, 12 N. E. 599; Fox v. Mayor, etc., of N. Y., 5 App. Div. (N. Y.) 349, 39 N. Y. Supp. 309; Rogers v. New York & Brooklyn Bridge, 11 App. Div. (N. Y.) 141, 42 N. Y. Supp. 1046. See also Brady v. Manhattan R. Co., 127 N. Y. 46.

85. Pitkin v. New York Cent., etc., R. Co., 94 App. Div. N. Y. 31, 87 N. Y. Supp. 906.

86. Wagner v. Brooklyn Heights R. Co., 95 App. Div. (N. Y.) 219, 88 N. Y. Supp. 791.

ward or forward so as to enable such passenger to step upon the platform.⁸⁷ But where a passenger voluntarily leaves a train of cars while in motion, simply to avoid being carried beyond the station where he desires to stop, and in doing so receives an injury, his own negligence is the proximate cause of the injury, and he cannot recover against the company, though the conductor was also at fault in not stopping the train.⁸⁸ So, where the passenger declines an offer to have the train backed to the platform and is assisted in getting off, the conductor using ordinary care,⁸⁹ and where the passenger gets off without objection, and without requesting that the train be run back to the depot, after being apprised of the dangers attending alighting at the place where the train has stopped, his failure to object to alighting there amounting to a waiver of his right to be carried back.⁹⁰ A railroad company carrying passengers is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure and care of the track and bridges and all other arrangements necessary to the safety of passengers.⁹¹ It is bound

87. Memphis, etc., R. Co. v. Whitfield, 44 Miss. 466, 7 Am. Rep. 699; New York, etc., R. Co. v. Doane, 115 Ind. 435, 7 Am. St. Rep. 451; Pennsylvania R. Co. v. Aspell, 23 Pa. St. 147, 62 Am. Dec. 323; Foy v. London, etc., R. Co., 18 C. B. N. S. 228, 114 E. C. L. 228.

88. Jeffersonville R. Co. v. Hendricks, 26 Ind. 228; Jeffersonville R. Co. v. Smith, 26 Ind. 459, nor is it sufficient to charge the company in such a case that the conductor advises the passenger that he could safely jump from the train; Evansville, etc., R. Co. v. Duncan, 28 Ind. 442, 92 Am. Dec. 322, if, however, the leap is made under such circumstances that a person of ordinary care will not apprehend danger therefrom, then it is not such an act of carelessness as will relieve the carrier from the responsibility otherwise resting upon it.

89. Conwill v. Gulf, etc., R. Co., 85 Tex. 96.

90. Winkler v. St. Louis, etc., R. Co., 21 Mo. App. 99; Gulf, etc., R. Co. v. Head, 4 Tex. App. Civ. Cas. § 209; Lewis v. London, etc., R. Co., 9 Q. B. 66; Weller v. London, etc., R. Co., 9 C. P. 126; Bridges v. North London R. Co., L. R. 6 Q. B. 377.

But where a passenger was not aware that he was carried beyond his station, his failure to demand that he be taken back will not operate as a waiver of his right, or relieve the carrier from its obligation to let him off at a proper place. *Id.*

91. Louisville, etc., R. Co. v. Lucas, 119 Ind. 583, 21 N. E. 968, 6 R. R. & Corp. L. J. 256; Searles v. Canawha, etc., R. Co. (W. Va.), 9 S. E. 248; Dodge v. Boston, etc., S. Co. (Mass.), 19 N. E. 373, 2 L. R. A. 83, 39 Alb. L. J. 211; Louisville, etc., R. Co. v. Jones, 83 Ala. 376, 3 So. 902; Florida R. & Nav. Co. v. Webster (Fla.), 5 So. 714; Louisville, etc., R. Co. v. Ritter, 85 Ky. 368, 3 S. W. 519.

as a general rule to keep in a safe condition all portions of its platforms and approaches thereto to which the public resort or would naturally resort, and all portions of its station grounds reasonably near to the platforms where passengers taking passage on its cars would naturally or ordinarily be likely to go.⁹² It must, for the safety of its passengers, properly light its platforms and the passageways to its trains or cars if passengers are received and discharged after dark, within a reasonable time before the arrival and departure of trains.⁹³

§ 38. Reasonable time for ingress and egress.—It is the duty of the servants of a carrier of passengers, especially when in charge of a railroad train, to stop it a reasonable time to allow passengers to board or alight with safety; and in the absence of contributory negligence on the part of the passenger, the carrier is liable for injuries resulting from a failure to perform this duty.⁹⁴ It is not the duty of conductors to see to the debarkation

92. Union Pac. R. Co. v. Sue, 25 Neb. 772, 41 N. W. 801; Reed v. Ax-tell, 84 Va. 231, 4 S. E. 587; Central R. Co. v. Thompson, 76 Ga. 770; Green v. Pennsylvania R. Co., 36 Fed. 66.

93. Grimes v. Pennsylvania Co., 36 Fed. 72; Alabama, etc., R. Co. v. Arnold, 84 Ala. 159, 5 Am. St. Rep. 354, 4 So. 359; Louisville, etc., R. Co. v. Lucas, *supra*; Reynolds v. Texas, etc., R. Co., 37 La. Ann. 697; Galveston, etc., R. Co. v. Thornsberry (Tex.), 17 S. W. 521; Rozwadosfskie v. International, etc., R. Co., 1 Tex. Civ. App. 487.

94. N. Y.—Flanagan v. New York, etc., R. Co., 55 Hun (N. Y.) 611, 29 St. Rep. 744, 5 Silv. Sup. Ct. (N. Y.) 495, affd. 125 N. Y. 773, 36 St. Rep. (N. Y.) 1011; McDonald v. Long Island R. Co., 116 N. Y. 546, 15 Am. St. Rep. 437; Bucher v. New York Cent., etc., R. Co., 98 N. Y. 128; Roberts v. Johnson, 58 N. Y. 613; Keating v. New York Cent., etc., R. Co., 49 N. Y. 673; Filer v. New York

Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Mulhado, v. Brooklyn City R. Co., 30 N. Y. 370; Dillon v. Manhattan R. Co., 49 Hun (N. Y.) 608, 16 St. Rep. (N. Y.) 767; Sauter v. New York Cent., etc., R. Co., 6 Hun (N. Y.) 446.

U. S.—Washington, etc., R. Co. v. Harmon, 147 U. S. 571.

Ala.—Montgomery, etc., R. Co. v. Stewart, 91 Ala. 421; Central R. Co. v. Miles, 88 Ala. 266; Birmingham, etc., R. Co. v. Smith, 90 Ala. 60.

Cal.—Carr v. Eel River, etc., R. Co., R. Co., 98 Cal. 366.

Colo.—Denver Tramway Co. v. Owens, 20 Colo. 107.

Conn.—Elwood v. Connecticut Ry., etc., Co., 77 Conn. 145, 58 Atl. 751; Fuller v. Naugatuck R. Co., 21 Conn. 557.

Ill.—North Chicago St. R. Co. v. Cook, 145 Ill. 551; Illinois Cent. R. Co. v. Taylor, 46 Ill. App. 141; Chicago, etc., R. Co. v. Arnold, 144 Ill. 261; Chicago West Div. R. Co. v.

or embarking of passengers, but when they have announced the arrival of the train at the station, and have stopped the train sufficiently long for the passengers to and from the station to get off and on, their duty to the passengers is performed.⁹⁵ The rule is well settled that when a passenger attempts to go aboard a car which is at rest, whether a steam or an electric or horse car, it is the duty of those managing the car to give him a reasonable oppor-

Mills, 105 Ill. 63; Wabash, etc., R. Co. v. Rector, 104 Ill. 296; Chicago City R. Co. v. Mumford, 97 Ill. 560; Toledo, etc., R. Co. v. Baddeley, 54 Ill. 19, 5 Am. Rep. 71.

Ind.—Louisville, etc., R. Co. v. Wood, 113 Ind. 544; Terre Haute, etc., R. Co. v. Buck, 96 Ind. 346, 49 Am. Rep. 168; Jeffersonville, etc., R. Co. v. Parmalee, 51 Ind. 42; Jeffersonville, etc., R. Co. v. Hendricks, 26 Ind. 228.

Iowa.—Patterson v. Omaha, etc., R. Co., 90 Iowa, 247.

Ky.—Mobile, etc., R. Co. v. Reeves, 25 Ky. L. Rep. 2236, 80 S. W. 471.

Md.—Central R. Co. v. Smith, 74 Md. 212.

Mass.—Brooks v. Boston, etc., R. Co., 135 Mass. 21.

Mich.—Wood v. Lake Shore, etc., R. Co., 49 Mich. 370; Michigan Cent. R. Co. v. Coleman, 28 Mich. 440; Flint, etc., R. Co. v. Stark, 38 Mich. 714; Finn v. Valley City St., etc., R. Co., 86 Mich. 74.

Minn.—Keller v. Sioux City, etc., R. Co., 27 Minn. 178.

Miss.—Dorrah v. Illinois Cent. R. Co., 65 Miss. 14, 7 Am. St. Rep. 629, 30 Am. & Eng. R. Cas. 576; New Orleans, etc., R. Co. v. Statham, 42 Miss. 607, 97 Am. Dec. 478; Southern R. Co. v. Kendrick, 40 Miss. 374, 90 Am. Dec. 332.

Mo.—Stoddard v. St. Louis, etc., R. Co. (Mo. App.), 80 S. W. 33; Madden v. Missouri Pac. R. Co., 50 Mo. App. 666; Weber v. Kansas City Ca-

ble R. Co., 100 Mo. 194, 18 Am. St. Rep. 541; Dougherty v. Missouri R. Co., 81 Mo. 325, 51 Am. Rep. 239, 21 Am. & Eng. R. Cas. 497; Straus v. Kansas City, etc., R. Co., 75 Mo. 185, 86 Mo. 421; Swigert v. Hannibal, etc., R. Co., 75 Mo. 475.

Neb.—Chollette v. Railroad Co., 26 Neb. 159, 41 N. W. 1106, 4 L. R. A. 135.

Pa.—Fairmount, etc., Pass. R. Co. v. Stutler, 54 Pa. St. 375, 93 Am. Dec. 714; Pennsylvania R. Co. v. Kilgore, 32 Pa. St. 294, 72 Am. Dec. 787; Dunn v. Pennsylvania R. Co., 20 Phila. (Pa.) 258.

Tex.—St. Louis, etc., R. Co. v. Turner (Tex. Civ. App.), 77 S. W. 255; Galveston, etc., R. Co. v. Hubbard (Tex. Civ. App.), 76 S. W. 764; Houston, etc., R. Co. v. Gorbett, 49 Tex. 573; Allen v. Galveston City R. Co., 79 Tex. 631.

Va.—Norfolk, etc., R. Co. v. Groseclose, 88 Va. 267, 29 Am. St. Rep. 718.

Wash.—Foster v. Seattle Electric Co., 35 Wash. 177, 76 Pac. 995.

Wis.—Imhoff v. Chicago, etc., R. Co., 20 Wis. 344; Davis v. Chicago, etc., R. Co., 18 Wis. 175.

N. Brunsw.—Hall v. McFadden, 19 N. Brunsw. 340.

95. New Orleans, etc., R. Co. v. Statham, 42 Miss. 607, 97 Am. Dec. 478; Imhoff v. Chicago, etc., R. Co., 20 Wis. 344; Davis v. Chicago, etc., R. Co., 18 Wis. 175.

tunity to get aboard and to assure himself of his footing before starting the car.⁹⁶ And it is equally well settled that it is the duty of a motorman of an electric car to use reasonable care in listening for the usual signal to stop the car and give passengers an opportunity to alight, and when signaled by a passenger, to stop his car at a usual and customary station for stopping a sufficient length of time to give him a reasonable opportunity to alight in safety, and his failure to perform this duty constitutes negligence.⁹⁷ The duty resting upon a carrier involves the obligation to deliver its passenger safely at his desired destination, and that involves the duty of observing whether he has actually alighted before the car is started again. If the conductor fails to attend to this duty and does not give the passenger time enough to get

96. Keating v. New York Cent., etc., R. Co., 49 N. Y. 673; Morrison v. Broadway, etc., R. Co., 8 N. Y. Supp. 436; Ganiard v. Rochester City, etc., R. Co., 50 Hun (N. Y.), 22, 2 N. Y. Supp. 470, aff'd 121 N. Y. 661, 24 N. E. 1092; Myers v. Long Island R. Co., 10 St. Rep. (N. Y.) 430, aff'd 112 N. Y. 681; Black v. Brooklyn City R. Co., 108 N. Y. 640, 15 N. E. 389; Kinkade v. Atlantic Ave. R. Co., 9 Misc. Rep. (N. Y.) 273, 61 St. Rep. (N. Y.) 323, 29 N. Y. Supp. 747, aff'd 149 N. Y. 615; McQuade v. Manhattan Ry. Co., 53 N. Y. Super. Ct. 91, it is a question for the jury as to the negligence of the carrier, although the conductor's arm is raised as if to take hold of the bell rope while the passenger is attempting to get on and the time for boarding the car is passed; Shuart v. Consol. Tract. Co., 15 Pa. Super. Ct. 26; Baltimore City Pass. Ry. Co. v. Baer, 90 Md. 97, 44 Atl. 992; Barth v. Kansas City Elev. R. Co., 142 Mo. 535, 10 Am. & Eng. R. Cas. N. S. 281, 44 S. W. 778, and time to permit the conductor to close behind him a gate used to protect passengers on an elevated railroad from falling from the car; Anacosta,

etc., R. Co. v. Klein, 8 App. D. C. 75, 24 Wash. L. Rep. 117; Meriwether v. Kansas City Cable R. Co., 45 Mo. App. 528; Steeg v. St. Paul City R. Co. (Minn.), 52 Am. & Eng. R. Cas. 550, 16 L. R. A. 379, 20 Wash. L. Rep. 541, 52 S. W. 393. Whether the car was prematurely started before the injured person had an opportunity to get aboard and reach a place of safety, may, under the circumstances of a particular case, be a question for the jury. De Rozas v. Metropolitan St. R. Co., 13 App. Div. (N. Y.) 296, 43 N. Y. Supp. 27; Shuart v. Consol. Tract. Co., *supra*.

97. Weiss v. Metropolitan St. Ry. Co., 29 Misc. Rep. (N. Y.) 332, 60 N. Y. Supp. 473; Murphy v. Metropolitan St. Ry. Co., 19 Misc. Rep. (N. Y.) 194, 43 N. Y. Supp. 223; Poulin v. Broadway, etc., R. Co., 61 N. Y. 621, affg. 34 N. Y. Super. Ct. 296; Fuller v. Dennison, etc., Ry. Co., 1 St. Ry. Rep. 780 (Tex.), 74 S. W. 940; Paducah St. Ry. Co. v. Walsh, 22 Ky. L. Rep. 532, 58 S. W. 431; West Chicago St. R. Co. v. Waniata, 68 Ill. App. 481, affg. 169 Ill. 17, 48 N. E. 437; Conway v. New

off before the car starts, it is necessarily this neglect of duty which is the primary and proximate cause of the accident, if injury be occasioned thereby to the passenger. It is not a duty due a person solely because he is in danger of being hurt, but it is a duty owed to a person whom the carrier had undertaken to deliver and who was entitled to the delivery safely, by being allowed to alight without danger.⁹⁸ What is a reasonable time for passengers to board or leave a car or train depends upon the circumstances in each case. A longer time would be required where there are many passengers to board or alight than when there are few; in a dark night with the landing place badly lighted, than where there is full light; at a place difficult to board or alight than where it is easy. And as railroad companies usually carry not merely the vigorous and active, but also those who, from age or extreme youth, are slower in their movements than vigorous and active persons, the time of stopping is not to be measured by the time in which the latter may make their entry into or exit from the cars, but by the time in which the other classes may, using diligence, but without hurry and confusion, board or alight.⁹⁹ A pas-

Orleans & C. R. Co., 46 La. Ann. 1429, 16 So. 362.

98. Flanagan v. Met. St. R. Co., 31 Misc. Rep. (N. Y.) 820, 64 N. Y. Supp. 379; Grace v. St. Louis R. Co., 156 Mo. 295, 56 S. W. 1121; Fenig v. New Jersey St. Ry. Co. (N. J.), 46 Atl. 602; Morrison v. Charlotte, etc., R. Co., 123 N. C. 414, 31 S. E. 720; Springfield Consol. R. Co. v. Hoeffner, 176 Ill. 634, 51 N. E. 884, affg. 71 Ill. App. 162; West Chicago St. R. Co. v. Manning, 170 Ill. 417, 48 N. E. 958, 9 Am. & Eng. R. Cas. N. S. 364, affg. 70 Ill. App. 239; Nichols v. Lynn & B. R. Co., 168 Mass. 528, 47 N. E. 427; Washington & G. R. Co. v. Tobiiner, 147 U. S. 571, 583, 37 I. Ed. 284, 289, 21 Wash. L. Rep. 231, 13 Sup. Ct. Rep. 557; Birmingham R. & E. Co. v. Weldman, 119 Ala. 547, 24 So. 548; Leaveworth Elect. R. Co. v. Cusick, 60 Kan. 590, 57 Pac. 519, 6 Am. Neg.

Rep. 282; Louisville R. Co. v. Rammacher, 21 Ky. L. Rep. 250, 51 S. W. 175; Cobb v. Lindell R. Co., 149 Mo. 135, 50 S. W. 310.

Notice to conductor or gripman on a car from the conduct of a passenger in his immediate presence and sight that such passenger wished to alight as soon as the car came to the stop which a would-be passenger has signaled the train to make, is the equivalent of express warning, or notification by the passenger, so as to render the company liable for the sudden starting of the car while he was endeavoring to alight. West Chicago St. R. Co. v. Stiver, 69 Ill. App. 625.

99. Keller v. Sioux City, etc., R. Co., 27 Minn. 178; Toledo, etc., R. Co. v. Baddeley, 54 Ill. 19, 5 Am. Rep. 71. And see cases cited under preceding notes to this section.

senger, diligent in attempting to get upon or alight from a car while it is stopped to receive passengers, although lacking in dexterity or suffering from infirmities making it difficult to board or alight from the car, may recover for injuries sustained by the starting of the car while he is attempting to board or alight from it.¹ When passengers have been given a reasonable opportunity to get on or off, and all have apparently done so, and the employes in charge of the car or train do not know or have reason to believe that any passenger is about to embark or alight or do not see any person attempting to board or alight, or in any perilous position, it is not negligence for them to start the train, or car, although some persons in fact be in the act of alighting or boarding.² But to start a train or car while passengers are obviously in the act of getting on or leaving the car or train is negligence on the part of the carrier.³ In an action for injuries sustained by the premature starting of a car, train or other vehicle, the burden of proof is upon the passenger to establish that his injuries were caused by the negligence or wrongful acts of the carrier's agents and that he exercised due care and reasonable diligence, or was free from contributory negligence, and he is entitled to the benefit of no presumptions in support of his diligence or caution.⁴

1. Dudley v. Front St. Cable R. Co., 73 Fed. 128; Peat v. Hartford St. Ry. Co., 72 Conn. 362, 44 Atl. 547.

2. McDonald v. Long Island R. Co., 116 N. Y. 546, 15 Am. St. Rep. 437; Paulitsch v. New York Cent., etc., R. Co., 102 N. Y. 280, 26 Am. & Eng. R. Cas. 162; Gilbert v. West End St. R. Co., 4 Am. Electl. Cas. 456, 160 Mass. 403; Central R., etc., Co. v. Perry, 58 Ga. 461; Perry v. Central R. Co., 66 Ga. 746; Highland Ave. R. Co. v. Burt, 92 Ala. 291; Hart v. St. Louis, etc., R. Co., 94 Mo. 255, 4 Am. St. Rep. 374; Straus v. Kansas City, etc., R. Co., 75 Mo. 185, 86 Mo. 421; Chicago, etc., R. Co. v. Landauer, 36 Neb. 642; Georgia Pac. R. Co. v. West, 66 Miss. 310.

3. Flanagan v. New York, etc., R. Co., *supra*; Eppendorf v. Brooklyn City, etc., R. Co., 67 N. Y. 52, 15 Am.

Ry. Rep. 293; Pfeffer v. Buffalo R. Co., 4 Misc. Rep. (N. Y.) 465, aff'd. 144 N. Y. 636; Keating v. New York Cent., etc., R. Co., *supra*; Detroit, etc., R. Co. v. Curtis, 23 Wis. 152, 99 Am. Dec. 141; Straus v. Kansas City, etc., R. Co., 86 Mo. 421, 27 Am. & Eng. R. Cas. 170; Louisville, etc., R. Co. v. Wood, 113 Ind. 544; Chicago, etc., R. Co. v. Drake, 33 Ill. App. 114; Lehman v. Louisiana, etc., R. Co., 37 La. Ann. 705; Nance v. Carolina Cent. R. Co., 94 N. C. 619; Gulf, etc., R. Co. v. Fox (Tex.), 6 S. W. 569, 33 Am. & Eng. R. Cas. 543.

4. Wiwirowski v. Lake Shore, etc., R. Co., 124 N. Y. 424; McDonald v. Long Island R. Co., 71 N. Y. 546, 15 Am. St. Rep. 437; Evansville, etc., R. Co. v. Athon, 6 Ind. App. 295, 51 Am. St. Rep. 303; Gardner v. Detroit St. R. Co., 99 Mich. 182.

§ 39. Duty to warn, instruct, or inform passengers.—It is the duty of a carrier to warn its passengers by proper and reasonable signals or other suitable warning of dangers that arise from unusual or extraordinary conditions which have been brought about by the acts of the carrier, and which are known to it or its agents, but are not known to its passengers;⁵ for example, the dangers that may attend the making of a running switch,⁶ or alighting from or boarding the car or train under certain circumstances, such as when a passenger train is approaching,⁷ or where there is danger in leaving or entering by a certain car door or platform,⁸ or in reaching the station platform at a particular place.⁹ And, if, with knowledge of the existence of a latent danger, known to the carrier's servant, but not to the passengers, the carrier's servant requests or invites the passenger, or permits him, to encounter this danger without informing him of it, or guarding against it, he fails to perform that duty to the passenger which the law requires and renders the carrier liable.¹⁰ As a general rule, a passenger is justified in obeying or heeding the directions of the servants or agents of the carrier, and in relying upon their assurances that it is safe for him to act, under the particular circumstances, unless such obedience or assurances will expose him to such known or apparent danger as an ordinarily prudent person would not encounter. The mere fact that it appears, under the circumstances, that,

5. *Brockway v. Lascala*, 1 Edm. Sel. Cas. (N. Y.) 135; *Moses v. Louisville, etc.*, R. Co., 39 La. Ann. 649, 4 Am. St. Rep. 231; *Sullivan v. Vicksburg, etc.*, R. Co., 39 La. Ann. 800, 4 Am. St. Rep. 239; *Summers v. Crescent City R. Co.*, 34 La. Ann. 139, 44 Am. Rep. 419; *East Line, etc., R. Co. v. Rushing*, 69 Tex. 306, 34 Am. & Eng. R. Cas. 367; *Peniston v. Chicago, etc.*, R. Co., 34 La. Ann. 777, 44 Am. Rep. 444.

6. *Lake Shore, etc., R. Co. v. Brown*, 123 Ill. 162, 5 Am. St. Rep. 510.

7. *Gonzales v. New York, etc.*, R. Co., 39 How. Pr. (N. Y.) 407; *Wilburn v. St. Louis, etc.*, R. Co., 36 Mo. App. 203; *Sonier v. Boston, etc.*, R.

Co., 141 Mass. 10; *Gaynor v. Old Colony, etc.*, R. Co., 100 Mass. 208, 97 Am. Dec. 96; *Chaffee v. Boston, etc.*, R. Corp., 104 Mass. 108; *Mayo v. Boston, etc.*, R. Co., 104 Mass. 137.

8. *Missouri Pac. R. Co. v. Long*, 81 Tex. 253, 26 Am. St. Rep. 811; *McDonald v. Illinois Cent. R. Co.*, 88 Iowa, 345, 58 Am. & Eng. R. Cas. 263.

9. *Praeger v. Bristol, etc.*, R. Co., 24 L. T. N. S. 105; *Mensing v. Michigan Cent. R. Co.*, 117 Mich. 606, 76 N. W. 98, 5 Det. L. N. 353, 4 Am. Neg. Rep. 649, 12 Am. & Eng. R. Cas. N. S. 223, where a rail of a side track was covered by a sudden fall of snow.

10. *Lewis v. Delaware, etc.*, Canal Co., 145 N. Y. 508.

had the passenger not obeyed such directions, he would have escaped the injury which he sustained, will not relieve the carrier of liability.¹¹ But while passengers have a right to rely, until differently informed, on the information received by them from the carrier's agents, they must not disregard reasonable means of information, and cannot hold the carrier responsible for a misdirection when proper attention on their part to such information would have prevented their being misled.¹² It is the right of a passenger to leave a train at his point of destination, and the courts recognize the manifest distinction between the case of a passenger getting on and off a moving car. In the latter case the act may be justifiably excused by necessity or what is termed a stress of circumstances that cannot exist in the former.¹³ It is negligence in a railroad corporation not to bring a train to a full stop at a regular station and for its officers to induce a passenger to leave it while in motion, and it is not negligence *per se* for the passenger to leave the train while in motion, if he is told by the carrier's agent to do so, or given by him to understand that he can safely do so, and the circumstances afford reason to believe he may, and the question of contributory negligence is for the jury.¹⁴

11. Filer v. New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327, 59 N. Y. 351; Weiler v. Manhattan R. Co., 53 Hun (N. Y.), 372; Illinois Cent. R. Co. v. Cheek, 152 Ind. 675; Louisville, etc., R. Co. v. Bisch, 120 Ind. 549; Lake Erie, etc., R. Co. v. Fix, 88 Ind. 381, 45 Am. Rep. 464; Pennsylvania Co. v. Hoagland, 78 Ind. 203; Nave v. Flack, 90 Ind. 205, 46 Am. Rep. 205; Louisville, etc., R. Co. v. Kelly, 92 Ind. 371, 47 Am. Rep. 149; Prothero v. Citizens St. R. Co., 134 Ind. 431; Olson v. St. Paul, etc., R. Co., 45 Minn. 536; Lambeth v. North Carolina R. Co., 66 N. C. 494, 8 Am. Rep. 508; Hinshaw v. Raleigh, etc., R. Co., 118 N. C. 1047; Watkins v. Raleigh, etc., R. Co., 116 N. C. 961; Baltimore, etc., R. Co. v. Leapley, 65 Md. 571; St. Louis, etc., R. Co. v. Cantrell, 37 Ark. 519, 40 Am. Rep. 105; St. Louis, etc., R. Co. v. Rosenberry, 45 Ark. 256; Baltimore,

etc., R. Co. v. Kane, 69 Md. 11; Atchison, etc., R. Co. v. Hughes, 55 Kan. 491; McCaslin v. Louisville, etc., R. Co., 69 Miss. 136; Pennsylvania R. Co. v. McCloskey, 23 Pa. St. 526.

12. Barker v. New York Cent. R. Co., 24 N. Y. 599; Lake Shore, etc., R. Co. v. Pierce, 47 Mich. 277; Dye v. Virginia Midland R. Co., 20 D. C. 63; Pennsylvania Co. v. Hoagland, 78 Ind. 203.

13. Mahar v. New York Cent., etc., R. Co., 5 App. Div. (N. Y.) 22; McDonald v. Long Island R. Co., 116 N. Y. 546; Filer v. New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Keller v. New York Cent. R. Co., 2 Abb. App. Dec. (N. Y.) 480.

14. Bucher v. New York Cent., etc., R. Co., 98 N. Y. 128; Morrison v. Erie R. Co., 56 N. Y. 305; Keating v. New York Cent. R. Co., 49 N. Y. 673; Malhado v. Brooklyn City R. Co., 30

But a man who, in the full possession of his faculties, attempts to board a railroad train moving at a rapid rate is negligent, as a matter of law, and proof that he was directed by the carrier's servant to jump on does not make the question one of fact. Such a direction creates no emergency calling for the exercise of immediate judgment in the choice between two dangers, the passenger being in absolute safety before he makes the attempt to board, and affords not the slightest justification or excuse for attempting an act of so highly dangerous a nature.¹⁵ And where a passenger of his own motion, deeming the motion of the car slow enough for safety, attempts to leave the train while it is in motion, it is negligence on his part and he cannot hold the carrier responsible in case of injury.¹⁶ Whether it is negligence for a passenger to follow the direction of a servant of a railroad company, and to pass from one car to another, in motion, to find a seat, is a question for the jury.¹⁷ A passenger who, without the knowledge or consent of the conductor of the train, rides in the baggage, mail, or express car, cannot maintain an action against the railroad company for injuries sustained which would not have happened to him had he been in a passenger car; nor can he be heard to contend that the conductor ought to have discovered him and ordered him out.¹⁸

N. Y. 372; Poulin v. Broadway, etc., R. Co., 61 N. Y. 621; Sauter v. New York Cent., etc., R. Co., 66 N. Y. 54; Taber v. Delaware, etc., R. Co., 71 N. Y. 493; Georgia R., etc., Co. v. McCurdy, 45 Ga. 288, 12 Am. Rep. 577; Jones v. Chicago, etc., R. Co., 42 Minn. 183; Texas, etc., R. Co. v. Bingham, 2 Tex. Civ. App. 278; International, etc., R. Co. v. Smith (Tex.), 14 S. W. 642, 44 Am. & Eng. R. Cas. 324; Wilburn v. St. Louis, etc., R. Co., 48 Mo. App. 224.

15. Hunter v. Cooperstown, etc., R. Co., 112 N. Y. 371, 2 L. R. A. 830, 9 Am. St. Rep. 75. Even where the agents of the carrier direct the passenger to attempt to get aboard a train in motion, the carrier is not liable if it was gross negligence on the

part of the passenger to make the attempt in view of all the circumstances; and whether it was so or not depends upon the fact whether, under the circumstances, the act was obviously dangerous, and is a question for the jury. Curry v. Canadian Pac. R. Co., 17 Ont. Rep. 65.

16. Blodgett v. Bartlett, 50 Ga. 353; Mississippi, etc., R. Co. v. Harrison, 66 Miss. 419, 14 Am. St. Rep. 573, 39 Am. & Eng. R. Cas. 449.

17. McIntyre v. New York Cent. R. Co., 37 N. Y. 287; Louisville, etc., R. Co. v. Kelly, 92 Ind. 371, 47 Am. Rep. 149. See Stewart v. Boston, etc., R. Co. (Mass.), 16 N. E. 466.

18. Kentucky Cent. R. Co. v. Thomas, 79 Ky. 160, 42 Am. Rep. 208.

§ 40. Duty to assist infirm, aged, and helpless passengers.—A railroad company having provided suitable and safe means for entering and alighting and having stopped its train in the proper position, is under no obligation to furnish some one to aid passengers generally in getting on board or alighting from its cars.¹⁹ In the case of infirm persons, however, whose age and infirmity is apparent from their appearance, it is the duty of the carrier's servants to assist them in alighting from or boarding a train, if such assistance is necessary for their safety.²⁰ And where a train stops at a place where passengers cannot alight without difficulty, they are bound to assist them.²¹ *Prima facie*, the persons controlling the motions of the train, and regulating its stoppings and its startings, would be those who would act in the admission and discharge of passengers.²² But the employes of the carrier are under no obligation to awaken a passenger upon his arriving at his station, or to direct a passenger how to get on or off.²³ A carrier is liable, however, for injuries sustained by a passenger in consequence of directing her to alight on a dark night at a distance from the station.²⁴ Ordinarily, whether or not assistance should have been rendered by the carrier's employes to a passenger in a given instance is a question for the jury under the circumstances of the case.²⁵ The conductor of a train having stopped the train

19. Lafflin v. Buffalo, etc., R. Co., 106 N. Y. 136, 60 Am. Rep. 433, revg. 36 Hun (N. Y.), 638; Central R. Co. v. Whitehead, 74 Ga. 441; Deming v. Chicago, etc., R. Co., 80 Mo. App. 152, 2 Mo. App. Rep. 547; Raben v. Central Iowa R. Co., 74 Iowa, 732, 73 Iowa, 579, 5 Am. St. Rep. 708; Selby v. Detroit Ry. (Mich.), 81 N. W. 106; Yarnell v. Kansas City, etc., R. Co., 113 Mo. 570; Simms v. South Carolina R. Co., 27 S. C. 268. But see Cawfield v. Asheville St. R. Co., 111 N. C. 597.

20. Memphis St. Ry. Co. v. Shaw, 1 St. Ry. Rep. 771, and notes (Tenn.), 75 S. W. 713; Railroad Co. v. Mitchell, 98 Tenn. 31; Jacobs v. West End St. Ry. Co. (Mass.), 59 N. E. 639. But see New Orleans, etc., R. Co. v. Statham, 42 Miss. 607, 97 Am.

Dec. 478, holding that any assistance that a conductor may extend to women without escorts or with children, or to persons who are sick and ask his assistance in getting on or off trains, is purely a matter of courtesy, and not at all incumbent upon him in the line of his public duty.

21. Memphis, etc., R. Co. v. Whitfield, 44 Miss. 446, 7 Am. Rep. 699.

22. Drew v. Sixth Ave. R. Co., 26 N. Y. 49.

23. Nichols v. Chicago, etc., R. Co., 90 Mich. 203.

24. Wilburn v. St. Louis, etc., R. Co., 36 Mo. App. 203; Warden v. Missouri Pac. R. Co., 35 Mo. App. 631.

25. Chicago, etc., R. Co. v. Drake, 33 Ill. App. 114; Texas, etc., R. Co.

sufficiently long for passengers to get out without danger to their persons or lives, is not bound to go through the train and see that every person has safely passed out of the cars.²⁶ As we have seen, it is the duty of a railroad company to give passengers a reasonable opportunity to leave its train at stations where it stops,²⁷ and reasonable diligence on the part of the passenger in alighting from it is also required.²⁸ But the fact that a passenger proceeds to leave a train at a station where it has stopped ought, for the purpose of his protection, to be known by the company, through its servants, and, therefore, so far as that is essential, it is deemed chargeable with knowledge; and if the proper discharge of duty in that respect requires more means of observation or precaution it should be furnished.²⁹ A railroad company which voluntarily accepts as a passenger, without an attendant, a person whose physical disability or inability to care for himself is apparent, or is made known at the time to its servants, and renders special assistance necessary, is negligent if it fails to render such passenger the necessary care and assistance.³⁰ Knowledge communicated to the

v. Miller, 79 Tex. 78, 23 Am. St. Rep. 308; Allender v. Chicago, etc., R. Co., 43 Iowa, 276; Thompson v. Belfast, etc., R. Co., 5 Ir. R. C. L. 517.

26. Pennsylvania R. Co. v. Kilgore, 32 Pa. St. 294, 72 Am. Dec. 787; Raben v. Central Iowa R. Co., 73 Iowa, 579, 5 Am. St. Rep. 708; Culberson v. Chicago, etc., R. Co., 50 Mo. App. 556; Hurt v. St. Louis, etc., R. Co., 94 Mo. 255, 4 Am. St. Rep. 374.

27. See § 38, *ante*.

28. McDonald v. Long Island R. Co., 116 N. Y. 546, 15 Am. St. Rep. 437; Falls v. San Francisco, etc., R. Co., 97 Cal. 114; Pennsylvania R. Co. v. Lyons, 129 Pa. St. 113, 15 Am. St. Rep. 701; Weber v. Kansas City Cable R. Co., 100 Mo. 194, 18 Am. St. Rep. 541.

29. McDonald v. Long Island R. Co., *supra*. A person who enters the cars of a railroad, not as a passenger, but for the purpose of assisting an aged and infirm person to take a seat

as a passenger, must, in order to recover for an injury sustained while leaving the car, show that he exercised due care and that the railroad company were wanting in ordinary care, and that such negligence was the cause of the injury. Lucas v. Taunton, etc., R. Co. 6 Gray (Mass.), 64.

30. Croom v. Chicago, etc., R. Co., 52 Minn. 296, 38 Am. St. Rep. 557, 53 N. W. 1128, 18 L. R. A. 602, 7 Am. Ry. & Corp. Rep. 468; Foss v. Boston & M. R. Co., 66 N. H. 256, 47 Am. & Eng. R. Cas. 566, 21 Atl. 222, 11 L. R. A. 367; Toledo, etc., Ry. Co. v. Baddely, 54 Ill. 19; New Orleans, etc., R. Co. v. Statham, 42 Miss. 607; Wardle v. City R. Co., 35 La. Ann. 202; Jacksonville St. Ry. Co. v. Cappell, 21 Fla. 175; Memphis St. Ry. Co. v. Shaw, 1 St. Ry. Rep. 771 (Tenn.), 75 S. W. 713; Meyer v. St. Louis, etc., R. Co., 54 Fed. 116, 10 U. S. App. 677; Cincinnati, etc., R. Co. v. Cooper, 120 Ind. 469; Atch-

conductor of the car or train that a passenger is feeble and will need assistance in getting on or off is notice to the carrier, and it is not necessary to notify every other conductor or employe that may be in charge of the car or train.³¹ The act of the conductor, driver or brakeman of a street car in assisting passengers to get on board or to alight from the cars is in the course of their employment, a passenger has the right to rely on such assistance, and the company is liable for negligence in rendering it resulting in injury.³² A passenger who becomes sick on a railroad train or car is entitled to such care from the carrier as it is fairly practicable for it to give with the facilities at hand, without thereby unduly delaying the car or train or unreasonably interfering with the safety and comfort of the other passengers.³³ A conductor's failure to stop a street car when twice requested by a girl who had become suddenly ill and less able to look after her own safety and who had asked to get off, and his failure to afford her such reasonable attention as would save her from harm because of her detention in the moving vehicle, constitute negligence.³⁴ The persons in charge of the train or car are negligent when, with knowledge that the passenger boarding it is a cripple, compelled to use a crutch and stick, they start before she has reasonable time to enter the car and take her seat, thereby causing her injury.³⁵ But the fact that a woman getting into a car is fleshy and incumbered with a number of children, when she has an escort with her, is not sufficient notice to the conductor of an infirmity which requires him to wait until she reaches a seat before starting a train.³⁶

son, etc., R. Co. v. Weber, 33 Kan. 543, 52 Am. Rep. 543, 21 Am. & Eng. R. Cas. 418; Columbus, etc., R. Co. v. Powell, 40 Ind. 37.

31. Foss v. Boston & M. R. Co., 66 N. H. 256, 47 Am. & Eng. R. Cas. 566.

32. Drew v. Sixth Ave. R. Co., 26 N. Y. 49, 3 Keyes (N. Y.), 429, 1 Abb. Dec. (N. Y.) 556.

33. Lake Shore, etc., R. Co. v. Salzman, 52 Ohio St. 558, 31 L. R. A. 261, 40 N. E. 891.

34. McCann v. Newark, etc., R. Co., 58 N. J. L. 642, 34 Atl. 1052, 4 Am. & Eng. R. Cas. 382, 33 L. R. A. 127. And see Indianapolis, etc., R.

Co. v. Pitzer, 109 Ind. 179; East Line & R. Co. v. Rushing, 69 Tex. 306, 6 S. W. 834; Shenandoah Val. R. Co. v. Moose, 83 Va. 827, 3 S. E. 796; Atchison, etc., R. Co. v. Weber, 33 Kan. 543; Louisville, etc., R. Co. v. Fleming, 14 Lea (Tenn.), 128; Columbus, etc., R. Co. v. Powell, 40 Ind. 37, as to the duty of the carrier to ill, feeble or disabled passengers.

35. Central Texas, etc., Ry. Co. v. Holloway (Tex.), 54 S. W. 419. See Little Rock Tract., etc., Co. v. Nelson, 66 Ark. 494; Haug v. Railway Co., 8 N. D. 23.

36. Louisville & N. R. Co. v. Hale,

And the act of a conductor who, after attempting to assist a person negligently attempting to board a car in motion, releases him at his own request, will not charge the company with negligence, where he falls and is run over by the cars.³⁷ Where plaintiff requested the conductor of defendant's street car on which he was a passenger, to stop the car and it did stop, and according to his testimony, corroborated by two witnesses, the car was started while he was alighting and had one foot on the step and the other on the ground, whereupon, being infirm and using a cane, he fell and was injured, it was held that his complaint in an action against the street car company was erroneously dismissed.³⁸ If a passenger on a street car is evidently crippled, infirm, aged, or very young, the duty of the carrier towards him while alighting from and boarding the car must be performed with due regard to such apparent condition.³⁹ A railroad company is liable for an injury to a pregnant passenger, caused by its negligence in allowing a car to collide with a train, though such collision would not have injured an ordinary passenger, and the company or its agents had no knowledge of the passenger's condition.⁴⁰

§ 41. Duty to carry to point of destination.—Under the New York statute every railroad corporation is under the obligation to take, transport, and discharge passengers from, to and at the usual stopping places established for receiving and discharging way passengers for its trains, on the due payment of the fare legally authorized therefor. A passenger is, under such statute, entitled to be safely carried to and discharged at the point of destination for which he has purchased a ticket or paid fare, when such point is a usual stopping place, and for a failure to perform this statutory obligation the railroad company is liable, because such failure

19 Ky. Law Rep. 1651, 42 L. R. A. 293, 44 S. W. 213, 10 Am. & Eng. R. Cas. N. S. 73.

37. Baltimore Tract. Co. v. State, Ringgold, 78 Md. 409, 58 Am. & Eng. R. Cas. 200, 28 Atl. 397.

38. Schiller v. Dry Dock, etc., R. Co., 56 N. Y. Supp. (90 St. Rep.) 184, 26 Misc. Rep. (N. Y.) 392.

39. Ridenhour v. Kansas City Cable R. Co., 102 Mo. 283, 14 S. W.

760; Clark v. Durham Tract. Co., 3 St. Ry. Rep. 731, 138 N. C. 77, 50 S. E. 518; Macon Ry. & L. Co. v. Vining, 3 St. Ry. Rep. 88, 120 Ga. 511, 48 S. E. 232; Indianapolis & G. R. T. Co. v. Derry, 3 St. Ry. Rep. 231, (Ind. App.) 71 N. E. 912; see also note, 2 St. Ry. Rep. 945.

40. St. Louis S. W. R. Co. v. Ferguson (Tex.), 54 S. W. 797.

is of itself negligence.⁴¹ But, independent of such a statute, by the sale of a ticket or the receipt of the price of transportation from one point to another, a railroad company expressly contracts to carry such person to the point covered by the contract, and there is an implied contract that the passenger shall be carried safely; and the passenger has a right to be safely put off at a regular station to which he has bought a ticket or paid fare; and the carrier is liable for any injury that may result to the passenger through its negligence in the performance of such contract.⁴² But, in the absence of a special contract, a railroad company is not bound to stop a train and discharge a passenger at his point of destination where such point is a station where, under reasonable rules of the company, the train does not regularly or ordinarily stop and is not scheduled to stop.⁴³ In the absence of a special contract a passenger cannot complain that a carrier refused to stop its train at a point other than one of its stations, even if the passenger mistakenly embarked thereon and paid his fare, if he is put off in a civil manner at the stopping place nearest his destination.⁴⁴ Where a railroad company's agent from whom a

41. Minor v. Lehigh Valley R. Co., 21 App. Div. (N. Y.) 307, 47 N. Y. Supp. 307. See N. Y. Laws 1890, Chap. 565, § 34.

42. Bucher v. New York Cent., etc., R. Co., 98 N. Y. 128, 21 Am. & Eng. R. Cas. 361; Kentucky, etc., Bridge Co. v. Quinkert, 2 Ind. App. 244; Pennsylvania R. Co. v. Aspell, 23 Pa. St. 149, 62 Am. Dec. 323; Sunday v. Gordon, B. & H. Adm. (U. S.) 569, as to right of passengers and seamen carried to a port different from the one agreed upon; Lambeth v. North Carolina R. Co., 66 N. C. 494, 8 Am. Rep. 508; Thomas v. Charlotte, etc., R. Co., 38 S. C. 485; Porter v. Steamboat New England, 17 Mo. 290. But he cannot require a train to be stopped at a station at which the time tables of the company do not provide that such train shall stop. Dietrich v. Pennsylvania R. Co., 71 Pa. St. 432, 10 Am. Rep. 711. A passenger has a right to have a

train stopped at a place at which it is scheduled in the time table to stop, and his ejection at the last preceding station is wrongful. McDonald v. Central R. Co. (N. J.), 62 Atl. 405.

43. Ill.—Chicago, etc., R. Co. v. Randolph, 53 Ill. 510, 5 Am. Rep. 60.

Ind.—Pittsburgh, etc., R. Co. v. Lightcap, 7 Ind. App. 249; Ohio, etc., R. Co. v. Applewhite, 52 Ind. 540; Pittsburgh, etc., R. Co. v. Nuzum, 50 Ind. 141, 19 Am. Rep. 703.

Mich.—Lake Shore, etc., R. Co. v. Pierce, 47 Mich. 279.

Miss.—Humphries v. Illinois Cent. R. Co., 70 Miss. 453.

Mo.—Sira v. Wabash R. Co., 115 Mo. 127, 37 Am. St. Rep. 386.

Wis.—Schiffler v. Chicago, etc., R. Co., 96 Wis. 141, 71 N. W. 97, 8 Am. & Eng. R. Cas. N. S. 122; Plott v. Chicago, etc., R. Co., 63 Wis. 511.

44. Wells v. Alabama G. S. R.

passenger purchased a return ticket was informed and understood that such passenger purchased the ticket with the intention of returning from his destination on the night train, if that train did not stop at his station, it was the duty of the agent to notify him of the fact.⁴⁵ A railway passenger who is notified that he has reached his destination, but refuses to get off, and is so drunk that the conductor carries him beyond that station because he does not dare to leave him, is rightfully ejected by the use of such force as is necessary, upon his refusal on the next day to pay his fare on a train which he boards to return to his destination.⁴⁶

§ 42. Carrying passengers beyond destination.—A passenger is entitled to recover damages for the inconvenience, loss of time, and labor of traveling back, where he has paid his fare to a regular station and was carried beyond his destination by the failure of the conductor to stop his train, as such failure is a breach of contract and of itself constitutes negligence on the part of the carrier; and if injured by reason of such negligence, he is entitled to recover for such injury.⁴⁷ But the carrier is not liable when

Co. (Miss.), 6 So. 737, 40 Am. & Eng. R. Cas. 645.

45. St. Louis, etc., R. Co. v. Adcox, 52 Ark. 406, 12 S. W. 874, 40 Am. & Eng. R. Cas. 682.

46. Louisville, etc., R. Co. v. Lewis, 14 Ky. L. Rep. 770, 21 S. W. 341.

47. N. Y.—*Minor v. Lehigh Valley R. Co.*, 21 App. Div. (N. Y.) 307, 47 N. Y. Supp. 307; *Bucher v. New York Cent.*, etc., R. Co., 98 N. Y. 128, 21 Am. & Eng. R. Cas. 361.

U. S.—*Brulard v. The Alvin*, 45 Fed. 766.

Ala.—*Alabama G. S. R. Co. v. Seller*, 93 Ala. 9; *East Tennessee, etc., R. Co. v. Lockhart*, 79 Ala. 315.

Ark.—*St. Louis, etc., R. Co. v. Cantrell*, 37 Ark. 519, 40 Am. Rep. 105.

Cal.—*Franklin v. Southern California, etc., R. Co.*, 85 Cal. 63.

Ga.—*Caldwell v. Richmond, etc.*,

R. Co., 89 Ga. 550; *Nunn v. Georgia R. Co.*, 71 Ga. 710, 51 Am. Rep. 284; *Georgia R., etc., Co. v. McCurdy*, 45 Ga. 288, 12 Am. Rep. 577.

Ill.—*Chicago, etc., R. Co. v. Fisher*, 66 Ill. 152.

Ind.—*White Water R. Co. v. Butler*, 112 Ind. 598; *Ohio, etc., R. Co. v. Hatton*, 60 Ind. 12; *Baltimore, etc., R. Co. v. Pixley*, 61 Ind. 22; *Columbus, etc., R. Co. v. Farrell*, 31 Ind. 408; *Evansville, etc., R. Co. v. Kyte*, 6 Ind. App. 52.

Ky.—*Louisville, etc., R. Co. v. Jackson*, 18 Ky. L. Rep. 296.

Miss.—*Thompson v. New Orleans, etc., R. Co.*, 50 Miss. 315, 19 Am. Rep. 12; *Mobile, etc., R. Co. v. McArthur*, 43 Miss. 180; *Southern R. Co. v. Kendrick*, 40 Miss. 375, 90 Am. Dec. 332; *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785.

Mo.—*Strange v. Missouri Pac. R.*

stopping the train was deemed unsafe,⁴⁸ or where the air brakes were in good condition when the train started, but became unmanageable from a cause which could not have been prevented.⁴⁹ Nor is the carrier liable in damages for carrying a passenger past his destination, he being sick and drowsy, or asleep when his destination is reached, although the conductor agreed to rouse him at his destination, and failed to do so;⁵⁰ since the employes of a carrier are under no obligation to awaken a passenger upon his arrival at his station.⁵¹ But a railroad company which carries a sick passenger past his destination while unconscious, although the conductor and station agent had agreed to give him care on the way and have him carried from the train at his destination, is liable for the injuries which result to him therefrom.⁵² And a railroad com-

Co., 61 Mo. App. 586; *Trigg v. St. Louis*, etc., R. Co., 74 Mo. 147, 41 Am. Rep. 305; *Warden v. Missouri Pac. R. Co.*, 35 Mo. App. 631.

N. C.—*Cable v. Southern R. Co.*, 122 N. C. 892, 29 S. E. 377.

N. H.—*Foss v. Boston*, etc., R. Co., 66 N. H. 256, 11 L. R. A. 367.

Pa.—*Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147, 62 Am. Dec. 323.

S. C.—*Samuels v. Richmond R. Co.*, 35 S. C. 493.

Tex.—*Houston, etc., R. Co. v. Smith* (Tex. Civ. App.), 32 S. W. 710; *Texas*, etc., R. Co. v. *Mansell* (Tex. Civ. App.), 23 S. W. 549; *For-dyce v. Dillingham* (Tex. Civ. App.), 23 S. W. 550; *International*, etc., R. Co. v. *Terry*, 62 Tex. 380, 50 Am. Rep. 529; *Galveston*, etc., R. Co. v. *Crispi*, 73 Tex. 236.

Eng.—*Hobbs v. London*, etc., R. Co., L. R. 10 Q. B. 111; *Robson v. North Eastern R. Co.*, 2 Q. B. Div. 85. The carrier is liable, even though unable to stop the train because the appliances imperfectly communicated the signal to the engineer, if the conductor failed to return the passenger to her station, or to offer to do so, and compelled her to leave the train against her will, a half mile

beyond her station. *Louisville, etc., R. Co. v. Daney*, 97 Ala. 338, 11 So. 796.

48. *Reed v. Duluth*, etc., R. Co., 100 Mich. 507.

49. *Porter v. Chicago*, etc., R. Co., 80 Mich. 156, 20 Am. St. Rep. 511.

50. *Texas*, etc., R. Co. v. *Alexander* (Tex. Civ. App.), 30 S. W. 113; *Wil-son v. New Orleans*, etc., R. Co., 68 Miss. 9; *Sevier v. Vicksburg*, etc., R. Co., 61 Miss. 8, 48 Am. Rep. 74; *Nunn v. Georgia R. Co.*, 71 Ga. 710, 51 Am. Rep. 284. See also *Louis-ville, etc., R. Co. v. Mask*, 64 Miss. 738; *New Orleans*, etc., R. Co. v. *Statham*, 42 Miss. 607, 97 Am. Dec. 478; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 294, 72 Am. Dec. 787.

51. *Nichols v. Chicago*, etc., R. Co., 90 Mich. 203; *McClelland v. Louis-ville*, etc., R. Co., 94 Ind. 276. A passenger carried beyond his destination while asleep is not entitled to a free passage to the next station. *Texas*, etc., R. Co. v. *James*, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347.

52. *Weightman v. Louisville*, etc., R. Co., 70 Miss. 563, 12 So. 586, 19 L. R. A. 671, 14 Alb. L. J. 370. But see *Tillery v. Bond*, 38 Fed. 825.

pany which accepted a drunken man as a passenger, negligently carried him beyond his destination, and put him off at another station, from the depot at which he was ejected, although the night was cold and stormy, is liable in damages for his death, where he died from exposure while attempting to find shelter.⁵³ Where a carrier of passengers fails to stop its train at the station of a passenger's destination, it becomes the duty of the passenger to retain his seat and institute his action against the carrier for damages, and if he is injured by his own negligence in passing from one coach to another to find the conductor and have the train stopped, he cannot recover.⁵⁴ So, in an action against the carrier for causing a passenger to alight at a distance from her station, no recovery can be had for injuries caused by walking from the place of alighting to her destination, where she could have discovered a place to stay over night had she inquired, and knew that her health was such that she might be seriously affected by the walk.⁵⁵ A passenger cannot recover after being carried by, in the absence of a request of the conductor or other agent of the railroad to run the train back to the station.⁵⁶ But it is no defense that the con-

53. Haug v. Great Northern R. Co., 8 N. Dak. 23, 77 N. W. 97, 42 L. R. A. 664, 5 Am. Neg. Rep. 467, 12 Am. & Eng. R. Cas. 25. See Gill v. Rochester, etc., R. Co., 37 Hun (N. Y.), 107; Louisville, etc., R. Co. v. Johnson, 108 Ala. 62, 31 L. R. A. 372, 19 So. 51; Tanner v. Louisville, etc., R. Co., 60 Ala. 621; Isbell v. New York, etc., R. Co., 27 Conn. 393, 71 Am. Dec. 78; Kerwhacker v. Cleveland, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Louisville, etc., R. Co. v. Sullivan, 81 Ky. 624; Johnson v. Chicago, etc., R. Co., 58 Iowa, 348; Kline v. Central Pac. R. Co., 37 Cal. 400, 99 Am. Dec. 282; Railway Co v. Valleley, 32 Ohio St. 345, 30 Am. Rep. 601; Atchison, etc., R. Co. v. Weber, 33 Kan. 543, 52 Am. Rep. 543; Conolly v. Crescent City R. Co., 41 La. Ann. 57, 3 L. R. A. 133; Indianapolis, etc., R. Co. v. Pitzer, 109 Ind. 179, 58 Am. Rep. 387; Roseman v. Carolina Cent. R. Co., 112 N. C.

709, 19 L. R. A. 327, 16 S. E. 768; Toledo, etc., R. Co. v. Wright, 68 Ind. 586, 34 Am. Rep. 277; Brown v. Chicago, etc., R. Co., 51 Iowa, 235; Central R. Co. v. Glass, 60 Ga. 441; International, etc., R. Co. v. Gilbert, 64 Tex. 536; Lake Shore, etc., R. Co. v. Rosenzweig, 113 Pa. St. 519; Rudy v. Rio Grande Western R. Co., 8 Utah, 165; Cincinnati, etc., R. Co. v. Skillman, 39 Ohio St. 444; Texas, etc., R. Co. v. McDonald, 2 Tex. App. Civ. Cas. § 163; Hall v. South Carolina R. Co., 28 S. C. 261; Wyman v. Northern Pac. R. Co., 34 Minn. 210; Weymire v. Wolfe, 52 Iowa, 533; Ham v. Delaware, etc., Canal Co., 155 Pa. 548, 20 L. R. A. 682.

54. Jamison v. Chesapeake, etc., R. Co., 92 Va. 327.

55. Childs v. New York, etc., R. Co., 77 Hun (N. Y.), 539, 28 N. Y. Supp. 894.

56. Gulf, etc., R. Co. v. Head (Tex. App.), 15 S. W. 504. But

ductor agreed to let him off at an intermediate station, and give him a pass by which he could take the next train, where such offer was not accepted.⁵⁷ A conductor's promise to look after a seven-year-old boy, who was traveling alone, and to tell his successor to do so, will not render the railroad company liable for carrying the boy beyond his destination, if he was safely returned that night, even though the boy's father, who was at the station to meet his son, was told by the second conductor that he was not on the train.⁵⁸

§ 43. Duty to carry promptly.—Where a carrier of passengers has undertaken to carry a passenger from one place to another, the law imposes upon it, independent of any special agreement, the duty of carrying the passenger through without unreasonable delay or detention, and it will be liable for damages sustained as the direct and necessary result of its failure to do so, unless prevented by some valid reason.⁵⁹ Such damages may include sickness caused by detention in an unhealthy climate, expenses thereof, loss of time, the passage money, and return passage money.⁶⁰ Whether such detention was the willful act of the conductor or not, does not alter the rule of law, the act being within the scope of the agent's employment and authority.⁶¹ A railroad company which fails to run a train according to its published schedule, unless prevented by some valid reason, is liable to a person sustaining injury from such failure, for the damages actually sustained by him as the direct and necessary result thereof, but not

otherwise when not aware of his carriage beyond his station. *Winkler v. St. Louis, etc., R. Co.*, 21 Mo. App. 99.

57. *Ohio, etc., R. Co. v. People*, 29 Ill. App. 561.

58. *Gage v. Illinois Cent. R. Co.*, 75 Miss. 17, 21 So. 657, 8 Am. & Eng. R. Cas. N. S. 377.

59. *Van Buskerk v. Roberts*, 31 N. Y. 661; *Williams v. Vanderbilt*, 28 N. Y. 211; *Ward v. Vanderbilt*, 1 Keyes (N. Y.), 70, 4 Abb. Dec. (N. Y.) 521; *Benson v. New Jersey R., etc., Co.*, 9 Bosw. (N. Y.) 412; *Block v. Bannerman*, 10 La. Ann. 1; Michi-

gan Cent. R. Co. v. Coleman, 28 Mich. 440; *Savannah, etc., R. Co. v. Bonaud*, 58 Ga. 180; *Le Blanche v. London, etc., R. Co.*, 1 C. P. Div. 286; *Fitzgerald v. Midland R. Co.*, 34 L. T. N. S. 771; *Denton v. Great Northern R. Co.*, 34 Eng. L. & Eq. 154. See also *Hurst v. Great Western R. Co.*, 19 C. B. N. S. 310, 115 E. C. L. 310, 11 Jur. N. S. 730, 34 L. J. C. P. 264, 13 W. R. 950, 12 L. T. N. S. 634.

60. *Van Buskirk v. Roberts, supra*; *Williams v. Vanderbilt, supra*.

61. *Weed v. Panama R. Co.*, 17 N. Y. 364, 72 Am. Dec. 474.

for conjectural or unproved damages.⁶² The publication of a time table, in common form, imposes upon a railroad company the obligation to use due care and skill to have the trains arrive and depart at the precise moments indicated therein; but it does not import an absolute and unconditional engagement for such arrival and departure, and does not make the company liable for want of punctuality which is not attributable to its negligence.⁶³ A railroad company is liable to a passenger for damages for being compelled to remain in a rain and hail storm after leaving the train at her place of destination, from two to ten minutes, because of the obstruction by a freight train of the way to the depot, where, to reach the depot, she would have been compelled either to crawl under the train or walk around it at a distance of several hundred yards, and on the side of the passenger train opposite the freight train there was no house, and the way was obstructed by a wire fence.⁶⁴ The failure of a railroad company to start an ordinary passenger train, owing to the neglect of the fireman of the engine to get up steam, is not an accident, but an act of negligence, and a passenger who suffers loss by the delay may recover his reasonable damages.⁶⁵ But unless the carrier has been notified of the urgent necessity from prompt carriage, it will be liable, in case of its negligent delay, only for the usual and ordinary damages; for example, a theatrical manager, who with his troupe was a passenger and who was prevented from reaching his destination, by reason of a collision on defendant's road, in time to fulfill an advertised engagement, for which tickets had been sold, and had to refund the ticket money, could not recover that amount.⁶⁶

62. *Savannah, etc., R. Co. v. Bonaud*, 58 Ga. 180; *Lafayette, etc., R. Co. v. Sims*, 27 Ind. 59; *Heirn v. Mc-Caughan*, 32 Miss. 17, 66 Am. Dec. 588; *Hamlin v. Great Northern R. Co.*, 1 H. & N. 408; *Dunlop v. Edinburgh, etc., R. Co.*, 16 Jur. Pt. 2, 407; *Denton v. Great Northern Co.*, 5 El. & Bl. 860, 85 E. C. L. 860; *Sears v. Eastern R. Co.*, 14 Allen (Mass.), 433, 92 Am. Dec. 780.

63. *Gordon v. Manchester, etc., R. Co.*, 52 N. H. 596, 13 Am. Rep. 97; *Nelson v. Chicago, etc., R. Co.*, 60 Wis. 320, 22 Am. & Eng. R. Cas. 391;

Compton v. Long Island R. Co., 41 Hun (N. Y.), 642, 1 St. Rep. (N. Y.) 554.

64. *Louisville, etc., R. Co., v. Keller*, 20 Ky. L. Rep. 957, 47 S. W. 1072, 5 Am. Neg. Rep. 348, 12 Am. & Eng. R. Cas. N. S. 89.

65. *Buckmaster v. Great Eastern R. Co.*, 23 L. T. N. S. 471. See also *McCarten v. North Eastern R. Co.*, 54 L. J. Q. B. Div. 441; *Le Blanche v. London, etc., R. Co.*, 24 W. R. 808, 34 L. T. N. S. 667, 45 L. J. C. P. Div. 521, 1 C. P. Div. 286.

66. *Georgia R. Co. v. Hayden*, 71

§ 44. Safety of passengers.—While carriers of passengers are not insurers of the safety of those whom they undertake to carry against all the risks of travel, they are under the general obligation to carry safely, and are liable for any fault or negligence on their part resulting in injury to their passengers which is not contributed to by the negligence of the latter.⁶⁷ As we have seen they are held to the highest degree of care for the safety of their passengers in the actual transportation and in regard to the results naturally to be apprehended from a failure to furnish safe roadbeds, proper machinery, perfect cars, coaches, or vessels, and things of that nature. As to incidental damages which may arise in the course of transportation they are not held to so high a degree of care, but are only bound to exercise reasonable care to be measured by the circumstances surrounding each case to prevent accidents or injury of their passengers.⁶⁸ For example, a carrier of passengers is responsible for the consequences of the falling of an

Ga. 518, 51 Am. Rep. 274; Missouri Pac. R. Co. v. Curtis, 3 Tex. App. Civ. Cas. § 311.

67. N. Y.—Loftus v. Union Ferry Co., 84 N. Y. 455, 22 Hun (N. Y.), 33; Walker v. Erie R. Co., 63 Barb. (N. Y.) 260.

U. S.—Behrens v. The Furnessia, 35 Fed. 798; The Oriflamme, 3 Sawy. (U. S.) 397; Curtis v. Central R. Co., 6 McLean (U. S.), 410.

Ark.—St. Louis, etc., R. Co. v. Rexroad, 59 Ark. 180, 58 Am. & Eng. R. Cas. 615.

Ill.—Hannibal, etc., R. Co. v. Martin, 111 Ill. 219, affd. 11 Ill. App. 386; Chicago, etc., R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33; Ohio, etc., R. Co. v. Schiebe, 44 Ill. 460, running trains on side track.

Ind.—Louisville, etc., R. Co. v. Kelly, 92 Ind. 371, 47 Am. Rep. 149; Pennsylvania Co. v. Dean, 92 Ind. 459; Terre Haute, etc., R. Co. v. Jackson, 81 Ind. 19; Cleveland, etc., R. Co. v. Newell, 75 Ind. 542; Thayer v. St. Louis, etc., R. Co., 22 Ind. 26, 85 Am. Dec. 409, carrier liable for

injuries done to persons not passengers.

Iowa.—Quackenbush v. Chicago, etc., R. Co., 73 Iowa, 458, 34 Am. & Eng. R. Cas. 545, switching cars.

La.—Julien v. Steamer Wade Hampton, 27 La. Ann. 377.

Mo.—Leslie v. Wabash, etc., R. Co., 88 Mo. 50; Gilson v. Jackson Co. H. R. Co., 76 Mo. 282; Lemon v. Chancellor, 68 Mo. 340, 30 Am. Rep. 799.

N. J.—New York, etc., R. Co. v. New Jersey Electric R. Co. (N. J.), 37 Atl. 627, electric street cars crossing steam railroad.

Pa.—Fearn v. West Jersey Ferry Co., 143 Pa. St. 122; Neslie v. Second, etc., Streets Pass. R. Co., 113 Pa. St. 300.

Tex.—East Line, etc., R. Co. v. Rushing, 69 Tex. 306, failure to notify of danger from switch engines.

Eng.—Jackson v. Metropolitan R. Co., 26 W. R. 175, revg. 2 C. P. Div. 125, crushing hand by suddenly shutting door.

68. See § 32, *ante*.

upper tier of berths upon a passenger, because of its defective construction, the carrier being bound to the exercise of ordinary care and skill in the construction of its berths, and to use materials of sufficient strength and so far as practicable such as would be safe and secure against the commotion of the elements, and the violence occasioned thereby.⁶⁹ But the carrier may not be responsible for any injury to a passenger caused by the falling of an article placed in a rack intended to hold the same by another passenger, where there was no evidence that the article was not securely placed in the first instance, or that at any time before it fell there was anything in its position to indicate that it was likely to fall, or that there was anything extraordinary about the parcel or its position in the rack, or anything to attract particular attention to it, since, in the absence of such facts, the failure of the carrier's servants to notice it, or if noticed, to order it removed, was insufficient to establish negligence on the part of the carrier, it being required in such a case to use only reasonable care and vigilance.⁷⁰ A carrier is liable for injuries to a passenger where it so stopped a train at its station that a car projected over the intersecting track of another road, down which came cars belonging to the company owning the other road, which had become uncoupled, and overturned the projecting car.⁷¹ A railroad company is responsible for an injury occasioned by want of proper care and prudence on the part of its servants in the management of a train which is under their exclusive care, direction and control, although the train belongs to another company.⁷² It is negligence in a railroad company to permit its passengers to alight on the opposite track, without giving notice of an approaching train,⁷³ but it is the duty of a passenger, on alighting, knowing that a train is just due, to look in the direction from which it should come, before attempting to cross the railroad track, and if he omits to do so, he is guilty

69. Smith v. British, etc., Steam Packet Co., 86 N. Y. 408.

70. Morris v. New York Cent., etc., R. Co., 106 N. Y. 678, 11 St. Rep. (N. Y.) 678, 1 Silv. App. (N. Y.) 513, 30 Am. & Eng. R. Cas. 538, falling of a clothes-wringer; Whiting v. New York Cent., etc., R. Co., 97 App. Div. (N. Y.) 11, 89 N. Y. Supp. 584.

71. Kellow Central Iowa R. Co., 68 Iowa, 470, 56 Am. Rep. 858, 21 Am. & Eng. R. Cas. 485.

72. Barron v. Illinois Cent. R. Co., 1 Biss. (U. S.) 453, 5 Wall. (U. S.) 90; Fletcher v. Boston, etc., R. Co., 1 Allen (Mass.), 9, 79 Am. Dec. 695.

73. Gonzales v. New York, etc., R. Co., 39 How. Pr. (N. Y.) 407.

of contributory negligence.⁷⁴ The fact that the conductor of a passenger train and a watchman were supplied with the same uniforms and the same kind of signal lanterns, and that the signal of one was mistaken by the engineer for that of the other whereby a collision with a freight train occurred causing the death of a passenger, in such evidence of negligence as will warrant a recovery against the company.⁷⁵

§ 45. Safety of passengers on freight and other trains.—The rule that a railroad company undertaking to carry passengers is bound to the highest degree of diligence applies irrespective of any distinction between different kinds of trains. There is no reason for relaxing the rule where a passenger is carried on a freight or construction train. If the company accepts passengers upon its freight trains, or other than passenger trains, it is held to the same degree of care for their safety as if on passenger trains, except that the passenger must assume the usual ordinary risks arising from and incident to that method of travel, except for neglect of the company.⁷⁶ But the assumption by a passenger of the extra risks of riding on a freight train does not include any greater risk as to the condition of the roadway and tracks than passengers on regular passenger trains assume, and if he is injured by the negligence of the company, and at the same time he is using due care and caution, he may recover for such injury.⁷⁷ A railroad company which undertakes to transport passengers on a freight train is bound to exercise the highest degree of care

74. Gonzales v. New York, etc., R. Co., 38 N. Y. 440.

Am. St. Rep. 510; Way v. Chicago, etc., R. Co., 73 Iowa, 463, 34 Am. &

75. Kansas City, etc., R. Co. v. Sanders, 98 Ala. 293, 13 So. 57, 58 Am. & Eng. R. Cas. 140.

Eng. R. Cas. 286. The same rule applies to gratuitous passengers on pas-

seger trains or vessels. Philadelphia, etc., R. Co. v. Derby, 14 How. (U. S.) 486; New York Cent., etc., R. Co. v. Lockwood, 17 Wall. (U. S.) 357.

76. Indianapolis, etc., R. Co. v. Horst, 93 U. S. 291; New York, etc., R. Co. v. Doane, 115 Ind. 435, 17 N. E. 913, 7 Am. St. Rep. 451, 1 L. R. A. 157; Wallace v. Western, etc., R. Co., 98 N. C. 494, 4 S. E. 503, 2 Am. St. Rep. 346; Illinois Cent. R. Co. v. Axley, 47 Ill. App. 307; Chicago, etc., R. Co. v. Hazzard, 26 Ill. 373; Rosenbaum v. St. Paul, etc., R. Co., 33 Minn. 173, 36 N. W. 447; Lake Shore, etc., R. Co. v. Brown, 123, Ill. 162, 5

Am. St. Rep. 510; Way v. Chicago, etc., R. Co., 73 Iowa, 463, 34 Am. &

Eng. R. Cas. 286. The same rule applies to gratuitous passengers on pas-

seger trains or vessels. Philadelphia, etc., R. Co. v. Derby, 14 How. (U. S.) 486; New York Cent., etc., R. Co. v. Lockwood, 17 Wall. (U. S.) 357.

77. Illinois Cent. R. Co. v. Nelson, 59 Ill. 112; Ohio Valley R. Co. v. Watson, 93 Ky. 654, 40 Am. St. Rep. 211, 58 Am. & Eng. R. Cas. 418; Murphy v. St. Louis, etc., R. Co., 43 Mo. App. 342; Dougherty v. Missouri R. Co., 81 Mo. 325, 51 Am. Rep. 239; Reber v. Bond, 38 Fed. 822.

possible on such a train for their safety.⁷⁸ A railroad company owes to a passenger the exercise of the highest degree of care consistent with the practical and efficient use of the train, whether it is a passenger or a freight train; but precautions which are required in case of a passenger train are not always required in case of a freight train.⁷⁹

§ 46. Duty of carrier to provide passengers with seats.—A railroad company must furnish to its passengers seats as well as mere transportation, and cannot require the payment of fare or the surrender of a ticket until it has furnished both; but a passenger accepting transportation without a seat waives his right to the latter, and for refusal to pay fare or surrender his ticket may be ejected. The passenger has no right to ride free because not furnished with a seat. His remedy when he is refused a seat is to leave the train, and he may then recover damages for the railroad's breach of contract.⁸⁰ A passenger who refuses to pay fare unless a seat is provided does not thereby become a trespasser on the train.⁸¹ A male passenger who has taken a seat in a car exclusively appropriated to ladies cannot rightfully be removed by force

78. *Sprague v. Southern R. Co.*, 63 U. S. App. 711, 34 C. C. A. 207, 92 Fed. 59, 14 Am. & Eng. R. Cas. N. S. 356. And see *New Jersey R., etc., Co. v. Pollard*, 22 Wall. (U. S.) 341, 22 L. Ed. 877; *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181, 10 L. Ed. 115; *Inland & S. Coasting Co. v. Tolson*, 139 U. S. 551, 35 L. Ed. 270; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 35 L. Ed. 458.

79. *Steele v. Southern R. Co.*, 55 S. C. 389, 33 S. E. 509, 14 Am. & Eng. R. Cas. N. S. 350. See also *Chicago, etc., R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 206, 19 L. R. A. 313; *Olds v. New York, etc., R. Co.*, 172 Mass. 73, 51 N. E. 451; *Dunn v. Grand Trunk R. Co.*, 58 Me. 187, 4 Am. Rep. 272; *Crine v. East Tennessee, etc., R. Co.*, 84 Ga. 651, 11 S. E. 557; *McGee v. Missouri Pac. R. Co.*,

92 Mo. 208; *Delaware, etc., R. Co. v. Ashley*, 67 Fed. 209, 28 U. S. App. 375, 14 C. C. A. 368; *Louisville, etc., R. Co. v. Bisch*, 120 Ind. 549, 22 N. E. 664.

80. *Memphis, etc., R. Co. v. Benson*, 85 Tenn. 627, 4 S. W. 5, 4 Am. St. Rep. 776; *St. Louis, etc., R. Co. v. Leigh*, 45 Ark. 368, 55 Am. Rep. 558; *Davis v. Kansas City, etc., R. Co.*, 53 Mo. 317, 14 Am. Rep. 457.

A passenger may be rightfully ejected for refusing to pay his fare or deliver his ticket unless a seat is furnished in a car already filled with passengers, when there are seats vacant in another car which are offered to him. *Pittsburgh, etc., R. Co. v. Van Houten*, 48 Ind. 90.

81. *Hardenbergh v. St. Paul, etc., R. Co.*, 39 Minn. 3, 12 Am. St. Rep. 610.

without being offered a seat elsewhere.⁸² The conductor of a train must furnish the holder of a first class ticket with a seat in a first class coach unless a sudden and unusual influx of passengers more than exhaust the seating capacity of the car, allowing a single seat to each passenger.⁸³ It is as much the duty of the conductor as the agent of the railroad company to see that each passenger is furnished with a proper seat, as it is to require him to pay his fare. The seat must be furnished by the company and the passenger is not compelled in seeking a seat to assume the risk of trespassing upon the rights of others to ask as a favor from the courtesy of a fellow passenger that which is due from the company to him as a right. He is not bound to pass from car to car in search of a seat, and is not negligent in standing on the platform of a car in motion, if there is no vacant seat within the car.⁸⁴ He is not a trespasser in passing into a drawing room car and taking a seat until seats in the other cars are vacated and when he offers to leave the car as soon as a seat is provided in the other car, the company is liable for removing or attempting to remove him forcibly for refusing to pay extra fare.⁸⁵ The carrier is liable for injuries to a passenger who, being unable to find a seat, was directed by the conductor, while the train was in motion, to pass to another car, where he would find a seat, and in so passing was jostled by the brakeman on the platform and fell off the car.⁸⁶ The failure of a railroad company to furnish accommodations for its passengers, so that a large number of them are compelled to stand in the aisles and upon the platforms of the cars, constitutes negligence.⁸⁷

§ 47. Liability for injuries caused by collision.—A passenger in a railway car who has been injured in a collision caused by the negligence of the employes of the carrier, is entitled in an action against the carrier to recover damages for the injury actually sustained.⁸⁸ But if the carrier were negligent, as, for ex-

82. Bass v. Chicago, etc., R. Co., 36 Wis. 450.

83. Louisville, etc., R. Co. v. Patterson, 69 Miss. 421, 13 So. 697.

84. Willis v. Long Island R. Co., 34 N. Y. 670. But see Camden, etc., R. Co. v. Hoosey, 99 Pa. St. 492, 44 Am. Rep. 120.

85. Thorpe v. New York Cent., etc., R. Co., 76 N. Y. 402, 32 Am.

Rep. 325. See Kingsley v. Lake Shore, etc., R. Co., 125 Mass. 54, 28 Am. Rep. 200.

86. Louisville, etc., R. Co. v. Kelly, 92 Ind. 371, 47 Am. Rep. 149.

87. Graham v. McNeill, 20 Wash. 466, 55 Pac. 631, 4 L. R. A. 300, 5 Am. Neg. Rep. 484, 12 Am. & Eng. R. Cas. N. S. 149.

88. U. S.—Farlow v. Kelly, 108 U.

ample, in leaving an engine on a side track unattended, and with fire in it, if such negligence was not the proximate cause of the injury, the engine being moved to the main track by a wrong-doer, the carrier is not liable.⁸⁹ In an action for injuries to a passenger from a railroad collision, it is presumed in the first instance that the collision was the result of the carrier's negligence, to rebut which the defendant must affirmatively show that the collision was the result of inevitable casualty, or of some cause which human care and foresight could prevent.⁹⁰ The carrier is liable for injuries to a passenger received in a collision at a grade crossing where it failed to keep a proper lookout for an approaching train or car on another road, and to have its train or car under proper control so as to be able to stop it before reaching

S. 288, 11 Am. & Eng. R. Cas. 104; Milwaukee, etc., R. Co. v. Arms, 91 U. S. 489.

N. Y.—Truex v. Erie R. Co., 4 Lans. (N. Y.) 198.

Del.—McAlister v. Peoples Ry. Co. (Del.), 54 Atl. 743, failure of employes to discover that a snap switch was closed.

Ind.—Louisville, etc., R. Co. v. Taylor, 126 Ind. 126.

Ky.—Louisville, etc., R. Co. v. Richmond, 23 Ky. L. Rep. 2394, 67 S. W. 25; Louisville, etc., R. Co. v. Long, 94 Ky. 410; Louisville Southern R. Co. v. Minogue, 90 Ky. 369, 29 Am. St. Rep. 378.

N. J.—Dunn v. Pennsylvania R. Co. (N. J.), 58 Atl. 164.

Ohio.—Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co., 30 Ohio St. 604, as to effect of statute to prevent collision.

Pa.—Bunting v. Hogsett, 139 Pa. St. 363, 23 Am. St. Rep. 192, 48 Am. & Eng. R. Cas. 87.

Mass.—Blanchett v. Holyoke St. Ry. Co., 175 Mass. 51, 55 N. E. 481.

Miss.—Alabama, etc., R. Co. v. Beardsley, 79 Miss. 417, 30 So. 660.

Mo.—Fleming v. Kansas City, etc.,

R. Co., 89 Mo. App. 129; Hennessy v. St. Louis, etc., R. Co., 173 Mo. 86, 73 S. W. 162.

Tex.—Central Texas, etc., R. Co. v. Smith (Tex. Civ. App.), 73 S. W. 537, a switch engine left standing on the track over which a passenger train was expected; International, etc., R. Co. v. Gray, 65 Tex. 32, 27 Am. & Eng. R. Cas. 318; Gulf, etc., R. Co. v. Holt (Tex. Civ. App.), 70 S. W. 519.

Tenn.—Louisville, etc., R. Co. v. Burke, 6 Coldw. (Tenn.) 45, carriers liable for accidents and collisions unless they show the precautions prescribed by the statute.

89. Mars v. Delaware, etc., Canal Co., 54 Hun (N. Y.), 625, 8 N. Y. Supp. 107. On the general subject of proximate and remote cause in action for negligence, see West v. Ward (Iowa), 42 N. W. 309, and note; Phillips v. De Wald (Ga.), 7 S. E. 151, and note; Frazer v. Telegraph Co. (Ala.), 4 So. 831, and note.

90. Bower v. New York Cent. R. Co., 18 N. Y. 408, 72 Am. Dec. 529; Sambuck v. Southern Pac. Co. (Cal.), 71 Pac. 174; Coddington v. Brooklyn, etc., R. Co., 102 N. Y. 66.

the crossing in case danger of collision is apparent.⁹¹ But want of proper care on its part must be shown. For instance, where a motorman of an electric railway started to cross an intersecting steam railroad after his conductor had used proper care to ascertain that no train was expected, and while crossing at a moderate speed a railroad train rounded the curve at a high rate of speed without warning, and a collision seemed imminent, and the motorman instantly applied all power and increased the speed, a verdict attributing negligence to the motorman on these facts, whereby a passenger was thrown to the floor of the car and injured, cannot be sustained.⁹² One injured by the negligence of a railway company in whose car he is riding may recover therefor, although the negligence of another railway company concurred in or contributed thereto. If both were negligent in a manner and to a degree contributing to the result, they are liable jointly and severally. This rule is generally maintained by the courts of this country.⁹³

91. Selma St., etc., R. Co. v. Owen (Ala.), 31 So. 598; West Jersey R. Co. v. Railway Co., 52 N. J. Eq. 31, 29 Atl. 423; Kansas City, etc., R. Co. v. Stoner, 51 Fed. 649, 52 Am. & Eng. R. Cas. 462; West Chicago St. R. Co. v. Martin, 47 Ill. App. 610; Pratt v. Chicago, etc., R. Co., 38 Minn. 455; Pittsburgh, etc., R. Co. v. Spencer, 98 Ind. 186, 21 Am. & Eng. R. Cas. 478; Kellow v. Central Iowa R. Co., 68 Iowa, 470, 56 Am. Rep. 858, 21 Am. & Eng. R. Cas. 485; Graham v. Great Western R. Co., 41 U. C. Q. B. 324; Flournoy v. Shreveport Belt Ry. Co., 50 La. Ann. 491, 23 So. 465; Railroad Co. v. Boyer, 97 Pa. 91; Richmond v. Railway Co., 87 Mich. 374, 49 N. W. 621.

92. Cork-hill v. Camden, etc., R. Co. (N. J.), 54 Atl. 522.

93. *N. Y.*—Dyer v. Erie R. Co., 71 N. Y. 228; Robinson v. New York Cent., etc., R. Co., 66 N. Y. 11, 23 Am. Rep. 1; Wylde v. Northern R. Co., 53 N. Y. 156; Barrett v. Third Ave. R. Co., 45 N. Y. 628; Webster v. Hudson River R. Co., 38 N. Y.

260; Brown v. New York Cent. R. Co., 32 N. Y. 597, 88 Am. Dec. 353; Colegrove v. New York, etc., R. Co., 20 N. Y. 492, 75 Am. Dec. 418; Chapman v. New Haven R. Co., 19 N. Y. 341, 75 Am. Dec. 344; Mott v. Hudson River R. Co., 8 Bosw. (N. Y.) 345; Knapp v. Murray, 18 How. Pr. (N. Y.) 165; Metcalf v. Baker, 2 J. & S. (N. Y.) 10, 11 Abb. Pr. (N. Y.) 431, 52 N. Y. 649.

U. S.—Kansas City, etc., R. Co. v. Stoner, 51 Fed. 649; The Steamer New Philadelphia, 1 Black (U. S.), 62; Little v. Hackett, 116 U. S. 366.

Cal.—Tompkins v. Clay St. R. Co., 66 Cal. 163.

Ill.—Wabash, etc., R. Co. v. Shackett, 105 Ill. 364, 44 Am. Rep. 791, 12 Am. & Eng. R. Cas. 166.

Ind.—Pittsburgh, etc., R. Co. v. Spencer, 98 Ind. 186; Albion v. Hetrick, 90 Ind. 545, 46 Am. Rep. 230.

Ky.—Louisville, etc., R. Co. v. Case, 9 Bush (Ky.), 728; Danville, etc., R. Co. v. Stewart, 2 Metc. (Ky.) 119.

'A railroad company is bound to exercise all the care and skill which human prudence and foresight can suggest and to take all measures necessary and proper to secure the safety of the train and passengers, without regard to the statutory requirements as to cattle on the track.⁹⁴ The presence of cattle on the track raises a *prima facie* presumption of negligence on the part of the company, it being bound, as between itself and its passengers, to keep the road free from obstructions of that character by the use of every reasonable precaution, such as the construction of fences, the absence of which renders the track unsafe, the keeping of a watchman where necessary at crossings, and the keeping of a proper watch by a fireman when the engineer is unable to see both sides of the track.⁹⁵ A high rate of speed is not *per se* negligence, if the conditions of the railway and the machinery employed permit of it within the limit of prudence and safety and without increasing the peril of the passengers, yet in determining as to whether or not a certain rate of speed maintained is, in effect, a negligent operation of the road, the character of the road, its

Mich.—Cuddy v. Horn, 46 Mich. 596, 41 Am. Rep. 178.

Minn.—Flaherty v. Minneapolis, etc., R. Co., 39 Minn. 326, 12 Am. St. Rep. 654.

Mo.—Olsen v. Citizens Ry. Co., 152 Mo. 426, 54 S. W. 470.

N. J.—New York, etc., R. Co. v. Steinbrenner, 47 N. J. L. 161, 54 Am. Rep. 126; Bennett v. New Jersey R., etc., Co., 36 N. J. L. 225, 13 Am. Rep. 435.

Ohio.—Covington Transfer Co. v. Kelly, 36 Ohio St. 86.

Wis.—Prideaux v. Mineral Point, 43 Wis. 513.

The leading English case holds to the contrary that an action will lie only against the carrier with whom the passenger contracted for carriage. Thorogood v. Bryan, 8 C. B. 131, 65 E. C. L. 131. The same rule has been adopted in Pennsylvania. Lockhart v. Lichtenthaler, 46

Pa. St. 151. But the English case cited seems to have been overruled by the later case of *The Bernina*, 12 Prob. Div. 58.

94. Brown v. New York Cent. R. Co., 34 N. Y. 404; Bowers v. New York Cent. R. Co., 18 N. Y. 408, 72 Am. Dec. 529.

95. Card v. New York, etc., R. Co., 50 Barb. (N. Y.) 39; Sullivan v. Philadelphia, etc., R. Co., 30 Pa. St. 234, 72 Am. Dec. 698; Chicago, etc., R. Co. v. McAra, 52 Ill. 296; Cornwall v. Sullivan R. Co., 28 N. H. 161; Messerno v. Nashville R. Co., 1 Snead. (Tenn.) 220; Wright v. Pennsylvania R. Co., 3 Pittsb. (Pa.) 116; Fordyce v. Jackson, 56 Ark. 594; East Tennessee, etc., R. Co. v. Deaver, 79 Ala. 216; East Tennessee, etc., R. Co. v. Bayliss, 75 Ala. 466; Nashville, etc., R. Co. v. Troxler, 1 Lea (Tenn.), 520; Patchell v. Irish North Western R. Co., 6 Ir. R. C. L. 117.

grades and curves, and various other conditions necessarily affecting the question of safety must be taken into consideration.⁹⁶

§ 48. Duty of carrier for safety of sick passengers.—A passenger who becomes sick and unable to help herself during the transit is entitled to such care from the carrier's servants as will afford her proper protection in her prostrate condition, and, if removed from the conveyance, must be carried to a place of safety and security.⁹⁷ A rule of a street railroad company, requiring conductors not to allow intoxicated persons to ride on the cars, is no protection to the company for the forcible ejection of a person not disorderly or intoxicated, but affected with a disease, St. Vitus dance, which produces involuntary motions resembling the movements of an intoxicated person.⁹⁸ The rule of a street railway company forbidding passengers riding on car platforms is a reasonable one, however, and a passenger is not excused from complying with it by the fact that he is suffering from nausea, and upon his refusal to comply with a request to enter the car, the conductor is justified in ejecting him without the use of excessive force.⁹⁹

§ 49. Articles constituting personal baggage.—The personal baggage or effects of a passenger, within the rule of the carrier's liability, is, in general terms, defined to consist of and include all such articles of personal convenience and necessity as are usually carried by passengers for their personal use, comfort, and con-

96. Chicago, etc., R. Co. v. Lewis, 145 Ill. 67; Indianapolis, etc., R. Co. v. Hall, 106 Ill. 371; Chicago, etc., R. Co. v. Lea, 68 Ill. 576; Mc-Konkey v. Chicago, etc., R. Co., 40 Iowa, 205; Maher v. Atlantic, etc., R. Co., 64 Mo. 267; Grows v. Maine Cent. R. Co., 67 Me. 100; Telfer v. Northern R. Co., 30 N. J. L. 188; Young v. Hannibal, etc., R. Co., 79 Mo. 336, 19 Am. & Eng. R. Cas. 512; Houston v. Vicksburg, etc., R. Co., 39 La. Ann. 796, 34 Am. & Eng. R. Cas. 76; Black v. Carrollton R. Co., 10 La. Ann. 33, 63 Am. Dec. 586; East Tennessee, etc., R. Co. v. Deaver,

79 Ala. 216; East Tennessee, etc., R. Co. v. Winters, 85 Tenn. 240.

97. Smith v. British, etc., Steam Packet Co., 86 N. Y. 408; Atchison, etc., R. Co. v. Webber, 33 Kan. 543.

98. Regner v. Glens Falls, etc., R. Co., 74 Hun (N. Y.), 202, 26 N. Y. Supp. 625.

99. Montgomery v. Buffalo Ry. Co., 165 N. Y. 139, 58 N. E. 770, affg. 24 App. Div. (N. Y.) 454, 48 N. Y. Supp. 849. See also Barker v. Central Park, etc., R. Co., 151 N. Y. 237; Pease v. Delaware, etc., R. Co., 101 N. Y. 367; Hibbard v. New York, etc., R. Co., 15 N. Y. 455.

venience, instruction and amusement, or protection, during the journey and for a reasonable period thereafter, having regard to the character and length, the purpose and object of the journey, the station in life and mode of living of the passenger, and the habits, usages and wants of the class to which the traveler belongs.¹ These articles "are as various as the tastes, occupations,

1. Weeks v. New York, etc., R. Co., 72 N. Y. 50, affg. 9 Hun (N. Y.), 669; Orange County Bank v. Brown, 9 Wend. (N. Y.) 85; Hawkins v. Hoffman, 6 Hill (N. Y.), 586, 41 Am. Dec. 767; Glovinski v. Cunard Steamship Co., 6 Misc. Rep. (N. Y.) 388, 26 N. Y. Supp. 751; New York, etc., R. Co. v. Fraloff, 100 U. S. 24; Mau- ritz v. New York, etc., R. Co., 23 Fed. 767, 21 Am. & Eng. R. Cas. 286; Hannibal R. Co. v. Swift, 12 Wall. (U. S.) 272; Pfister v. Central Pac. R. Co., 70 Cal. 169; Hutchings v. Western, etc., R. Co., 25 Ga. 61; At- wood v. Mohler, 108 Ill. App. 416; Parmelee v. Fischer, 22 Ill. 212; Dunlap v. International Steamboat Co., 98 Mass. 371; Collins v. Boston, etc., R. Co., 10 Cush. (Mass.) 507; Jordan v. Fall River R. Co., 5 Cush. (Mass.) 69; New Orleans, etc., R. Co. v. Moore, 40 Miss. 39; Whitmore v. The Steamboat Caroline, 20 Mo. 513; Gleason v. Goodrich Transp. Co., 32 Wis. 85; Oakes v. Northern Pac. R. Co., 20 Or. 392; Boman v. Max- well, 9 Humph. (Tenn.) 624; Ma- crow v. Great Western R. Co., L. R. 6 Q. B. 612; Texas, etc., R. Co. v. Ferguson, 1 Tex. App. Civ. Cas. § 1253; Johnson v. Stone, 11 Humph. (Tenn.) 419; Phelps v. London, etc., R. Co., 116 E. C. L. 321, 19 C. B. N. S. 321.

Articles constituting personal baggage:

Books and manuscripts.—Hop- kins v. Westcott, 6 Blatchf. (U. S.) 64; Doyle v. Kiser, 6 Ind. 242; Glea-

son v. Goodrich Transp. Co., *supra*. Compare Hannibal, etc., R. Co. v. Swift, 12 Wall. (U. S.) 262.

A carpet.—Minter v. Pacific R. Co., 41 Mo. 503.

Opera glass or telescope.—To-ledo, etc., R. Co. v. Hammond, 33 Ind. 379; Cadwallader v. Grand Trunk R. Co., 9 L. C. R. 169.

Rifle, a revolver, two gold chains, two gold rings, and a silver pencil case. Bruty v. Grand Trunk R. Co., 32 U. C. Q. B. 66.

Revolver.—Davis v. Michigan R. Co., 22 Ill. 278; Woods v. Devin, 13 Ill. 746.

Two revolvers are not.—Chi- cago, etc., R. Co. v. Collins, 56 Ill. 212.

The clothing of a woman and that of her children, including fancy work and miscellaneous ornaments, a savings bank and contents, and a zither key, all being carried in her trunk. Yazoo, etc., R. Co. v. Baldwin (Tenn.), 81 S. W. 599, also a small amount of her husband's underwear.

Articles not constituting per- sonal baggage:

Books, which plaintiff bought for her husband with money which he remitted to her. Hurwitz v. Hamburg American Packet Co., 27 Misc. Rep. (N. Y.) 814, 56 N. Y. Supp. 379.

Cloth for a dress intended for a third person. Dexter v. Syracuse, etc., R. Co., 42 N. Y. 326, 1 Am. Rep. 527.

and habits of travelers. The sportsman who sets out on an excursion for amusement in his department of pleasure, needs, in addition to his clothing, his guns and fishing apparatus; the musician, his favorite instrument; the man of letters, his books; the mechanic, his tools. In all these cases, and in a vast number of others unnecessary to enumerate, the articles carried are necessary in one sense to the use of the passenger. He cannot attain the object he is in pursuit of without them, and the object of his journey would be lost unless he was permitted to carry them with him. Yet, under pretense of carrying these articles, it by no means follows that the carrier is bound to carry a box of guns, a pianoforte or organ, a library, or the tools or machinery of a machine shop."² Not only the ordinary clothing and wearing apparel of a traveler,³ but fine apparel, such as valuable laces and all

Child's rocking horse.—Hudston v. Midland R. Co., 36 L. T. R. Q. B. 213.

Deeds and documents required as evidence in a trial. Phelps v. London, etc., R. Co., 19 C. B. 321.

Masonic regalia.—Nevis v. Bay State Steamboat Co., 4 Bosw. (N. Y.) 225.

Stage costumes, scenery, and paraphernalia of a theatrical company. Saunders v. Southern Ry. Co., 128 Fed. 115, 62 C. C. A. 523.

Masquerade costumes for use by others at a ball. Michigan Southern R. Co. v. Oehm, 56 Ill. 293. See Oakes v. Northern Pac. R. Co., 20 Or. 396, 26 Pac. 230, theatrical costumes, etc.

Medicines, handcuffs, and locks. Bomar v. Maxwell, 9 Humph. (Tenn.) 620.

Engravings.—Nevis v. Bay State Steamboat Co., 4 Bosw. (N. Y.) 225.

Memoranda and papers of a principal in the possession of an agent carried solely for business purposes. Yazoo, etc., R. Co. v. Georgia Home Ins. Co. (Miss.), 37 So. 500, 67 L. R. A. 646.

Papers of value.—Thomas v. Great Western R. Co., 14 U. C. Q. B. 389; Phelps v. London, etc., R. Co., 19 C. B. 321.

Pencil sketches and utensils of an artist. Mauritz v. New York, etc., R. Co., 21 Am. & Eng. R. Cas. 286; Mytton v. Midland R. Co., 28 L. J. Exch. 385.

Perishable articles, such as fruit, etc., when placed in a trunk, are not baggage. Georgia R., etc., Co. v. Johnson, 113 Ga. 589, 38 S. E. 954.

Presents.—Nevins v. Bay State Steamboat Co., 4 Bosw. (N. Y.) 225; The Ionic, 5 Blatchf. (U. S.) 538.

Toys.—Hudston v. Midland, etc., R. Co., 10 B. & S. 504.

Sacque, muff, and napkin ring carried in a trunk by a man. Chicago, etc., R. Co. v. Boyce, 73 Ill. 510.

2. Merrill v. Grinnell, 30 N. Y. 619.

3. **Clothing.**—Dexter v. Syracuse, etc., R. Co., 42 N. Y. 326, 1 Am. Rep. 527; Duffy v. Thompson, 4 E. D. Sm. (N. Y.) 178; Dibble v. Brown, 12 Ga. 217; Toledo, etc., R. Co. v. Hammond, 33 Ind. 379, 5 Am. Rep. 221;

articles pertaining to the wardrobe, to the extent that the articles do not exceed in quantity and value such as are ordinarily taken by passengers of like station and pursuing like journeys for their personal use when traveling;⁴ watches and jewelry intended for personal use, to a reasonable extent,⁵ but not where not intended to be worn on the person,⁶ or where carried for the purpose of sale or for the use of some other person,⁷ and money in sums reasonably

Baltimore, etc., R. Co. v. Smith, 23 Md. 402; Munster v. Southeastern R. Co., 4 C. B. N. S. 676.

A passenger cannot recover for an embroidered table centerpiece of her own and a dress belonging to her mother, carried with her own personal clothing. Billard v. Delaware, etc., R. Co., 21 Pa. Super. Ct. 583.

Cloth and materials intended for clothing. Van Horn v. Kermit, 4 E. D. Sm. (N. Y.) 453; Duffy v. Thompson, *supra*; Mauritz v. New York, etc., R. Co., 23 Fed. 767, 21 Am. & Eng. R. Cas. 286. *Compare* Dexter v. Syracuse, etc., R. Co., *supra*.

4. New York Cent., R. Co. v. Fraloff, 100 U. S. 24; Galveston, etc., R. Co. v. Fales (Tex. Civ. App.), 77 S. W. 234.

5. **Watches and jewelry** when intended to be worn on the person.—Carlson v. Oceanic Steam Nav. Co., 109 N. Y. 359, 34 Am. & Eng. R. Cas. 215; Merrill v. Grinnell, 30 N. Y. 620; McCormick v. Hudson River R. Co., 4 E. D. Sm. (N. Y.) 181; Torpey v. Williams, 3 Daly (N. Y.) 162; Central Trust Co. v. Wabash, etc., R. Co., 39 Fed. 417, 40 Am. & Eng. R. Cas. 636; New York, etc., R. Co. v. Fraloff, 100 U. S. 24; Battle v. Columbia, etc., R. Co., 70 S. C. 329, 40 S. E. 849; American Contract Co. v. Cross, 8 Bush. (Ky.) 472; Jones v. Voorhees, 10 Ohio, 145; McGill v. Rowland, 3 Pa. St. 451; Mexican

Nat. R. Co. v. Ware (Tex. Civ. App.), 60 S. W. 343; Coward v. East Tennessee R. Co., 16 Lea (Tenn.) 225; Galveston, etc., R. Co. v. Fales (Tex. Civ. App.), 77 S. W. 234. *Compare* Michigan Cent. R. Co. v. Carrow, 73 Ill. 348; Mississippi Cent. R. Co. v. Kennedy, 41 Miss. 678, recovery cannot be had for more than one watch.

It is a question for the jury whether jewelry exceeds in value that usually carried by passengers of the same station and character, and therefore is not properly baggage. Bonner v. Blum (Tex. Civ. App.), 25 S. W. 60.

6. **Watches, jewelry, plate, bullion** and the like, not intended to be worn on the person.—Steers v. Liverpool, etc., R. Co., 57 N. Y. 1; Nevins v. Bay State Steamboat Co., 4 Bosw. (N. Y.) 225; Michigan, etc., R. Co. v. Carrow, 73 Ill. 348; Cincinnati, etc., R. Co. v. Marcus, 38 Ill. 219; Mississippi Cent. R. Co. v. Kennedy, 41 Miss. 671; The Ionic, 5 Blatchf. (U. S.) 538; Cadwallader v. Grand Trunk, R. Co., 9 L. C. Rep. 169. *Compare* American Contract Co. v. Cross, 8 Bush (Ky.) 472; Coward v. East Tennessee R. Co., 16 Lea (Tenn.) 225.

7. Humphreys v. Perry, 148 U. S. 627; Wunsch v. Northern Pac. R. Co., 62 Fed. 878; Metz v. California Southern R. Co., 86 Cal. 329; Bowler, etc., Co. v. Toledo, etc., R. Co., 3 Ohio Dec. 41.

necessary for the payment of traveling expenses,⁸ but not money in excess of that reasonably necessary for such purpose,⁹ or intended for the purchase of a business or merchandise,¹⁰ or other business purposes,¹¹ may be considered as personal baggage for which the carrier is liable as an insurer. In determining what is a reasonable amount of money to meet the passenger's actual and contingent expenses, hotel bills, allowances for sickness, accidents, etc., the length of the journey and, to some extent, the wealth of the traveler is to be considered.¹² But carriers cannot be held

8. Money for expenses.—Merrill v. Grinnell, 30 N. Y. 594; Weed v. Saratoga R. Co., 19 Wend. (N. Y.) 534; Orange County Bank v. Brown, 9 Wend. (N. Y.) 85, 24 Am. Dec. 129; Hutchings v. Western R. Co., 25 Ga. 61; Toledo, etc., R. Co. v. Hammond, 33 Ind. 379; Doyle v. Kiser, 6 Ind. 242; Davis v. Michigan Cent. R. Co., 22 Ill. 278; Dunlap v. International S. Co., 98 Mass. 371; Mad River R. Co. v. Fulton, 20 Ohio, 318; Jones v. Voorhees, 10 Ohio, 180; Bomar v. Maxwell, 9 Humph. (Tenn.) 621; Battle v. Columbia, etc., R. Co., 70 S. C. 329, 40 S. E. 849; Knieriem v. New York Cent., etc., R. Co., N. Y. Law J. Jan. 3, 1906, (N. Y. Sup. Ct.).

A reasonable amount of bank bills may be carried in a trunk as baggage.—Illinois Cent. R. Co. v. Copeland, 24 Ill. 332.

9. Money, except reasonable sums intended for travelling expenses.—Fairfax v. New York Cent., etc., R. Co., 73 N. Y. 167; Merrill v. Grinnell, 30 N. Y. 594; Torpey v. Williams, 3 Daly (N. Y.) 162; Orange County Bank v. Brown, 9 Wend. (N. Y.) 85; Duffy v. Thompson, 4 E. & D. Sm. (N. Y.) 178; Taylor v. Monnot, 4 Duer (N. Y.) 116; Weed v. Saratoga, etc., R. Co., 19 Wend. (N. Y.) 534; Hutchings v. Western, etc., R. Co., 25 Ga. 61; Dibble v. Brown, 12 Ga. 217; Davis v. Michigan, etc., R.

Co., 22 Ill. 278; Cincinnati, etc., R. Co. v. Marcus, 38 Ill. 219; Illinois, etc., R. Co. v. Copeland, 24 Ill. 362; Doyle v. Kiser, 6 Ind. 242; Hickox v. Naugatuck R. Co., 31 Conn. 281; Jordan v. Fall River R. Co., 5 Cush. (Mass.) 69; Dunlap v. International Steamboat Co., 98 Mass. 371; Whitmore v. Steamer Caroline, 20 Mo. 513; First Nat. Bank v. Marietta, etc., R. Co., 20 Ohio St. 259; Bomar v. Maxwell, 9 Humph. (Tenn.) 620; Butcher v. London, etc., R. Co., 16 C. B. 13; Phelps v. London, etc., R. Co., 19 C. B. (N. S.) 321; Missouri Pac. R. Co. v. York, 2 Tex. App. Cas., § 638; International, etc., R. Co. v. McCoun, 2 Tex. App. Civ. Cas., § 712; St. Louis S. R. Co. v. Berry, 60 Ark. 433.

Small sum of money to meet current travelling expenses not baggage.—Grant v. Newton, 1 E. D. Sm. (N. Y.) 95; Davis v. Michigan, etc., R. Co., 22 Ill. 278.

10. Levins v. New York, etc., R. Co., 183 Mass. 175, 66 N. E. 803; Hickox v. Naugatuck R. Co., 31 Conn. 281; Hutchings v. Western, etc., R. Co., 25 Ga. 61.

11. Pfister v. Central Pac. R. Co., 70 Cal. 169, 59 Am. Rep. 404, funds carrier by a county treasurer.

12. Merrill v. Grinnell, 30 N. Y. 594; Weeks v. New York, etc., R. Co., 72 N. Y. 50, 28 Am. Rep. 104; Fairfax v. New York Cent. R. Co., 73 N.

liable for the money and effects of travelers not delivered into their custody, but retained by the passengers and carried on their persons, except for gross neglect in the management of the cars or the selection of their servants.¹³ Bedding necessary for a steerage passenger on a steamer for the comfort of himself and family has been classed as baggage,¹⁴ but bedding and bed furnishings, not intended for use on the journey,¹⁵ curtains, table cloths and covers, books, pictures, albums, and household goods generally not necessary during the journey, are not baggage for which the carrier is liable as an insurer, but, if at all, only as a bailee.¹⁶ The guns and hunting apparatus of sportsmen,¹⁷ and in some cases hunting dogs,¹⁸ tools in reasonable quantity for a mechanic,¹⁹ surgical in-

Y. 167; *Duffy v. Thompson*, 4 E. D. Sm. (N. Y.) 178; *Johnson v. Stone*, 11 Humph. (Tenn.) 419; *Missouri Pac. R. Co. v. York*, 2 Tex. App. Civ. Cas., § 638.

It is a question for the jury and their finding will not be disturbed except in plain cases of error. *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332; *Bonner v. Blum* (Tex. Civ. App.), 25 S. W. 60; *Jones v. Priester*, 1 Tex. App. Civ. Cas., § 613; and cases cited *supra* this note.

13. Carpenter v. New York, etc., R. Co., 124 N. Y. 53, 21 Am. St. Rep. 644, 47 Am. & Eng. R. Cas. 421; *Greenfield First Nat. Bank v. Marietta*, etc., R. Co., 20 Ohio St. 259; *Illinois Cent. R. Co. v. Handy*, 63 Miss. 609.

14. Bedding, where passenger is required to provide it.—*Hirschsohn v. Hamburg Am. Packet Co.*, 2 J. & S. (N. Y.) 531. See also *Glovinsky v. Cunard Steamship Co.*, 4 Misc. Rep. 212; *Ouimit v. Henshaw*, 35 Vt. 605. (N.Y.) 266; *Parmalee v. Fischer*, 22 Ill.

Dressing case.—*Cadwallader v. Grand Trunk R. Co. (Can.)*, 9 L. C. Rep. 169.

15. Bedding.—*St. Louis*, etc., R. Co. v. *Hardway*, 17 Ill. App. 321; *Connolly v. Warren*, 106 Mass. 146,

8 Am. Rep. 300; *Texas*, etc., R. Co. v. *Ferguson*, 9 Am. & Eng. R. Cas. 395; *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612. But see *Hirschsohn v. Hamburg American Packet Co.*, 2 J. & Sp. (N. Y.) 521; *Ouimit v. Henshaw*, 35 Vt. 605.

16. Household goods.—*Pardee v. Drew*, 25 Wend. (N. Y.) 459; *Mauritz v. New York*, etc., R. Co., 23 Fed. 765; *Hamburg-American Packet Co. v. Gattman*, 127 Ill. 598; *Mississippi Cent. R. Co. v. Kennedy*, 41 Miss. 679; *Smith v. Cincinnati*, etc., R. Co., 3 Ohio Dec. 192; *Texas*, etc., R. Co. v. *Ferguson*, 1 Tex. App. Civ. Cas., § 1253; *Pettigrew v. Barnum*, 11 Md. 449.

17. Guns when for sporting purposes.—*Van Horn v. Kermit*, *supra*; *Davis v. Cayuga*, etc., R. Co., 10 How. Pr. (N. Y.) 330; *Hawkins v. Hoffman*, 6 Hill (N. Y.) 506, 51 Am. Dec. 44.

18. Kansas City, etc., R. Co. v. *Higdon*, 94 Ala. 286; *Cantling v. Hannibal*, etc., R. Co., 54 Mo. 385; *St. Louis*, etc., R. Co. v. *Hanks*, 78 Tex. 300. But see *Honeyman v. Oregon*, etc., R. Co., 13 Or. 352; *Jones v. Bond*, 40 Fed. 281; *Jemison v. Southwestern R. Co.*, 75 Ga. 444.

19. Tools in reasonable quantity

struments,²⁰ and a dentist's instruments,^{20a} have been held to be baggage. But a passenger cannot include in his personal baggage the property of other persons, and the carrier is liable for such property only as a gratuitous bailee.²¹ The samples carried in his trunk by a commercial traveler and belonging to his employer, although necessary to the object of the passenger's journey, are held not to be personal baggage, but properly mere merchandise,²² but a salesman's catalogue or price book is his personal baggage.²³ Where a carrier undertakes, without extra compensation, to transport a traveling case with notice that it contains merchandise or samples, and not baggage, it will be liable for the loss thereof.²⁴ And where a carrier, with a full knowledge of the char-

for a mechanic.—*Davis v. Cayuga*, etc., R. Co., *supra*; *Porter v. Hildebrand*, 14 Pa. St. 129; *Kansas City*, etc., R. Co. v. *Morrison*, 34 Kan. 502, 23 Am. & Eng. R. Cas. 481.

20. Surgical instruments,—*Hannibal*, etc., R. Co. v. *Swift*, 12 Wall. (U. S.) 262.

20a. Dentist's instruments,—*Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356.

21. Property of other persons, *Gurney v. Grand Trunk R. Co.*, 37 St. Rep. (N. Y.) 155, 14 N. Y. Supp. 321; *Dexter v. Syracuse*, etc., R. Co., 42 N. Y. 326, 1 Am. Rep. 527; *Weed v. Saratoga*, etc., R. Co., 19 Wend. (N. Y.) 534; *Greenfield First Nat. Bank v. Marietta*, etc., R. Co., 20 Ohio St. 260; *Chicago*, etc., R. Co. v. *Boyce*, 73 Ill. 510; *Dunlap v. International Steamboat Co.*, 98 Mass. 371; *Mississippi*, etc., R. Co. v. *Kennedy*, 41 Miss. 671; *Becker v. Great Eastern R. Co.*, L. R. 5 Q. B. 241; *Andrews v. Ft. Worth*, etc., R. Co. (Tex. Civ. App.), 25 S. W. 1040.

Members of the same family travelling together may carry each other's effects.—*Curtis v. Delaware*, etc., R. Co., 74 N. Y. 116; *Dexter v. Syracuse*, etc., R. Co., 42 N. Y. 326; *Jones v. Priester*, 1 Tex. App. Civ.

Cas., § 613. See *McCormick v. Pennsylvania Cent. R. Co.*, 99 N. Y. 65, as to husband's right to recover for loss of clothing and ornaments of his wife.

22. Samples of a commercial traveler,—*Talcott v. Wabash R. Co.*, 66 Hun (N. Y.) 456, 21 N. Y. Supp. 318; *Gurney v. Grand Trunk R. Co.*, 14 N. Y. Supp. 321; *Scoville v. Griffith*, 12 N. Y. 509; *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586; *Switzerland Marine Ins. Co. v. Louisville*, etc., R. Co., 131 U. S. 440; *Michigan Cent. R. Co. v. Carrow*, 73 Ill. 348; *Weber Co. v. Chicago*, etc., R. Co. (Iowa), 60 N. W. 637; *Southern Kansas R. Co. v. Clark*, 52 Kan. 398; *Jacobs v. Tutt*, 33 Fed. 412; *Alling v. Boston*, etc., R. Co., 126 Mass. 121; *Stimson v. Connecticut River R. Co.*, 98 Mass. 83; *Pennsylvania R. Co. v. Miller*, 35 Ohio St. 541; *Texas*, etc., R. Co. v. *Capps*, 2 Tex. App. Cas. § 33.

23. Catalogue or price-book used by a drummer,—*Gleason v. Goodrich Transp. Co.*, 32 Wis. 85, 14 Am. Rep. 716; *Staub v. Kendrick*, 121 Ind. 226, 40 Am. & Eng. R. Cas. 632.

24. Saleeby v. Central R. Co. of

acter of the contents of a trunk, or that the articles therein are not properly baggage, receives the same for transportation as baggage, it will be liable therefor.²⁵ But the fact that commercial travelers or others are accustomed to carry merchandise on passenger trains without paying any more than the usual price of a ticket for a passenger, even if known to the carrier, will not render it liable for such merchandise.²⁶ The mere payment of an extra charge, on account of the overweight of alleged baggage, does not convert it into freight and render the carrier liable for it as such; and where merchandise to be used in trade is packed in a trunk, and shipped as personal baggage, the carrier having no notice or knowledge of its character, no liability as a common carrier attaches.²⁷ But if the trunks and this compensation are received with notice that the trunks contained property other than the baggage of the passenger, then there is evidence of an agreement, aside from the contract to transport the passenger, for a new, separate, and independent consideration, to transport such property as freight, which will render the carrier liable therefor.²⁸ A carrier is not responsible as carrier or insurer for merchandise or articles which are carried for the purpose of trade, and not for the personal use of the traveler on his journey, although carried in the trunk or valise of a passenger as baggage, the true character of the articles not being disclosed; they do not come under the denomination of personal baggage, and the carrier is not obliged to carry them, except upon the payment of an additional compensation, and cannot be held liable for them as baggage.²⁹ But if the carrier makes an

N. J., 99 App. Div. (N. Y.) 163, 90
N. Y. Supp. 1042.

25. Central Trust Co. v. Wabash, etc., R. Co., 39 Fed. 417; Jacobs v. Tutt, 33 Fed. 412; Strouss v. Wabash, etc., R. Co., 17 Fed. 209; Butler v. Hudson River R. Co., 3 E. D. Sm. (N. Y.) 571; Texas, etc., R. Co. v. Capps, 2 Tex. App. Civ. Cas. § 33; Worth, etc., R. Co. v. I. B. Rosenthal Millinery Co. (Tex. Civ. App.), 29 S. W. 196; Hoeger v. Chicago, etc., R. Co., 63 Wis. 100; Rider v. Wabash, etc., R. Co., 14 Mo. App. 529; Dixon v. Richelieu Nav. Co., 15 Ont. App. 647.

26. Alling v. Boston, etc., R. Co., 126 Mass. 121.

27. Humphreys v. Perry, 148 U. S. 627; Hamburg American Packet Co. v. Gattman, 127 Ill. 598.

28. Talcott v. Wabash R. Co., 159 N. Y. 461, 54 N. E. I., modg. 89 Hun (N. Y.), 492, 35 N. Y. Supp. 574; Trimble v. New York Cent., etc., R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115; Sloman v. Great Western R. Co., 67 N. Y. 208; Perley v. New York Cent., etc., R. Co., 65 N. Y. 374; Stoneman v. Erie R. Co., 52 N. Y. 429.

29. N. Y.—Pardee v. Drew, 25

extra charge for the conveyance of a passenger's trunk, known to contain merchandise as well as baggage, or in the absence of fraud or concealment as to its contents, it is liable for the loss.³⁰ And it is generally held that while the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either on payment or without payment of an extra charge, to take articles as personal baggage, which are not properly such, its acceptance will be considered a waiver of its right to object, or an estoppel to claim, that they were not baggage, and it will be liable for their loss or destruction, though without fault.³¹ The carrier must be shown to have had actual

Wend. (N. Y.) 459; Hawkins v. Hoffman, 6 Hill (N. Y.), 586; Bell v. Drew, 4 E. D. Sm. (N. Y.) 59; Grant v. Newton, 1 E. D. Sm. (N. Y.) 95.

U. S..—Wunsch v. Northern Pac. R. Co., 62 Fed. 878; Hellman v. Holladay, 1 Wollw. (U. S.) 365; The Ionic, 5 Blatchf. (U. S.) 538.

Ga..—Dibble v. Brown, 12 Ga. 217.

Ill..—Hamburg American Co. v. Gattman, 127 Ill. 598; Michigan Cent. R. Co. v. Carrow, 73 Ill. 348; Michigan Southern, etc., R. Co. v. Oehm, 56 Ill. 293; Cincinnati, etc., R. Co. v. Marcus, 38 Ill. 219.

Ind..—Doyle v. Kiser, 6 Ind. 242.

Me..—Blumenthal v. Maine Cent. R. Co., 79 Me. 550.

Mass..—Blumantle v. Fitchburg R. Co., 127 Mass. 322; Alling v. Boston, etc., R. Co., 126 Mass. 121; Stimson v. Connecticut River R. Co., 98 Mass. 83; Collins v. Boston, etc., R. Co., 10 Cush. (Mass.) 506; Dunlap v. International Steamboat Co., 98 Mass. 377.

Minn..—Haines v. Chicago, etc., R. Co., 29 Minn. 160.

Miss..—Mississippi Cent. R. Co. v. Kennedy, 41 Miss. 671.

Mo..—Spooner v. Hannibal, etc., R. Co., 23 Mo. App. 403.

N. H..—Smith v. Boston, etc., R. Co., 44 N. H. 325.

Ohio.—Bowler, etc., R. Co. v. Toledo, etc., R. Co., 3 Ohio Dec. 41; Greenwich Ins. Co. v. Memphis, etc., Packet Co., 1 Ohio N. P. 126.

Can..—Shaw v. Grand Trunk R. Co., 7 U. C. C. P. 493; Lee v. Grand Trunk R. Co., 36 U. C. Q. B. 350.

Eng..—Cahill v. London, etc., R. Co., 100 E. C. L. 154, 106 E. C. L. 818; Belfast, etc., R. Co. v. Keys, 9 H. L. Cas. 556, 9 W. R. 793; Richards v. London, etc., R. Co., 62 E. C. L. 839.

30. Perley v. New York Cent., etc., R. Co., 65 N. Y. 375; Stoneman v. Erie R. Co., 52 N. Y. 429.

31. *N. Y.*.—Millard v. Missouri, etc., R. Co., 86 N. Y. 441; Butler v. Hudson River R. Co., 3 E. S. Sm. (N. Y.) 571.

U. S..—Central Trust Co. v. Wabash, etc., R. Co., 39 Fed. 417; Strouss v. Wabash, etc., R. Co., 17 Fed. 209; Hannibal, etc., R. Co. v. Swift, 12 Wall. (U. S.) 262.

Ark..—St. Louis S. W. R. Co. v. Berry, 60 Ark. 433.

Dak..—Waldron v. Chicago, etc., R. Co., 1 Dak. 341.

Iowa.—Weber Co. v. Chicago, etc., R. Co. (Iowa), 60 N. W. 637.

Kan..—Chicago, etc., R. Co. v. Conklin, 32 Kan. 55.

Mass..—Blumantle v. Fitchburg R. Co., 127 Mass. 322.

knowledge of the character of the goods in order to render it liable;³² but, although it is not bound to inquire as to the nature of the property,³³ it may be chargeable with knowledge from the outward appearance of the package.³⁴ Knowledge, however, on its part cannot be shown by proof of the custom of its agents at other places on the road.³⁵ The question of notice as to the contents of a trunk or valise may be one of fact for the jury.³⁶ The carrier is responsible for the acts of its duly authorized agents in accepting or refusing baggage offered.³⁷ The carrier is liable as a gratuitous bailee only for merchandise fraudulently imposed upon it.³⁸

§ 50. Duty to carry baggage.—The carrying of a traveler's baggage by a carrier constitutes a mere incident to its contract to carry the traveler, and a recovery for the loss thereof will not be governed by the rules applicable to carriers of goods.³⁹ A con-

Mo.—*Ross v. Missouri, etc., R. Co., 4 Mo. App. 583.*

Ohio.—*Bowler v. Toledo, etc., R. Co., 10 Ohio C. C. 272; Toledo, etc., R. Co. v. Ambach, 10 Ohio C. C. 490.*

Or.—*Oakes v. Northern Pac. R. Co., 20 Or. 393.*

Tex.—*Fort Worth, etc., R. Co. v. I. B. Rosenthal Milling Co. (Tex. Civ. App.), 29 S. W. 196.*

Wis.—*Hoeger v. Chicago, etc., R. Co., 63 Wis. 100.*

Eng.—*Great Northern R. Co. v. Shepherd, 8 Exch. 30, 7 Railw. Cas. 310.*

32. *Humphreys v. Perry, 148 U. S. 627; Michigan Cent. R. Co. v. Carrow, 73 Ill. 348; Haines v. Chicago, etc., R. Co., 29 Minn. 160; Rider v. Wabash, etc., R. Co., 14 Mo. App. 529; Cahill v. London, etc., R. Co., 100 E. C. L. 154, 106 E. C. L. 818.*

33. *Michigan Cent. R. Co. v. Carr, supra; Haines v. Chicago, etc., R. Co., supra.*

34. *Hannibal, etc., R. Co. v. Swift, 12 Wall. (U. S.) 262; New York Cent., etc., R. Co. v. Fraloff, 100 U. S. 24; Dunlap v. International*

Steamboat Co., 98 Mass. 371; Ross v. Missouri, etc., R. Co., 4 Mo. App. 583.

35. *Blumenthal v. Maine Cent. R. Co., 79 Me. 550; Blumantle v. Fitchburg R. Co., 127 Mass. 322; Smith v. Boston, etc., R. Co., 44 N. H. 325.*

36. *Sloman v. Great Western R. Co., 67 N. Y. 208; Blumantle v. Fitchburg R. Co., 127 Mass. 322.*

37. *Saleseby v. Central R. Co. of N. J., 99 App. Div. (N. Y.) 163, 90 N. Y. Supp. 1042; St. Louis S. W. R. Co. v. Berry, 60 Ark. 433; Waldron v. Chicago, etc., R. Co., 1 Dak. 341; Chicago, etc., R. Co. v. Conklin, 32 Kan. 55; Winter v. Pacific R. Co., 41 Mo. 503.*

38. *Wunsch v. Northern Pac. R. Co., 62 Fed. 878; Cincinnati, etc., R. Co. v. Marcus, 38 Ill. 219; Alling v. Boston, etc., R. Co., 126 Mass. 121; Smith v. Boston, etc., R. Co., 44 N. H. 325; Missouri Pac. R. Co. v. York, 2 Tex. App. Civ. Cas. § 638.*

39. *Talcott v. Wabash R. Co., 89 Hun (N. Y.), 492, 35 N. Y. Supp. 574, 154 N. Y. 461.*

tract to carry without additional compensation a reasonable amount of personal baggage is implied from the sale of a ticket to a passenger, the price paid for the ticket or for transportation embracing compensation for the carriage of the baggage, but such implied obligation is limited to such articles of personal baggage as are reasonably required for the comfort or convenience of the passenger and his family.⁴⁰ The obligation moreover includes, as in the case of merchandise, an obligation to deliver the baggage carried.⁴¹ The carrier has a right to make reasonable limitations as to the amount of personal baggage it will carry free,⁴² and is entitled to exact extra compensation for carrying an extra weight of baggage above such limited amount.⁴³ The fare paid by a passenger is the compensation for his carriage and for the transportation at the same time of such baggage as he may require for his personal convenience and necessity during his journey. Baggage subsequently forwarded by his direction, in the absence of any special agreement with the carrier, or of negligence on its part, is liable, like any other article of merchandise, to the payment of the usual freight.⁴⁴ Where baggage is not forwarded on the same train through the fault of the carrier, it will be liable for loss or injury due to its negligence.⁴⁵ If a carrier has reasonable grounds

40. Isaacson v. New York Cent., etc., R. Co., 94 N. Y. 278, 46 Am. Rep. 142, 16 Am. & Eng. R. Cas. 188; Orange County Bank v. Brown, 9 Wend. (N. Y.) 85, 24 Am. Dec. 129; Glasco v. New York Cent. R. Co., 36 Barb. (N. Y.) 557; Saunders v. Southern Ry. Co., 128 Fed. 15, 62 C. C. A. 523; Beers v. Boston, etc., R. Co. (Conn.), 34 Atl. 541; Chicago, etc., R. Co. v. Fahey, 52 Ill. 81, 4 Am. Rep. 587; Atchison, etc., R. Co. v. Brewer, 20 Kan. 669; Commonwealth v. Connecticut River R. Co., 15 Gray (Mass.), 447; Mississippi Cent. R. Co. v. Kennedy, 41 Miss. 671; Smith v. Boston, etc., R. Co., 41 Miss. 671; Peixotti v. McLaughlin, 1 Strobh. (S. C.) 468; Bomar v. Maxwell, 9 Humph. (Tenn.) 622; Norfolk, etc., R. Co. v. Irvine, 84 Va. 553.

41. Isaacson v. New York Cent., etc., R. Co., *supra*; Powell v. Myers, 26 Wend. (N. Y.) 591; Cole v. Goodwin, 19 Wend. (N. Y.) 251.

42. Nordemeyer v. Loescher, 1 Hilt. (N. Y.) 499; also cases cited in last preceding note. See also Limitation of liability, § 52, *post*.

43. Gulf, etc., R. Co. v. Ions, 3 Tex. Civ. App. 619.

44. Graffam v. Boston, etc., R. Co., 67 Mo. 234, 15 Am. Ry. Rep. 372; Wilson v. Grand Trunk R. Co., 57 Me. 138, 2 Am. Rep. 26, 56 Me. 60, 96 Am. Dec. 435.

45. Warner v. Burlington, etc., R. Co., 22 Iowa, 166, 92 Am. Dec. 389; Wilson v. Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654. Where a railroad company received a passenger's trunk from an expressman, but, when the passenger subsequently went to

for refusing to receive or carry persons applying or their property, it must make the objection at the time the application is made. If, without making objection, it receives the person or property for transportation, its liability is the same as though no ground for refusal existed.⁴⁶ The traveling public have the right to stop and receive their baggage at any regular station or stopping place for the train on which they may be traveling, and to have their baggage checked to and delivered at any such station, and any regulation that deprives them of that right is arbitrary, unreasonable, and illegal.⁴⁷ Where the facts are indisputable, it is the province of the court to determine, as a matter of law, the reasonableness of a regulation by which a railroad company refuses to sell tickets or check baggage to a regular stopping place of a passenger train.⁴⁸ In some States statutes impose a penalty for a refusal to check baggage properly tendered,⁴⁹ and in some cases permit the recovery of actual damages in addition.⁵⁰ A carrier has a lien on baggage in its possession for all charges which may be legally due it for its transportation,⁵¹ and for any fare or passage money due by the passenger for that trip;⁵² but it is liable for loss of or injury to

the station to check the trunk, it could not be found, and the passenger accepted a check from the baggage master on his promise that he would send the trunk on; she presented the check at her destination, but failed to get the trunk, it appearing that it had been stolen from the company, the company's relation to the trunk was that of common carrier, and not of warehouseman. *Williams v. Central R. Co. of N. J.*, 93 App. Div. (N. Y.) 582, 88 N. Y. Supp. 434. See also *Curtis v. Delaware, etc., R. Co.*, 74 N. Y. 116; *Brown v. Camden, etc., R. Co.*, 83 Pa. 316.

46. *Hannibal, etc., R. Co. v. Swift*, 12 Wall. (U. S.) 262; *Commonwealth v. Connecticut River R. Co.*, 15 Gray (Mass.), 447.

47. *Pittsburgh, etc., R. Co. v. Lyon*, 123 Pa. St. 140, 16 Atl. 607, 2 L. R. A. 489, 10 Am. St. Rep. 517, 37 Am. & Eng. R. Cas. 233.

48. *Vedder v. Fellows*, 20 N. Y. 130; *Pittsburgh, etc., R. Co. v. Lyon*, *supra*; *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661, 33 Am. & Eng. R. Cas. 496.

49. *Commonwealth v. Connecticut River R. Co.*, 15 Gray (Mass.), 447; *Norfolk, etc., R. Co. v. Irvine*, 84 Va. 553.

50. *Western Union Tel. Co. v. Reynolds*, 77 Va. 178.

51. *Nordemeyer v. Loescher*, 1 Hilt. (N. Y.) 499; *Singer Mfg. Co. v. London, etc., R. Co.*, 1 Q. B. 833, 10 R. 152, 42 W. R. 347; *Rumsey v. North Eastern R. Co.*, 14 C. B. N. S. 641; 108 E. C. L. 641. See *Blum v. Southern Pullman Palace Car Co.*, 1 Flip. (U. S.) 500.

52. *Moskowitz v. International Nav. Co.*, 84 N. Y. Supp. 297; *Roberts v. Koehler*, 30 Fed. 94; *Wolf v. Summers*, 2 Campb. 631.

baggage held under such a lien.⁵³ Where a passenger has obtained a ticket in regular course upon a prepaid certificate procured for her by her husband from the carrier, the fact that without notice to her the carrier has refunded the money to the husband, though without requiring him to deliver up the certificate, will not give the carrier a lien on her baggage for unpaid passage money.⁵⁴

§ 51. Liability of carrier for loss or injury.—Carriers of passengers are common carriers of the baggage of their passengers and liable as insurers for the safety thereof. When they contract to carry a passenger, by virtue of that contract they are bound to carry his baggage without additional compensation therefor, and are liable for its value if lost, unless their liability has been restricted by a special contract.⁵⁵ The carrier is only relieved from

53. Southwestern R. Co. v. Bentley, 51 Ga. 311.

54. Moskowitz v. International Nav. Co., 84 N. Y. Supp. 297.

55. *N. Y.*—Isaacson v. New York Cent., etc., R. Co., 94 N. Y. 278; McCormick v. Pennsylvania Cent. R. Co., 80 N. Y. 353; Burnell v. New York Cent. R. Co., 45 N. Y. 184; Merrill v. Grinnell, 30 N. Y. 594; Van Horn v. Kermit, 4 E. D. Sm. (N. Y.) 453; Chamberlain v. Western Transp. Co., 45 Barb. (N. Y.) 218; Hollister v. Nowlen, 19 Wend. (N. Y.) 234; Camden, etc., R. etc., Co. v. Burke, 13 Wend. (N. Y.) 611; Orange County Bank v. Brown, 9 Wend. (N. Y.) 85; Hawkins v. Hoffman, 6 Hill (N. Y.), 586.

U. S.—Saunders v. Southern Ry. Co., 128 Fed. 15, 62 C. C. A. 523; Hannibal, etc., R. Co. v. Swift, 12 Wall. (U. S.) 262.

Ala.—Montgomery, etc., R. Co. v. Culver, 75 Ala. 587; Mobile, etc., R. Co. v. Hopkins, 41 Ala. 486.

Ga.—Dibble v. Brown, 12 Ga. 217.

Ill.—Michigan Cent. R. Co. v. Carroll, 73 Ill. 348; Davis v. Michigan Southern, etc., R. Co., 22 Ill. 278.

Compare Rice v. Illinois Cent. R. Co., 22 Ill. App. 643.

Ind.—Louisville, etc., R. Co. v. Nicholai, 4 Ind. App. 119.

Kan.—Chicago, etc., R. Co. v. Conklin, 32 Kan. 55.

Mich.—Flint, etc., R. Co. v. Weir, 37 Mich. 111.

Minn.—Shaw v. Northern Pac. R. Co., 40 Minn. 144.

Miss.—Illinois Cent. R. Co. v. Troutine, 64 Miss. 834.

Or.—Oakes v. Northern Pac. R. Co., 20 Or. 392.

Pa.—Bullard v. Delaware, etc., R. Co., 21 Pa. Super. Ct. 583; Brown v. Camden, etc., R. Co., 83 Pa. St. 316.

S. C.—Dill v. South Carolina R. Co., 7 Rich. (S. C.) 158.

Tenn.—Louisville, etc., R. Co. v. Katzenberger, 16 Lea (Tenn.), 380.

Wyo.—Lake Shore, etc., R. Co. v. Warren, 3 Wyo. 134.

Eng.—Cohen v. South Eastern R. Co., 2 Exch. Div. 253, 25 W. R. 475; Williams v. Great Western R. Co., 10 Exch. 15.

Can.—Polland v. Canadian Pac. R. Co., 7 Montreal Super. Ct. 131.

liability where the loss is caused by the act of God or the public enemy,⁵⁶ and such a defense must be alleged and proved by the carrier.⁵⁷ Where by special contract the carrier's liability is limited to losses caused by its negligence, the burden of proving negligence rests on the passenger and the question may be one for the jury.⁵⁸ To render a carrier liable as an insurer the baggage must be placed in its exclusive charge and custody; it is not responsible if the passenger retain it in his own possession, except where the loss is due to the negligence or misconduct of the carrier's agents or servants.⁵⁹ It is not an insurer of baggage and hand luggage taken into a day coach.⁶⁰ But that a steamship company permitted a passenger to retain control of his valise, and store the same on deck, did not exempt it from liability for the misconduct of its servant in ordering the same to be thrown overboard.⁶¹ Where the passenger retains custody of his baggage the carrier is not responsible for its loss unless its negligence is affirmatively shown; it is not liable, even if some negligence on its part be shown, where it appears that the passenger's contributory negligence was the proximate cause of the loss.⁶² A carrier is not

56. *Strouss v. Wabash, etc.*, R. Co., 17 Fed. 209; *Long v. Pennsylvania R. Co.*, 147 Pa. St. 343; *Martin v. Great Indian Peninsular R. Co.*, 3 Exch. 9, 17 L. T. N. S. 349.

57. *Toledo, etc., R. Co. v. Tapp*, 6 Ind. App. 304; *Toledo, etc., R. Co. v. Ambach*, 10 Ohio Cir. Ct. Rep. 490.

58. *Downey v. Inman Steamship Co.*, 2 N. Y. Supp. 659. But see *Rice v. Illinois Cent. R. Co.*, 22 Ill. App. 643. -

59. *N. Y.—Cohen v. Frost*, 2 Duer (N. Y.), 335; *Sewall v. Allen*, 6 Wend. (N. Y.) 335; *Tolano v. National Steam Nav. Co.*, 5 Robt. (N. Y.) 318, 35 How. Pr. (N. Y.) 496, 4 Abb. Pr. N. S. (N. Y.) 316.

U. S.—*The Humboldt*, 97 Fed. 656; *The R. E. Lee*, Fed. Cas. No. 11, 690.

Ky.—*Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. (Ky.) 302; *Pullman Palace Car Co. v. Gaylord*, 6 Ky. L. Rep. 279.

La.—*Del Valle v. Steamboat Richmon*d, 27 La. Ann. 90.

Me.—*Abbott v. Bradstreet*, 55 Me. 530.

Mass.—*Kinsley v. Lake Shore, etc., R. Co.*, 125 Mass. 54; *Clark v. Burns*, 118 Mass. 275.

Mo.—*Williams v. Keokuk, etc., Packet Co.*, 3 Cent. L. J. (Mo.) 400.

Pa.—*American Steamship Co. v. Bryan*, 83 Pa. St. 446.

Tex.—*Pullman Palace Car. Co. v. Pollock*, 69 Tex. 120.

60. *Nashville, etc., R. Co. v. Lillie* (Tenn.), 78 S. W. 1055.

61. *De Felice v. Campagnie Francaise De Navigation A. Vapeur, Cyprien Fabre & Cie*, 83 App. Div. (N. Y.) 73, 82 N. Y. Supp. 552.

62. *Carpenter v. New York, etc., R. Co.*, 124 N. Y. 53; *Bonner v. Grumbach*, 2 Tex. Civ. App. 482; *Henderson v. Louisville, etc., R. Co.*, 20 Fed. 430, 123 U. S. 61; *Great Western R. Co. v. Bunch*, L. R. 13

responsible for the loss of articles which the passenger retains in his own possession and places on his seat in the train, where he leaves them there on his departure from the train or they are otherwise lost or stolen,⁶³ unless such loss can be shown to have been due to the negligence or wrongful conduct of the carrier after full knowledge of the facts.⁶⁴ The rule is the same in the case of money carried by the passenger on his person and lost or stolen from him.⁶⁵ Where the carrier's agent, pursuant to its regulations, takes charge of property inadvertently left in its cars, and it provides at its depot a place for its safe keeping, it is liable therefor as a bailee for hire.⁶⁶ In the case of steamship companies a different rule of liability prevails from that which is applied to carriers by rail and sleeping car companies. The relations that exist between a steamboat company and its passengers, who have procured staterooms for their comfort during the journey, are held to differ in no essential respect from those which exist between the innkeeper and his guests. It has been said that "the traveler who pays for his passage and engages a room in one of the modern floating palaces that cross the sea or navigate the interior waters of the country, establishes legal relations with the carrier that cannot well be distinguished from those that exist between the hotel keeper and his guests. The carrier in that case undertakes to provide for all his wants, including a private room for his exclusive use, which is to be as free from all intrusion as that assigned to a guest at a hotel. The two relations, if not identical, bear such close analogy to each other that the same rule of responsibility should govern." When the passenger has been assigned by the carrier to his stateroom, the steamship carrier is held to have taken entire charge of him and his effects, and it be-

App. 31, 34 Am. & Eng. R. Cas. 224; Talley v. Great Western R. Co., L. R. 6 C. P. 44, 19 W. R. 154.

63. Tower v. Utica, etc., R. Co., 7 Hill (N. Y.), 47, 42 Am. Dec. 36; Illinois Cent. R. Co. v. Handy, 63 Miss. 615, 56 Am. Rep. 846.

64. Kinsley v. Lake Shore, etc., R. Co., 125 Mass. 54; Bonner v. De Mendoza, 4 Tex. App. Civ. Cas. § 234; Gamble v. Western R. Co., 24 U. C. Q. B. 407.

65. Weeks v. New York, etc., R.

Co., 72 N. Y. 50, 28 Am. Rep. 104, 9 Hun (N. Y.) 669; Carpenter v. New York, etc., R. Co., 124 N. Y. 53; Greenfield First Nat. Bank v. Marietta, etc., R. Co., 20 Ohio St. 259; Lewis v. New York Sleeping Car Co., 143 Mass. 267; Cobb v. Great Western R. Co., App. Cas. 419, C. R. 203.

66. Morris v. Third Ave. R. Co., 1 Daly (N. Y.), 202, 23 How. Pr. (N. Y.) 345; Little Rock, etc., R. Co. v. Hunter, 42 Ark. 200; Clark v. Eastern R. Co., 139 Mass. 423.

comes liable as an insurer for the loss from his stateroom, without negligence on his part or that of the company, of any of his effects placed therein, including a sum of money reasonable and proper for him to carry upon his person for the expenses of his journey.⁶⁷ A different rule has been maintained in some cases and the carrier has been held not liable except upon proof of negligence.⁶⁸ To exonerate the carrier from the loss of a passenger's baggage on the ground of the latter's omission to comply with a reasonable regulation, such as that passengers shall put certain articles in the custody of an officer, notice thereof must be brought home to him; a notice posted in a steamboat is not sufficient.⁶⁹ And such a regulation is unreasonable and does not apply where the passenger is furnished with a stateroom, except as to baggage not necessary to be used on the voyage.⁷⁰ It is the duty of the carrier to carry the passenger and his baggage on the same train, and if it charges and receives compensation for extra baggage, to carry it on the same train with the passenger.⁷¹ Baggage not forwarded at the same time with the passenger is subject to the usual charges for freight and the carrier is not liable therefor as baggage,⁷² except where the carrier is at fault for not transport-

- 67.** Adams v. New Jersey Steamboat Co., 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616; Lincoln v. New York, etc., S. S. Co., 30 Misc. Rep. (N. Y.) 753, 62 N. Y. Supp. 1085; Dunn v. New Haven Steamboat Co., 58 Hun (N. Y.), 461, 12 N. Y. Supp. 406; Crozier v. Boston, etc., R. Co., 43 How. Pr. (N. Y.) 467; Gore v. Norwich, etc., Transp. Co., 2 Daly (N. Y.), 254; Mudgett v. Bay State Steamboat Co., 1 Daly (N. Y.), 151; Macklin v. New Jersey Steamboat Co., 7 Abb. Pr. N. S. (N. Y.) 229; Steamboat Crystal Palace v. Vanderpool, 16 B. Mon. (Ky.) 302; Del Valle v. Steamboat Richmond, 27 La. Ann. 90; Gleason v. Goodrich Transp. Co., 32 Wis. 85.
- 68.** The R. E. Lee, 2 Abb. (U. S.) 50; Laffrey v. Grummond, 74 Mich. 186; McKee v. Owen, 15 Mich. 115; American Transp. Co. v. Moore, 5

Mich. 368, 24 How. (U. S.) 1; Clark v. Burns, 118 Mass. 275; Abbott v. Bradstreet, 55 Me. 530; American Steamship Co. v. Bryan, 83 Pa. St. 446.

69. Macklin v. New Jersey Steamboat Co., 7 Abb. Pr. N. S. (N. Y.) 229.

70. Crozier v. Boston, etc., Steamboat Co., 43 How. Pr. (N. Y.) 466; Horn v. Kermit, 4 E. D. Sm. (N. Y.) 453.

71. Glasco v. New York Cent., R. Co., 36 Barb. (N. Y.) 557; Blumenthal v. Maine Cent. R. Co., 79 Me. 550; Collins v. Boston, etc., R. Co., 10 Cush. (Mass.) 506. See also cases cited note 44, § 50, *ante*. Compare Wilson v. Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654.

72. See cases cited in last preceding note.

ing it at the same time,⁷³ or where it expressly consents to so transport it.⁷⁴ The carrier is liable for the wrongful conversion of the baggage of a passenger by its servants and, to escape liability therefor, it must replace the same in the actual custody and possession of the owner.⁷⁵ A tender more than a year after demand will not relieve it of liability.⁷⁶ A carrier is also liable for delay in the delivery of baggage whether the same is injured thereby or not.⁷⁷ In the absence of special agreement, the carrier does not incur liability as an insurer of the baggage of a passenger, unless the passenger accompanies it in its transportation, or is prevented from so doing by the fault of the carrier; and, where the owner does not become a passenger, the carrier would not have his property in the character of baggage, and would not be responsible for it as such.⁷⁸ Where a carrier receives a trunk of a traveling salesman, with notice that it contained samples, for the transportation of which it charges and receives extra compensation, it is liable for its value if lost while in its custody, not on its contract for the transportation of the passenger and his personal baggage, but on its contract to carry the same as freight.⁷⁹

§ 52. Limitation of liability.—A carrier may, by special contract or by a notice or regulation assented to by a passenger expressly or impliedly, limit its liability as insurer of a passenger's

73. McCormick v. Pennsylvania Cent. R. Co., 99 N. Y. 65; St. Louis S. W. R. Co. v. Ray (Tex.), 35 S. W. 951.

74. Howell v. Grand Trunk R. Co., 36 N. Y. Supp. 544; Warner v. Burlington, etc., R. Co., 22 Iowa, 166; Logan v. Pontchartrain R. Co., 11 Rob. (La.) 24.

75. McCormick v. Pennsylvania Cent. R. Co., 99 N. Y. 65, 52 Am. Rep. 6, 21 Am. & Eng. R. Cas. 296; Morris v. Third Ave. R. Co., 23 How. Pr. (N. Y.) 345, 1 Daly (N. Y.), 202.

76. Lake Shore, etc., R. Co. v. Warren, 3 Wyo. 134, 21 Am. & Eng. R. Cas. 302.

77. International, etc., R. Co. v. Philips, 63 Tex. 590. See also Anderson v. Toledo, etc., R. Co., 32 Iowa,

86, 10 Am. Ry. Rep. 16, as to statutory penalty for such delay.

78. Wood v. Maine Cent. R. Co., 98 Me. 98, 56 Atl. 457, the same rule applies where the owner did not intend to accompany his baggage the entire distance, and did not do so.

A steamship company is not responsible for the destruction of trunks by fire while detained at the custom house, where a passenger, on arrival in Germany, directed his trunks to be forwarded to him by slow freight via. London to an interior town in England. Parker v. North German Lloyd S. S. Co., 74 App. Div. (N. Y.) 16, 76 N. Y. Supp. 806.

79. Trimble v. New York Cent., etc., R. Co., 162 N. Y. 84, 56 N. E.

baggage to losses arising from the negligence or misconduct of its agents, but it cannot stipulate for exemption from liability for losses caused by its own negligence or wrong-doing, or that of its agents or servants.⁸⁰ It is competent for passenger carriers, by specific regulations which are reasonable and not inconsistent with any statute or its duties to the public, and which are distinctly brought to the knowledge of the passenger, to protect themselves against liability as insurers of baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk.⁸¹ A passenger is not bound by a printed notice on his ticket limiting the weight and value of his baggage, unless he is aware

532, 48 L. R. A. 115; *Sloman v. Great Western R. Co.*, 67 N. Y. 214; *Talcott, v. Wabash R. Co.*, 159 N. Y. 470, 54 N. E. 3.

80. *N. Y.*—*Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212, 8 Am. Rep. 543; *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. N. S. (N. Y.) 229, 9 Am. L. Reg. N. S. 239; *Camden, etc., R. Co. v. Burke*, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488; *Cole v. Goodwin*, 19 Wend. (N. Y.) 354; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; *Glovinsky v. Cunard Steamship Co.*, 4 Misc. Rep. (N. Y.) 266.

U. S.—*Mauritz v. New York, etc., R. Co.*, 23 Fed. 765, 21 Am. & Eng. R. Cas. 286; *Saunders v. Southern Ry. Co.*, 128 Fed. 15, 62 C. C. A. 523.

Ala.—*Mobile, etc., R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607, the rule applies where the passenger is using a free pass.

Ill.—*Adams Express Co. v. Stettiners*, 61 Ill. 184, 14 Am. Rep. 57.

Ind.—*Indianapolis, etc., R. Co. v. Cox*, 29 Ind. 360, 95 Am. Dec. 640; *Louisville, etc., R. Co. v. Nicholai*, 4 Ind. App. 119.

Kan.—*Kansas City, etc., R. Co. v. Rodebaugh*, 38 Kan. 45, 34 Am. & Eng. R. Cas. 219.

La.—*Logan v. Pontchartrain R.*

Co., 11 Rob. (La.) 24, 43 Am. Dec. 199.

Me.—*Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, 50 Am. Dec. 659.

Mass.—*Squire v. New York Cent., etc., R. Co.*, 98 Mass. 239, 93 Am. Dec. 162; *Malone v. Boston, etc., R. Corp.*, 12 Gray (Mass.), 388.

N. C.—*Smith v. North Carolina R. Co.*, 64 N. C. 235.

Ohio.—*Baltimore, etc., R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617, 3 Am. & Eng. R. Cas. 246; *Cincinnati, etc., R. Co. v. Pontius*, 19 Ohio St. 221.

Pa.—*Bingham v. Rogers*, 6 W. & S. (Pa.) 495, 40 Am. Dec. 581; *Camden, etc., R. Co. v. Baldauf*, 16 Pa. St. 67, 55 Am. Dec. 481.

S. C.—*Swindler v. Hilliard*, 2 Rich. (S. C.) 286, 45 Am. Dec. 732.

Tenn.—*Coward v. East Tennessee R. Co.*, 16 Lea (Tenn.), 225, 57 Am. Rep. 227.

Tex.—*International, etc., R. Co. v. Foltz*, 3 Tex. Civ. App. 644.

Va.—*Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. (Va.) 654.

81. *New York Cent. etc., R. Co. v. Fraloff*, 100 U. S. 24; *The Majestic*, 56 Fed. 244; *Humphreys v. Perry*, 148 U. S. 627, 54 Am. & Eng. R. Cas. 29, revg. 39 Fed. 417, 40 Am. & Eng. R. Cas. 636; *Cole v. Goodwin*, 19

of it when he purchases his ticket, and then he is presumed to assent unless he objects. The burden of proving such assent is upon the carrier.⁸² An acceptance of baggage by the carrier as offered, either upon payment of extra compensation or with a knowledge of the facts, constitutes an implied waiver of the limitation in the ticket.⁸³ But if by fraud or misrepresentation on the part of the passenger or others, the carrier is induced to receive an amount greater than its rules prescribe, its liability for the excess is that of a gratuitous bailee merely.⁸⁴ One who receives from a carrier a pass over its line, issued on condition that the person accepting it agrees that the company shall not be liable

Wend. (N. Y.) 251, 32 Am. Dec. 470; Davis v. Chicago, etc., R. Co., 83 Iowa 744; Norfolk, etc., R. Co. v. Irvine, 84 Va. 553; Shaw v. Canadian Pac. R. Co., 5 Manitoba L. Rep. 334; Jacobs v. Central R. Co. of N. J., 208 Pa. 535, 57 Atl. 982, 19 Pa. Super. Ct. 13.

Whether any particular regulation is reasonable must be determined from the facts in the case and is generally a question for the jury. Glovinsky v. Cunard Steamship Co., 4 Misc. Rep. (N. Y.) 266; Weber Co. v. Chicago, etc., R. Co. (Iowa), 60 N. W. 637; Texas Mexican R. Co. v. Willis, 3 Tex. App. Civ. Cas. § 71; Norfolk, etc., R. Co. v. Irvine, 84 Va. 553. A provision limiting liability to \$50, in a ticket for a first class cabin passage across the Atlantic, in a first class steamer, is unreasonable. The New England, 110 Fed. 415; Glovinsky v. Cunard Steamship Co., 4 Misc. Rep. (N. Y.) 266; 24 N. Y. Supp. 136. But see Steers v. Cunard Steamship Co., 57 N. Y. 1. In the absence of legislative enactment the law does not prescribe any definite limit to the value of baggage, beyond which a carrier is not liable. Galveston, etc., R. Co. v. Fales (Tex. Civ. App.), 77 S. W. 234.

82. Rawson v. Pennsylvania R. Co., 48 N. Y. 212; Wiegand v. Cent. R. Co. of N. J., 75 Fed. 370; Indianapolis, etc., R. Co. v. Cox, 29 Ind. 360; Anderson v. Canadian Pac. R. Co., 17 Ont. Rep. 747, 40 Am. & Eng. R. Cas. 624; Brown v. Eastern R. Co., 11 Cush. (Mass.) 97. See also The Majestic, 60 Fed. 624; Gleason v. Goodrich Transp. Co., 32 Wis. 97, 14 Am. Rep. 716; Mauritz v. New York, etc., R. Co., 23 Fed. 765; Camden, etc., R. Co. v. Baldauf, 16 Pa. St. 67; Little Rock, etc., R. Co. v. Record (Ark.), 85 S. W. 421.

Where a railroad ticket has printed on its face in clear, legible type the words: "Only 150 pounds of baggage allowed each passenger; company's responsibility limited to \$1.00 per pound"—no excess of the amount specified can be recovered for loss of baggage by a passenger accepting the ticket. Mogill v. Central R. of N. J., 25 Pa. Super. Ct. 164.

83. Glasco v. New York Cent. R. Co., 36 Barb. (N. Y.) 557; Chicago, etc., R. Co. v. Conklin, 32 Kan. 55. But see Baldraff v. Camden, etc., R. Co., 2 Fed. Cas. 507.

84. Humphreys v. Perry, 148 U. S. 627.

under any circumstances for injury to the person or damage to the property, cannot recover the value of baggage lost while traveling on the pass.⁸⁵ A statute permitting a common carrier to limit its liability for loss of a passenger's baggage to a certain amount per 100 pounds by posting a general notice, unless the passenger shall pay money to the company "by way of insurance" for the assumption of additional responsibility, does not apply to the loss of a passenger's trunk by theft from the company at the station of departure before the passenger has had an opportunity to check it; the gist of the passenger's action being negligence.⁸⁶ And where a statute authorized carriers to limit their liability for loss of "goods, merchandise, or baggage" received for transportation by notice "inserted in the bills of lading or receipts given for such merchandise or in the tickets of passengers," a carrier's liability was not limited thereunder with respect to merchandise of a passenger transported in a packing case without extra compensation, where no bill of lading or receipt was given therefor except the passenger's ticket, which limited the company's liability to baggage defined as wearing apparel only.⁸⁷ Under a contract of carriage, limiting the carrier's liability to \$100 for loss of baggage, unless a declaration of the value thereof in excess of such sum be made by the passenger "at or before the issue of this contract or at or before the delivery of said luggage to the ship," the declaration need not be made before the delivery of the baggage on the ship; and, the baggage having been delivered to the carrier's employes on the wharf without such declaration, for the purpose of having it placed on the ship, and it not having been

85. Bissell v. New York Cent. R. Co., 25 N. Y. 442, 82 Am. Dec. 369; Wells v. New York Cent. R. Co., 24 N. Y. 181; Perkins v. New York Cent. R. Co., 24 N. Y. 196, 82 Am. Dec. 281; Holly v. Southern Ry. Co., 119 Ga. 767, 47 S. E. 188; Quimby v. Boston, etc., R. Co. (Mass.), 23 N. E. 205, 5 L. R. A. 846; Kinney v. Cent. R. Co., 32 N. J. L. 407, 90 Am. Dec. 675; Muldoon v. Seattle R. Co., 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794; Griswold v. New York R. Co. (Conn.), 4 Atl. 261, 55 Am. Rep. 115; Northern Pac. R. Co. v. Adams,

24 S. Ct. 408; Jacobs v. Central R. Co. of N. J., 208 Pa. 535, 57 Atl. 982.

86. Williams v. Central R. Co. of N. J., 93 App. Div. (N. Y.) 582, 88 N. Y. Supp. 434; Burnell v. New York Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61; Pennsylvania R. Co. v. Knight, 58 N. J. L. 287, 33 Atl. 845; Ashmore v. Pennsylvania Steam Towing, etc., Co., 28 N. J. L. 180.

87. Saleeby v. Central R. Co. of N. J., 99 App. Div. (N. Y.) 163, 90 N. Y. Supp. 1042.

placed thereon, the limitation does not apply.⁸⁸ A passenger must have actual notice of a limitation of liability before the train is started and while he has an opportunity to leave the car and remove his baggage, and a limitation brought to his notice after the journey has commenced will not be binding, or affect his rights.⁸⁹ The delivery and acceptance of a paper containing the contract may be binding though not read, provided the business is of such a nature and the delivery is under such circumstances as to raise the presumption that the person receiving it knows that it is a contract, containing the terms and conditions upon which the property is received to be carried. But when the circumstances of the transaction are such that the passenger has a right to regard the paper received merely as a receipt or voucher to enable him to follow and identify his baggage, and no notice is given to him that it embodies the terms of a special contract, his omission to read it is not *per se* negligence, and the delivery and acceptance of the receipt under such circumstances does not create a contract according to its terms, and he is not bound by the limitations contained therein. Whether, in a given case, such a paper was delivered and accepted by a passenger with notice of its contents, or that it contained a special contract, so as to require that he should acquaint himself with its contents, is a question of fact for the jury.⁹⁰ Contracts limiting the carrier's liability being in derogation of the common law are strictly construed and as a rule against the carrier, where their provisions are not plain and unquestionable.⁹¹ A distinction is made between a passenger's

88. Holmes v. North German Lloyd S. S. Co., 100 App. Div. (N. Y.) 36, 90 N. Y. Supp. 834.

89. Rawson v. Pennsylvania R. Co., 48 N. Y. 212; Mauritz v. New York, etc., R. Co., 23 Fed. 766; Wilson v. Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654; Logan v. Pontchartrain R. Co., 11 Rob. (La.) 24.

90. Malone v. Metropolitan Express Co., 86 N. Y. Supp. 1039; Engberman v. North German Lloyd S. S. Co., 84 N. Y. Supp. 201; Madan v. Sherrard, 73 N. Y. 329, 29 Am. Rep. 153, affg. 42 N. Y. Super. Ct. 353; Grossman v. Dodd, 63 Hun (N. Y.), 324, affd. 137 N. Y. 599; Woodruff

v. Sherrard, 9 Hun (N. Y.), 322; Limburger v. Westcott, 49 Barb. (N. Y.) 283;; Blossom v. Dodd, 43 N. Y. 270, 3 Am. Rep. 701; Brown v. Eastern R. Co., 11 Cush. (Mass.) 97; Baltimore, etc., R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617; Malone v. Boston, etc., R. Co., 12 Gray (Mass.), 388, 74 Am. Dec. 598; Wilson v. Chesapeake, etc., R. Co., *supra*.

91. Wheeler v. Oceanic Steam Nav. Co., 72 Hun (N. Y.), 5; Earle v. Cadmus, 2 Daly (N. Y.), 237; Hopkins v. Westcott, 6 Blatchf. (U. S.) 64; Edsall v. Camden, etc., R. Co., 50 N. Y. 661; St. Louis, etc., R.

contract ticket or engagement for a voyage across the ocean which is a matter of more deliberation and attention than buying a railroad ticket or taking an express company's receipt for baggage or freight, it being held that there is no room in the former case for the suggestion that the party is surprised into a contract when he supposes himself only to be taking a token indicative of his right. In the absence of fraud, concealment or improper practice, the legal presumption is held to be that stipulations limiting the common law liability of the carrier, contained in the ticket of a passenger by steamship for a foreign port, are known to the party receiving it.⁹² Where plaintiff delivered his trunk at the docks of an outgoing steamer in time to be shipped, and the carrier failed to put it on board, and it was destroyed by fire on the docks two days later, in an action to recover the value the carrier could not defend on the condition in the passage ticket limiting liability to \$50 unless value was declared, as its negligence in failing to ship the trunk was a proximate cause of the loss.⁹³

§ 53. Baggage checks mere receipts or vouchers.—The primary purpose of giving a passenger a duplicate check is to enable him to identify and claim his baggage at the end of the route. It has never been regarded as embodying the contract of carriage, but only as a voucher or token for the purpose mentioned.⁹⁴ The possession of the check is *prima facie* evidence of the holder's ownership of the baggage,⁹⁵ and of the receipt and possession of the baggage by the carrier and that it has not been de-

Co. v. Smuck, 49 Ind. 302; Deming v. Merchants Cotton Press, etc., Co., 90 Tenn. 320; Louisville, etc., R. Co. v. Nicholai, 4 Ind. App. 119; Coward v. East Tennessee, etc., R. Co., 16 Lea (Tenn.), 225, 57 Am. Rep. 227.

92. Steers v. Liverpool, etc., Steamship Co., 57 N. Y. 1, 15 Am. Rep. 453; Quimby v. Boston, etc., R. Co., 150 Mass. 365; Fonseca v. Cunard Steamship Co., 153 Mass. 553.

93. Tewes v. North German Lloyd S. S. Co., 89 App. Div. (N. Y.) 148; 42 Misc. Rep. (N. Y.) 148, 85 N. Y. Supp. 994.

94. Isaacson v. New York Cent., etc., R. Co., 94 N. Y. 278, 46 Am. Rep. 142, 16 Am. & Eng. R. Cas., 193; Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; Hyman v. Central Vermont R. Co., 66 Hun (N. Y.), 202; Marmonstein v. Pennsylvania R. Co., 13 Misc. Rep. (N. Y.) 32; Hickox v. Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143; Atchison, etc., R. Co. v. Brewer, 20 Kan. 669. Compare Wilson v. Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654.

95. Isaacson v. New York Cent., etc., R. Co., *supra*.

livered.⁹⁶ As between connecting carriers, the surrender of a check by one line to another is presumptive evidence that the baggage has been received in due course by the latter company, and it is responsible therefor.⁹⁷ The general practice or system of railroad companies in checking baggage is a matter of common observation and experience, and has so become a part of the common knowledge of the community that courts may take judicial notice of its existence.⁹⁸ A railroad company cannot escape liability for baggage lost, on the ground that the baggageman had no authority to check the baggage, by setting up a rule of the company prohibiting the baggageman from checking baggage of the class lost without a release of liability therefor, where the traveler has no knowledge of such rule.⁹⁹

§ 54. Commencement and termination of liability.—The carrier's liability for the baggage of a passenger commences with the actual delivery of such baggage to the carrier and its taking possession of the same,¹ regardless of whether the passenger has purchased a ticket or not, if he in good faith intended to become a passenger,² and regardless of whether the baggage has been checked or not.³ Except in cases where the delay in shipment is the fault of the carrier,⁴ the carrier's liability is that of a ware-

96. Davis v. Cayuga, etc., R. Co., 10 How. Pr. (N. Y.) 330; Denver, etc., R. Co. v. Roberts, 6 Colo. 333; Davis v. Michigan, etc., R. Co., 22 Ill. 278; Chicago, etc., R. Co. v. Clayton, 78 Ill. 616; Kansas Pac. R. Co. v. Montelle, 10 Kan. 119; Louisville, etc., R. Co. v. Weaver, 9 Lea (Tenn.), 38; Lake Shore, etc., R. Co. v. Lassen, 12 Ill. App. 659.

97. Chicago, etc., R. Co. v. Clayton, *supra*; St. Louis, etc., R. Co. v. Hawkins, 39 Ill. 406; Kansas Pac. R. Co. v. Montelle, *supra*; Ahlbeck v. St. Paul, etc., R. Co., 39 Minn. 424, 12 Am. St. Rep. 661.

98. Isaacson v. New York Cent., etc., R. Co., *supra*.

99. Trimble v. New York Cent., etc., R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115.

1. Davis v. Cayuga, etc., R. Co., 10 How. Pr. (N. Y.) 330; Wilson v. Grand Trunk R. Co., 57 Me. 138; Green v. Milwaukee, etc., R. Co., 41 Iowa, 410; Lake Shore, etc., R. Co. v. Foster, 104 Ind. 293.

2. Fairfax v. New York Cent., etc., R. Co., 37 N. Y. Super. Ct. 516; Hickox v. Naugatuck R. Co., 31 Conn. 281; Lake Shore, etc., R. Co. v. Foster, *supra*; Green v. Milwaukee, etc., R. Co., *supra*.

3. Rogers v. Long Island R. Co., 2 Lans. (N. Y.) 269, 1 T. & C. (N. Y.) 396, aff'd. 56 N. Y. 620; Chicago, etc., R. Co. v. Clayton, 78 Ill. 616; Jordan v. Fall River R. Co., 5 Cush. (Mass.) 69.

4. Toledo, etc., R. Co. v. Tapp, 6 Ind. App. 304; Shaw v. Northern Pac. R. Co., 40 Minn. 144.

houseman only for baggage brought to the station or depot and voluntarily deposited there for safe keeping and not for immediate transportation.⁵ But the carrier is liable as a common carrier where transportation of baggage is delayed for its convenience, although with the passenger's consent.⁶ Delivery to the baggage master or other authorized agent of the carrier and an acceptance by him will bind the carrier. A baggage master is held out to the world as the agent of the company, with general authority to receive baggage; his acts, within the general scope of his agency, are binding on the company, unless the owner of baggage has notice of a limitation of his powers.⁷ The carrier will be liable for a wrongful act of its baggage master,⁸ and for an acceptance of baggage in violation of its rules, if they are unusual and not brought to the notice of the passenger.⁹ Delivery to the only person in charge of the station, by depositing the baggage at the place indicated by him, and giving him directions as to checking, is a delivery to the carrier.¹⁰ Delivery to an agent other than the baggage master, having the control and supervision of business at the depot or station is a delivery which will be binding on the carrier.¹¹ But the carrier's agent must have notice of the delivery of the baggage at the depot or station; a mere deposit without notice is insufficient to constitute a delivery,¹² unless the carrier assents to such a delivery.¹³ The carrier will

5. Van Gilder v. Chicago, etc., R. Co., 44 Iowa, 548; Goodbar v. Wabash R. Co., 53 Mo. Ap. 434; Little Rock, etc., R. Co. v. Hunter, 42 Ark. 200.

6. Illinois Cent. R. Co. v. Troustine, 64 Miss. 834; Shaw v. Northern Pac. R. Co., *supra*.

7. Lake Shore, etc., R. Co. v. Foster, 104 Ind. 293, 54 Am. Rep. 319; Anniston Transfer Co. v. Gurley (Ala.), 18 So. 209; Wilson v. Grand Trunk R. Co., 57 Me. 138; Jordan v. Fall River R. Co., 5 Cush. (Mass.) 69, 51 Am. Dec. 44.

8. McCormick v. Pennsylvania Cent. R. Co., 99 N. Y. 65, 52 Am. Rep. 6, 21 Am. & Eng. R. Cas. 296, 80 N. Y. 353, 2 Am. & Eng. R. Cas.

635, 49 N. Y. 303, 4 Am. Ry. Rep. 429.

9. Lake Shore, etc., R. Co. v. Foster, *supra*.

10. Battle v. Columbia, etc., R. Co., 70 S. C. 329, 49 S. E. 849.

11. Rogers v. Long Island R. Co., 38 How. Pr. (N. Y.) 289, 1 T. & C. (N. Y.) 396, 2 Lans. (N. Y.) 269, affd. 56 N. Y. 620; Whitbeck v. Schuyler, 31 How. Pr. (N. Y.) 97; Fisher v. Geddes, 15 La. Ann. 14; International, etc., R. Co. v. Folliard, 66 Tex. 603.

12. Rider v. Wabash, etc., R. Co., 14 Mo. App. 529; Wright v. Caldwell, 3 Mich. 51; Kerr v. Grand Trunk R. Co., 24 U. C. C. P. 209.

13. Green v. Milwaukee, etc., R. Co., 38 Iowa, 100, 41 Iowa, 410.

incur the liability of a warehouseman for baggage delivered to it through the wrongful act or mistake of a connecting carrier.¹⁴ The carrier's liability as a common carrier for the baggage of a passenger terminates after the lapse of a reasonable time for its delivery after arrival at the place of destination, and it then becomes liable as a warehouseman.¹⁵ The question of what is a reasonable time is largely one for the jury upon all the facts of the case, such as the character of the station or depot, the facilities of the carrier for receiving baggage there and for delivering the same when called for, and the carrier's general custom of transacting such business, but when the facts are not disputed it is for the court to decide.¹⁶ When the passenger's baggage is not ready for delivery when called for, or the baggage remains in the depot because of the absence of the baggage master or his failure to discharge his duties, the liability of the carrier continues until the passenger has had reasonable time to again call for it.¹⁷ Where, upon arrival of the baggage at its destination, the passenger takes

14. *Fairfax v. New York Cent., etc., R. Co.*, 67 N. Y. 11, 73 N. Y. 167, 29 Am. Rep. 119.

15. *N. Y.—Burnell v. New York Cent. R. Co.*, 45 N. Y. 184, 6 Am. Rep. 61; *Roth v. Buffalo, etc., R. Co.*, 34 N. Y. 548, 90 Am. Dec. 736; *Burgevin v. New York Cent., etc., R. Co.*, 69 Hun (N. Y.), 479; *Cary v. Cleveland, etc., R. Co.*, 29 Barb. (N. Y.) 35; *Powell v. Myers*, 26 Wend. (N. Y.) 591; *Torpey v. Williams*, 3 Daly (N. Y.), 162; *Holdridge v. Utica, etc., R. Co.*, 56 Barb. (N. Y.) 191; *Klein v. Hamburg-American Packet Co.*, 3 Daly (N. Y.), 390; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 225.

Ill.—St. Louis, etc., R. Co. v. Hardway, 17 Ill. App. 321.

Ind.—Pennsylvania Co. v. Liveright (Ind. App.), 41 N. E. 350.

Iowa.—Mote v. Chicago, etc., R. Co., 27 Iowa, 22.

Kan.—Kansas City, etc., R. Co. v. Patten (Kan.), 45 Pac. 108.

Ky.—Wald v. Louisville, etc., R. Co., 92 Ky. 645.

Mass.—Nealand v. Boston, etc., R. Co., 161 Mass. 67.

Mo.—Cohen v. St. Louis, etc., R. Co., 59 Mo. App. 66; *Lin v. Terre Haute, etc., R. Co.*, 10 Mo. App. 125.

Tex.—Galveston, etc., R. Co. v. Smith (Tex. Civ. App.), 24 S. W. 668; *Gulf, etc., R. Co. v. Jackson* (Tex. App.), 15 S. W. 128.

Can.—Vineberg v. Grand Trunk R. Co., 13 Ont. App. 93, 27 Am. & Eng. R. Cas. 271.

16. *Roth v. Buffalo, etc., R. Co.*, 34 N. Y. 548; *Burgevin v. New York Cent. R. Co.*, 69 Hun (N. Y.) 479; *Jones v. Norwich, etc., Transp. Co.*, 50 Barb. (N. Y.) 193; *Nevis v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 225; *Louisville, etc., R. Co. v. Mahan*, 8 Bush. (Ky.) 184; *George F. Ditman Boot, etc., Co. v. Keokuk, etc., R. Co.*, 91 Iowa, 416; *Chicago, etc., R. Co. v. Boyce*, 73 Ill. 510; *Jacobs v. Tutt*, 33 Fed. 412; *Ouimit v. Henshaw*, 35 Vt. 605; *Brown v. Canadian Pac. R. Co.*, 3 Manitoba L. Rep. 496.

17. *Dininny v. New York, etc., R.*

possession of it, and subsequently, for his convenience and accommodation, the carrier's agent agrees to store it until sent or called for, the carrier's liability as a common carrier ends and it becomes liable thereafter only as a warehouseman.¹⁸ It is the passenger's duty to call for and remove his baggage within a reasonable time after arriving at his destination,¹⁹ and what is such reasonable time is determined by the same rules as stated above in reference to delivery by the carrier.²⁰ Delivery by the carrier must be made at the proper station, and the carrier's liability continues until such delivery and notification to the passenger, if delay has been occasioned by delivery at a place other than that called for in the contract of carriage.²¹ Delivery to an agent of the owner is sufficient.²² But delivery to a stranger upon a forged order is no delivery and the carrier is liable for the loss.²³

Co., 49 N. Y. 546, 4 Am. Ry. Rep. 457; Georgia R., etc., Co. v. Phillips, 93 Ga. 801.

18. Mattison v. New York Cent. R. Co., 57 N. Y. 552; Matteson v. New York Cent. R. Co., 76 N. Y. 381; Curtis v. Avon, etc., R. Co., 49 Barb. (N. Y.) 148; Northland v. Philadelphia, etc., R. Co., 81 Hun (N. Y.) 473; Mulligan v. Northern Pac. R. Co., 4 Dak. 315; Little Rock, etc., R. Co. v. Hunter, 42 Ark. 200; Laffrey v. Grummond, 74 Mich. 186; Minor v. Chicago, etc., R. Co., 19 Wis. 40; Galveston, etc., R. Co. v. Smith, 81 Tex. 479, 24 S. W. 668.

19. Gilhooley v. New York, etc., Steam Nav. Co., 1 Daly (N. Y.) 197; Morris v. Third Ave. R. Co., 1 Daly (N. Y.) 202; Holdridge v. Utica, etc., R. Co., 56 Barb. (N. Y.) 191; Curtis v. Avon, etc., R. Co., *supra*; Chicago, etc., R. Co. v. Addizoat, 17 Ill. App. 632; Ross v. Missouri, etc., R. Co., 4 Mo. App. 583; Ouimitt v. Henshaw, 35 Vt. 605; Texas, etc., R. Co. v. Cook, 2 Tex. App. Civ. Cas. § 659; Vineberg v. Grand Trunk R. Co., 13 Ont. App. 93.

20. Van Horn v. Kermit, 4 E. D. Sm. (N. Y.) 453; Cary v. Cleveland, etc., R. Co., 29 Barb. (N. Y.) 35;

Wiegand v. Central R. Co., 75 Fed. 370; Watkins v. New York Cent., etc., R. Co., 3 N. Y. Supp. 946; Hoeger v. Chicago, etc., R. Co., 63 Wis. 100; Holdridge v. Utica, etc., R. Co., 56 Barb. (N. Y.) 91; Wald v. Louisville, etc., R. Co., 92 Ky. 645; Clark v. Eastern R. Co., 139 Mass. 423; Fenton v. Grand Trunk R. Co., 28 U. C. Q. B. 367. See also cases cited note 16.

21. Klein v. Hamburg American Packet Co., 3 Daly (N. Y.) 390; Murphy v. Emigration Com'r's, 28 N. Y. 154; Gilhooley v. New York, etc., R. Co., 1 Daly (N. Y.) 197; Toledo, etc., R. Co. v. Hammond, 33 Ind. 379; Gulf, etc., R. Co. v. Moody (Tex. Civ. App.), 30 S. W. 574.

Where baggage is checked to the wrong station, it is contributory negligence which will defeat a recovery for delay in returning it, for the passenger to fail to read the check given to him, which would have disclosed the mistake. Gonthier v. New Orleans, etc., R. Co., 28 La. Ann. 67.

22. Mobile, etc., R. Co. v. Hopkins, 41 Ala. 486.

23. Mattison v. New York Cent. R. Co., 57 N. Y. 552; Powell v.

§ 55. Carrier's liability as warehouseman.—Where a passenger neglects to take baggage from the possession of a railroad company within a reasonable time, the company is subject to a contractual liability to care therefor as warehouseman.²⁴ But where a railroad company received a passenger's trunk from an expressman, but, when the passenger subsequently went to the station to check the trunk, it could not be found; the passenger accepted a check from the baggage master on his promise that he would send the trunk on; she presented the check at her destination, but failed to get the trunk, it appearing that it had been stolen from the company; the company's relation to the trunk was that of a common carrier, and not of a warehouseman.²⁵ So, where a passenger, on alighting at the station, was unable to get any information when his trunk would arrive; it arrived the next afternoon and was burglarized that night in the station, and he called for it on the next day; as such carrier's relation to plaintiff was still that of a carrier when the trunk was burglarized, its liability was not reduced to that of warehouseman.²⁶ If, after the lapse of a reasonable time, a carrier stores the baggage of a passenger, at his expense, it remains liable only as warehouseman.²⁷ It is liable only as a gratuitous bailee, if no charge is made for the storage.²⁸ The loss of a passenger's baggage is presumptively

Myers, 26 Wend. (N. Y.) 591; *Waldron v. Chicago, etc., R. Co.*, 1 Dak. 341.

24. *Blackmore v. Missouri Pac. R. Co.*, 162 Mo. 455; 62 S. W. 993; *St. Louis, etc., R. Co. v. Hardway*, 17 Ill. App. 321; *Louisville, etc., R. Co. v. Mahan*, 8 Bush. (Ky.) 184; *Kahn v. Atlantic, etc., R. Co.*, 115 N. C. 638. See also § 54.

25. *Williams v. Central R. Co. of N. J.*, 93 App. Div. (N. Y.) 582, 88 N. Y. Supp. 434.

26. *Felton v. Chicago G. W. R. Co.*, 86 Mo. App. 332.

27. *N. Y.—Matteson v. New York Cent., etc., R. Co.*, 76 N. Y. 381; *Burnell v. New York Cent. R. Co.*, 45 N. Y. 184.

Ga.—*Georgia R. Co. v. Thompson*, 86 Ga. 327.

Iowa.—*George F. Ditman Boot, etc., Co. v. Keokuk, etc., R. Co.*, 91 Iowa, 416.

Ky.—*Wald v. Louisville, etc., R. Co.*, 92 Ky. 645.

Mo.—*Ross v. Missouri, etc., R. Co.*, 4 Mo. App. 583.

Tex.—*Galveston, etc., R. Co. v. Smith*, 81 Tex. 479.

Vt.—*Ouimitt v. Henshaw*, 35 Vt. 646.

Wis.—*Hoeger v. Chicago, etc., R. Co.*, 63 Wis. 100.

28. *Jones v. Norwich, etc., Transp. Co.*, 50 Barb. (N. Y.) 193; *Clark v. Eastern R. Co.*, 139 Mass. 423; *Minor v. Chicago, etc., R. Co.*, 19 Wis. 40; *Little Rock, etc., R. Co. v. Hunter*, 42 Ark. 200.

by negligence of the carrier, it having been delivered into the custody of its proper agent, and no excuse being given for its disappearance.²⁹ And this rule applies whether the carrier is acting as carrier or warehouseman,³⁰ although the burden is upon the passenger to show that the loss or injury of baggage stored resulted as a proximate cause of the carrier's negligence.³¹

§ 56. Connecting carriers.—Connecting railroads constituting one system, employing the same agents to sell passage tickets and receive baggage to be carried over the entire road, and being under the same general direction and control, are liable as partners jointly for a loss occurring on any part of the route.³² But an agreement between distinct and independent lines by which any one of them may sell tickets and check baggage over the others does not make them partners or liable as such,³³ and each of them is liable only for losses occurring on its line, except in jurisdictions where the initial carrier is held to assume liability for the entire route.³⁴ Where an initial carrier sold tickets to points on the line of a connecting carrier, there being no special contract or partnership between the two under which one was responsible for the default of the other, nor anything to show that the initial carrier acted as agent for the other, the connecting carrier could not be held liable for the loss of a trunk delivered to the initial carrier, in the absence of any evidence that it was ever

29. Burnell v. New York Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61; The Priscilla, 106 Fed. 739; Pennsylvania R. Co. v. Baldauf, 16 Pa. 67, 55 Am. Dec. 481.

30. Fairfax v. New York Cent., etc., R. Co., 73 N. Y. 167, 67 N. Y. 11, 29 Am. Rep. 119, 15 Am. Ry. Rep. 141.

31. Curtis v. Delaware, etc., R. Co., 74 N. Y. 116, 30 Am. Rep. 271; Pennsylvania Co. v. Miller, 35 Ohio St. 541; Cohen v. St. Louis, etc., R. Co., 59 Mo. App. 66; Mote v. Chicago, etc., R. Co., 27 Iowa 24; Bartholomew v. St. Louis, etc., R. Co., 53 Ill. 227. See also cases cited note 27, *ante*.

32. Hart v. Rensselaer, etc., R.

Co., 8 N. Y. 37, 59 Am. Dec. 447; Green v. New York Cent. R. Co., 4 Daly (N. Y.) 553, 12 Abb. Pr. N. S. (N. Y.) 473; Wolff v. Central R., etc., Co., 68 Ga. 653; Peterson v. Chicago, etc., R. Co., 80 Iowa 92; Barter v. Wheeler, 49 N. H. 9; Texas, etc., R. Co. v. Fort, 1 Tex. App. Civ. Cas. § 1252, 9 Am. & Eng. R. Cas. 392; International, etc., R. Co. v. Foltz, 3 Tex. Civ. App. 44.

33. Ellsworth v. Tartt, 26 Ala. 733; Felder v. Columbia, etc., R. Co., 21 S. C. 35. *Contra*: Atchison, etc., R. Co. v. Roach, 35 Kan. 740; Texas cases cited in last preceding note.

34. Central Trust Co. v. Wabash, etc., R. Co., 31 Fed. 247; Pennsylvania R. Co. v. Connell, 112 Ill. 295.

received by the connecting carrier.³⁵ Mere proof that a passenger bought a ticket from the initial carrier reading over several lines named and that such ticket was honored by the last line, is insufficient to show either an original joint contract, or partnership, or ratification, so as to make the last line liable for lost baggage, without a showing that the baggage had once come into its possession.³⁶ Where baggage is checked on a through ticket over several connecting lines, the contract made with the initial carrier governs the liability of the other carriers, limitations contained therein inuring to the benefit of the connecting lines, unless expressly restricted to the initial line.³⁷ But the initial carrier cannot, in the absence of a special contract, bind a connecting line to liability for injuries not occurring on the latter's line.³⁸ Where a carrier sells a ticket to a point on the line of a connecting carrier, and checks the passenger's baggage through to the passenger's destination, the receiving carrier is, in the absence of express contract to the contrary, liable for loss of the baggage by the connecting carrier. A carrier may contract to transport beyond its own line and the sale of a through ticket is assumed to be an undertaking to safely deliver the baggage at the point to which the ticket is sold.³⁹ But the facts that a person, who has

35. Romero v. McKernan, 88 N. Y. Supp. 365.

36. Kessler v. New York Cent., etc., R. Co., 61 N. Y. 538; Texas, etc., R. Co. v. Berry (Tex. Civ. App.), 71 S. W. 326; Felder v. Columbia, etc., R. Co., 21 S. C. 35; 53 Am. Rep. 656, and proof that the last line sent out tracers for the lost baggage did not show that it ever became a party to the original contract.

37. Whitworth v. Erie R. Co., 87 N. Y. 413; Babcock v. Lake Shore, etc., R. Co., 49 N. Y. 491; Western Union Tel. Co. v. Carew, 15 Mich. 525.

38. Montgomery, etc., R. Co. v. Culver, 75 Ala. 587. But see Wolff v. Central R., etc., Co., 68 Ga. 653.

39. Isaacs v. New York Cent., etc., R. Co., 94 N. Y. 278, 46 Am. Rep. 142, 16 Am. & Eng. R. Cas. 188;

Burnell v. New York Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61; Talcott v. Wabash R. Co., 66 Hun (N. Y.), 456; Cary v. Cleveland, etc., R. Co., 29 Barb. (N. Y.) 35; Weed v. Saratoga, etc., R. Co., 19 Wend. (N. Y.) 534; Torpey v. Williams, 3 Daly (N. Y.), 162; Kansas City, etc., R. Co. v. Washington (Ark.), 85 S. W. 406; Little Rock, etc., R. Co. v. Record (Ark.), 85 S. W. 421; Mauritz v. New York, etc., R. Co., 23 Fed. 765; Harp v. The Grand Era, 1 Woods (U. S.), 184; Croft v. Baltimore, etc., R. Co., 1 MacArthur (D. C.), 492; Hawley v. Screven, 62 Ga. 347; Illinois Cent. R. Co. v. Cope land, 24 Ill. 332; Atchison, etc., R. Co. v. Roach, 35 Kan. 740; Knight v. Portland, etc., R. Co., 56 Me. 234; Perkins v. Portland, etc., R. Co., 47 Me. 573; Hartan v. Eastern R. Co., 114 Mass. 44; Baltimore, etc., R. Co.

paid through fare to the terminus of connecting railroad lines, and received a coupon ticket to that place from the first of the connecting carriers, knew what a coupon ticket meant and intended to purchase a ticket that would take him over connecting lines, warrant the inference of notice to him, even if the name of the company was not correctly given, of a statement at the head of a ticket, that the company "selling this ticket" acted "as agent," and that it did not intend to become "responsible beyond its own line," and tend to raise a question of fact as to whether the contract was for through transportation or not; and a finding on that question in the negative prevents a recovery and calls for the dismissal of a complaint against the carrier which sold the ticket, as to a cause of action for damages for personal baggage of the passenger, carried free as an incident of the ticket and destroyed by fire on another road.⁴⁰ The initial carrier is liable for any loss occurring on its own or connecting lines due to its own negligence in failing to properly check baggage, whether there is a special contract or not.⁴¹ Other cases maintain the rule that the initial carrier is only liable for such losses as occur on its own line, or by reason of its failure to make proper delivery of the baggage to the connecting carrier, and that selling a through ticket and checking baggage through is not sufficient to create a greater liability,⁴² although the carrier may by special contract extend its liability for the entire route.⁴³ An intermediate carrier, or the last carrier, is liable, like the initial carrier, for a loss of baggage occurring upon its own line, or where it fails to account for bag-

v. Campbell, 36 Ohio St. 647; Louisville, etc., R. Co. v. Weaver, 9 Lea (Tenn.), 38; Candee v. Pennsylvania R. Co., 21 Wis. 582; Wilson v. Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654; Nashua Lock Co. v. Worcester, etc., R. Co., 48 N. H. 339.

40. Talcott v. Wabash R. Co., 159 N. Y. 462.

41. Isaacson v. New York Cent., etc., R. Co., *supra*; Najac v. Boston, etc., R. Co., 7 Allen (Mass.), 329.

42. Milnor v. New York, etc., R. Co., 53 N. Y. 363; Marmonstein v. Pennsylvania R. Co., 13 Misc. Rep.

(N. Y.) 32; Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318; Mauritz v. New York, etc., R. Co., 23 Fed. 769; Green v. New York Cent. R. Co., 4 Daly (N. Y.), 553; Gulf, etc., R. Co., v. Jackson, 4 Tex. App. Civ. Cas. § 47.

43. Quimby v. Vanderbilt, 17 N. Y. 313, 72 Am. Dec. 469; Van Santvoord v. St. John, 6 Hill (U. S.), 157; Myrick v. Michigan Cent. R. Co., 107 U. S. 107; Perkins v. Portland, etc., R. Co., 47 Me. 573; Green v. New York Cent. R. Co., *supra*; Mauritz v. New York, etc., R. Co., *supra*.

gage delivered to it in good order by a previous carrier.⁴⁴ Proof of the receipt of the baggage by it raises the presumption that the loss occurred on its line, and requires it to prove delivery in good condition to the succeeding carrier to relieve it from liability.⁴⁵ An intermediate carrier, like an initial carrier, is liable for any damage arising from the loss or detention of baggage delivered to it, caused by its failure to forward it promptly.⁴⁶ But a passenger's notice to a carrier's baggageman that he had a large sample trunk, which he wished checked, is insufficient to charge the carrier with knowledge that any special reason existed for expediting the delivery of the particular trunk, so as to render the carrier liable, as for breach of contract, for damage resulting from delay caused by the necessity of having the samples in order to fulfil engagements already made to meet prospective customers, to whom no goods could be sold in the absence of the samples.⁴⁷

44. *Fairfax v. New York Cent., etc., R. Co.*, 73 N. Y. 167; *Estes v. St. Paul, etc., R. Co.*, 7 N. Y. Supp. 863; *McCormick v. Hudson River R. Co.*, 4 E. D. Sm. (N. Y.) 181; *Rome R. Co. v. Wimberly*, 75 Ga. 316; *Chicago, etc., R. Co. v. Fahey*, 52 Ill. 81; *Atchison, etc., R. Co. v. Roach*, 35 Kan. 740; *Baltimore Steam Packet Co. v. Smith*, 23 Md. 402; *Montgomery, etc., R. Co. v. Culver*, 75 Ala. 387; *Hooper v. London, etc., R. Co.*, 29 W. R. 241, 43 L. T. 570; *Louisville, etc., R. Co. v. Weaver*, 9 Lea (Tenn.), 38.

45. *Caldwell v. Erie Transfer Co.*, 13 Misc. Rep (N. Y.) 37; *Myerson v. Wolverton*, 9 Misc. Rep. (N. Y.) 186; *Hyman v. Central Vermont R. Co.*, 66 Hun (N. Y.), 202; *St. Louis, etc., R. Co. v. Hawkins*, 39 Ill. App. 406; *Philadelphia, etc., R. Co. v. Harper*, 29 Md. 330. See also cases cited in last preceding note.

46. *Davis v. Michigan Southern*,

etc., R. Co., 22 Ill. 278, 74 Am. Dec. 151.

47. *Katz v. Cleveland, etc., R. Co.*, 46 Misc. Rep. (N. Y.) 259, 91 N. Y. Supp. 720.

A carrier is not liable, as for a breach of contract, for delay in delivery of a sample trunk of a passenger, who was a member of a firm and had taken the samples with him on a selling trip, merely on proof of the value of the lost time of the passenger, and the amount of commission he would have earned by sales of goods he would have made each day, had the trunk not been delayed, where the contract was not made with reference to the peculiar circumstances known to both shipper and carrier, and the particular loss was not in contemplation of both, at the time of making the contract, as a contingency which might follow non-performance. *Id.*

CHAPTER XXI.

EJECTION OF PASSENGERS.

- SECTION**
1. Ejection of passengers for failure or refusal to procure ticket or pay fare.
 2. Passenger entitled to reasonable time to pay fare or produce ticket.
 3. Extra fare when paid on train.
 4. Tender or payment of fare to avoid ejection.
 5. Ejection of intoxicated passengers.
 6. Ejection of disorderly passengers.
 7. Ejection for violation of reasonable rules of the carrier.
 8. Defective or invalid tickets.
 9. Ejection of persons riding on freight trains.
 10. Manner of ejection.
 11. Place of ejection.

§ 1. Ejection of passenger for failure or refusal to procure ticket or pay fare.—Railroad passengers are bound to submit to a reasonable regulation of the company requiring them to exhibit their tickets when required to do so by the conductor, and for refusing to exhibit it the passenger may be removed from the car. So, a passenger who refuses or fails to pay proper fare, when demanded, by such refusal forfeits his right to proceed further on the train or car, and may be expelled.¹ A passenger on a railroad

1. N. Y.—*Hoelljes v. Interurban St. Ry. Co.*, 43 Misc. Rep. (N. Y.) 350, 87 N. Y. Supp. 133; *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343; *Hibbard v. New York*, etc., R. Co., 15 N. Y. 455; *Rown v. Christopher*, etc., St. R. Co., 34 Hun (N. Y.), 471; *Lasher v. Third Ave. R. Co.*, 27 Misc. Rep. (N. Y.) 824, 57 N. Y. Supp. 395; *Higgins v. Watervliet Turnpike*, etc., Co., 46 N. Y. 23; *Northern R. Co. v. Page*, 22 Barb. (N. Y.) 130.

U. S.—*Brown v. Memphis*, etc., R. Co., 4 Fed. 37.

Ala.—*Southern Ry. Co. v. Bunnell*, 138 Ala. 247, 36 So. 380.

Ga.—*Hornesby v. Georgia R.*, etc., Co., 120 Ga. 913, 48 S. E. 339; *Harp v. Southern Ry. Co.*, 119 Ga. 927, 47 S. E. 206, and a passenger has no right to be carried on offer to prove that he has lost his ticket. See *Louisville*, etc., R. Co. v. *Fleming*, 14 Lea (Tenn.), 128; *Rogers v. Atlantic City R. Co.* (N. J.), 34 Atl. 11; *Southern Ry. Co. v. De Saussure*, 116 Ga. 53, 42 S. E. 479; *Gulf*, etc. R. Co. v. *Asmore*, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53.

Ill.—*Illinois Cent. R. Co. v. Whittemore*, 43 Ill. 420, 92 Am. Dec. 138; *Ohio*, etc., R. Co. v. *Muhling*, 30 Ill.

car, being responsible for the fare of a child under his charge, may be ejected for refusal to pay such fare, though he has paid his own fare,² and though he himself is a minor.³ Under the Massachusetts statute, a child in the custody of his parent, upon refusal to pay fare, may be removed from the train at a regular passenger station, without being arrested.⁴

9., 81 Am. Dec. 336; *Terre Haute, etc., R. Co. v. Vanatta*, 21 Ill. 188, 74 Am. Dec. 96.

Ind.—*Indianapolis, etc., R. Co. v. Rinard*, 46 Ind. 293; *Columbus, etc., R. Co. v. Powell*, 40 Ind. 37; *Toledo, etc., R. Co. v. Wright*, 68 Ind. 586, 34 Am. Rep. 277.

Iowa.—*Hoffbauer v. Delhi, etc., R. Co.*, 52 Iowa, 342, 35 Am. Rep. 278; *Haley v. Chicago, etc., R. Co.*, 21 Iowa, 15.

Ky.—*Flood v. Chesapeake, etc., R. Co.*, 25 Ky. L. Rep. 2135, 80 S. W. 184; *Nutter v. Southern Ry.*, 25 Ky. L. Rep. 1700, 78 S. W. 470.

Md.—*McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532, 6 Am. Rep. 345.

Mass.—*Crowley v. Fitchburg, etc., R. Co.*, 185 Mass. 279, 70 N. E. 56; *O'Brien v. Boston, etc., R. Co.*, 15 Gray (Mass.), 20, 77 Am. Dec. 347; *McGarry v. Holyoke St. R. Co.*, 182 Mass. 123, 65 N. E. 45.

Mich.—*Brown v. Rapid Ry. Co.*, 10 Detroit L. N. 579 (Mich.), 96 N. W. 925; *Lake Shore, etc., R. Co. v. Pierce*, 47 Mich. 277, 3 Am. & Eng. R. Cas. 340; *Great Western R. Co. v. Miller*, 19 Mich. 305.

Mo.—*Shular v. St. Louis, etc., R. Co.*, 92 Mo. 339, 28 Am. & Eng. R. Cas. 186; *Lillis v. St. Louis, etc., R. Co.*, 64 Mo. 464, 27 Am. Rep. 255.

N. J.—*Jardine v. Cornell*, 50 N. J. L. 485; *Petrie v. Pennsylvania R. Co.*, 42 N. J. L. 449.

N. C.—*McGraw v. Southern Ry. Co.*, 135 N. C. 264, 47 S. E. 758; *Clark v. Wilmington, etc., R. Co.*, 91

N. C. 512, 49 Am. Rep. 647, 18 Am. & Eng. R. Cas. 366.

Ohio.—*New York, etc., R. Co. v. Willing*, 24 Ohio C. C. 474.

Pa.—*Pennsylvania Co. v. Lenhart*, 120 Fed. 61, as to wrongful ejection for failure to present a mileage exchange ticket.

S. C.—*Moore v. Columbia, etc., R. Co.*, 38 S. C. I.

Tex.—*Galveston, etc., R. Co. v. Scott* (Tex. Civ. App.), 79 S. W. 642; *Breen v. Texas, etc., R. Co.*, 50 Tex. 43. See *Texas, etc., R. Co. v. Lynch* (Tex. Civ. App.), 73 S. W. 65.

Wash.—*Braymer v. Seattle R. etc., Co.*, 35 Wash. 346, 77 Pac. 495.

W. Va.—*McKay v. Ohio River Co.*, 34 W. Va. 65, 26 Am. St. Rep. 913, 44 Am. & Eng. R. Cas. 395.

2. *Philadelphia, etc., R. Co. v. Hoeflich*, 62 Md. 300, 50 Am. Rep. 223, 18 Am. & Eng. R. Cas. 373.

3. *Warfield v. Louisville, etc., R. Co. (Tenn.)* 55 S. W. 304.

4. *Beckwith v. Cheshire R. Co.*, 143 Mass. 68, 27 Am. & Eng. R. Cas. 192.

Ejection of passengers from street railroads: As to use of insulting language by conductor, *Ostertyoung v. St. Louis Transit Co.*, 3 St. Ry. Rep. 566, 108 Mo. App. 703, 84 S. W. 179; as to failure to accept transfer, *Sommerfield v. St. Louis Transit Co.*, 3 St. Ry. Rep. 566, 108 Mo. App. 718, 84 S. W. 172; as to refusal to accept lawful money in payment of fare, *Breen v. St. Louis Transit Co.*, 3 St. Ry. Rep. 566, 108

§ 2. Passenger entitled to reasonable time to pay fare or produce ticket.—Where a passenger on a train or car has lost or mislaid his ticket, and is in good faith trying to find it, he is entitled to a reasonable time to do so, and if, in case he fails to find it, he is willing and ready to pay his fare, the conductor has no right to put him off the train.⁵ So, where a passenger, when asked for his fare, demanded an opportunity to go to a rear car and get it of a man who had promised to pay it.⁶ Whether a reasonable or sufficient time was given a passenger to produce his ticket or pay his fare is ordinarily a question of fact for the jury under the circumstances of the particular case.⁷

§ 3. Extra fare when paid on train.—A requirement by a railroad company that a passenger shall pay more for his fare when paid in the cars than at the depot is generally held to be reason-

Mo. App. 443, 83 S. W. 998; as to unnecessary force, Ruebsam v. St. Louis Transit Co., 3 St. Ry. Rep. 567, 108 Mo. App. 437, 83 S. W. 984; Birmingham Ry. L. & P. Co. v. Mullen, 2 St. Ry. Rep. 5, 138 Ala. 614, 35 So. 701; as to force to be used by conductor for failure to pay fare, Gottwald v. St. Louis Transit Co. (Mo.), 2 St. Ry. Rep. 632, 77 S. W. 125; for failure to produce transfer, Crowley v. Fitchburg & L. St. Ry. Co. (Mass.), 2 St. Ry. Rep. 453, 70 N. E. 56; see note on ejection of passenger for failure to present proper transfer, 2 St. Ry. Rep. 916, and note, 2 St. Ry. Rep. 5; as to injury to newsboy selling papers on street car, Indianapolis St. Ry. Co. v. Hockett (Ind.), 1 St. Ry. Rep. 115, 67 N. E. 106; as to reasonable time for payment of fare, Garrison v. United Rys. & Elec. Co. of Baltimore (Md.), 1 St. Ry. Rep. 267, 55 Atl. 371; Huba v. Schenectady Ry. Co., 1 St. Ry. Rep. 592, 85 App. Div. (N. Y.) 199, 83 N. Y. Supp. 157; for refusal to pay fare upon rejection of transfer, Perrine v. North Jersey St. Ry. Co. (N. J.), 1 St. Ry.

Rep. 525, 55 Atl. 799; upon presentation of defective transfer, Memphis St. Ry. Co. v. Graves (Tenn.), 1 St. Ry. Rep. 760, 75 S. W. 729; see note, 1 St. Ry. Rep. 593. See also Nellis Street Railroad Accident Law, 76-89, 158-163.

5. Hayes v. New York Cent. etc., R. Co., 34 Hun (N. Y.), 627, 30 Alb. L. J. 469, 18 Am. & Eng. R. Cas. 363, 20 Wkly. Dig. (N. Y.) 237; Maples v. New York, etc., R. Co., 38 Conn. 557, and he is entitled to ride as long as there is any reasonable expectation of finding it during the trip, where the conductor knew that he had the ticket.

6. Clark v. Wilmington, etc., R. Co., 91 N. C. 506, 49 Am. Rep. 647; Western, etc., R. Co. v. Ledbetter (Ga.), 25 S. E. 663.

7. International, etc., R. Co. v. Wilkes, 68 Tex. 617, 2 Am. St. Rep. 515, 34 Am. & Eng. R. Cas. 331; Texas, etc., R. Co. v. Bond, 62 Tex. 442, 50 Am. Rep. 532, 21 Am. & Eng. R. Cas. 413; Cincinnati, etc., R. Co. v. Skillman, 39 Ohio St. 444, 13 Am. & Eng. R. Cas. 31.

able, and a passenger may be ejected for refusal to so pay; while in many States the carrier is authorized by statute to charge extra fare when it is paid on the train.⁸ The rule is also generally maintained that a railroad company, requiring tickets to be purchased at a station, must furnish reasonable facilities therefor by keeping its office open for a reasonable time before and until the departure of the train so that passengers may purchase tickets, and where this has not been done no extra charge can be made for the carriage of the passenger because he has no ticket.⁹ And where

S. N. Y.—*Bordeaux v. Erie R. Co.*, 8 Hun (N. Y.), 579.

Conn.—*Crocker v. New London, etc., R. Co.*, 24 Conn. 249.

Ill.—*St. Louis, etc., R. Co. v. South*, 43 Ill. 176, 92 Am. Dec. 103; *Chicago, etc., R. Co. v. Brisbane*, 24 Ill. App. 463; *St. Louis, etc., R. Co. v. Dalby*, 19 Ill. 353.

Ind.—*Indianapolis, etc., R. Co., v. Rinard*, 46 Ind. 293; *Lake Erie, etc., R. Co. v. Mays*, 4 Ind. App. 413; *Jeffersonville, etc., R. Co. v. Rogers*, 38 Ind. 116, 10 Am. Rep. 103.

Iowa.—*State v. Chovin*, 7 Iowa, 204.

La.—*McGowen v. Morgan's L., etc., Co.*, 41 La. Ann. 732, 17 Am. St. Rep. 415, 39 Am. & Eng. R. Cas. 460.

Me.—*State v. Goold*, 53 Me. 279.

Minn.—*Du Laurans v. St. Paul, etc., R. Co.*, 15 Minn. 49, 2 Am. Rep. 102.

N. H.—*Hilliard v. Goold*, 34 N. H. 230.

Ohio.—*Cincinnati, etc., R. Co. v. Skillman*, 39 Ohio St. 444, 13 Am. & Eng. R. Cas. 31.

Vt.—*Stephen v. Smith*, 29 Vt. 160.

9. N. Y.—*Nellis v. New York Cent. R. Co.*, 30 N. Y. 505; *Chase v. New York Cent. R. Co.*, 26 N. Y. 523; *Porter v. New York Cent. R. Co.*, 34 Barb. (N. Y.) 353; *Bordeaux v. Erie R. Co.*, 8 Hun (N. Y.), 579, but it is not bound to keep the ticket office open for any particular time, before

the departure of the train, in the absence of a statutory provision requiring it to do so.

Ala.—*Kennedy v. Birmingham Ry., etc., Co.* (Ala.), 35 So. 108.

Ill.—*Illinois Cent. R. Co. v. Johnson*, 67 Ill. 312; *Illinois Cent. R. Co. v. Cunningham*, 67 Ill. 316; *Chicago, etc., R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133; *Chicago, etc., R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562; and cases cited in last preceding note.

Ind.—*Chicago, etc., R. Co. v. Graham*, 3 Ind. App. 28, 29 N. E. 170; *Cleveland, etc., R. Co. v. Beckett*, 11 Ind. App. 547; and cases cited in last preceding note.

Kan.—*Atchison, etc., R. Co. v. Dickenson*, 4 Kan. App. 345, 45 Pac. 975.

Mass.—*Swan v. Manchester, etc., R. Co.*, 132 Mass. 116, 42 Am. Rep. 432.

Minn.—*Du Laurans v. St. Paul, etc., R. Co.*, 15 Minn. 49, 2 Am. Rep. 102.

Tenn.—*Lane v. East Tennessee, etc., R. Co.*, 5 Lea (Tenn.), 124, and the fact that a ticket office was closed can raise no presumption that the regulation to sell tickets at less than the fare paid on the cars was discontinued.

Tex.—*Gulf, etc., R. Co. v. Sparger* (Tex. Civ. App.), 39 S. W. 1001.

Contra.—*Crocker v. New London, etc., R. Co.*, 24 Conn. 249, holding

the statute requires the ticket office to be open the carrier is liable to the statutory penalty for extortion in exacting a greater rate of fare than that allowed by law.¹⁰ A rule of a railroad company requiring a passenger to either pay an amount in excess of the highest amount that can be legally charged for his passage, or be expelled from the train, is not a valid rule, and the expulsion of a passenger because of his refusal to pay such excessive fare demanded of him, will render the company liable.¹¹

§ 4. Tender or payment of fare to avoid ejection.—If the stoppage of a train is rendered necessary to expel a passenger therefrom, for a fractious refusal to pay fare, and it is stopped for the sole purpose of ejecting him, he does not, by offering to pay the full fare before expulsion, become entitled to continue the trip. A mere offer to pay fare under all circumstances does not establish new relations between the carrier and the passenger, and entitle the passenger to continue his passage.¹² But a railroad passenger may not be ejected at a regular station or stopping place, for refusal to pay fare, if before the train started again and before being ejected, he, or others in his behalf, offer to pay the full fare.¹³ When a passenger on a railroad, by an illegal refusal to

that such a regulation of the company was not a contract, but a mere proposal, which might be withdrawn at pleasure; that the closing of the ticket office was a withdrawal of the proposal to discriminate in favor of those purchasing tickets, and that the conductor had a right to remove the passenger for refusal to pay the extra fare.

10. *Monnier v. New York Cent., etc., R. Co.*, 70 App. Div. (N. Y.) 405, 75 N. Y. Supp. 521. And see New York cases cited in last preceding note.

11. *Atchison, etc., R. Co. v. Dickerson*, 4 Kan. App. 345, 45 Pac. 975; *Chamberlain v. Lake Shore, etc., R. Co.* (Mich.), 68 N. W. 423.

12. *O'Brien v. New York Central, etc., R. Co.*, 80 N. Y. 236; *Hibbard v. New York, etc., R. Co.*, 15 N. Y.

455; *Nelson v. Long Island R. Co.*, 7 Hun (N. Y.), 140; *Hoffbauer v. Delhi, etc., R. Co.*, 52 Iowa, 342, 35 Am. Rep. 278; *Cincinnati, etc., R. Co. v. Skillman*, 39 Ohio St. 444, 13 Am. & Eng. R. Cas. 31; *State v. Campbell*, 32 N. J. L. 309; *Pickens v. Richmond, etc., R. Co.*, 104 N. C. 312; *Clark v. Wilmington, etc., R. Co.*, 91 N. C. 512, 49 Am. Rep. 647; *O'Brien v. Boston, etc., R. Co.*, 15 Gray (Mass.), 20, 77 Am. Dec. 347; *Fulton v. Grand Trunk R. Co.*, 17 U. C. Q. B. 428. But see *Texas, etc., R. Co. v. Bond*, 62 Tex. 442, 50 Am. Rep. 532, 21 Am. & Eng. R. Cas. 413, where the refusal was not made with intent to avoid payment of fare but in a mere jocular way.

13. *O'Brien v. New York Cent., etc., R. Co.*, 80 N. Y. 236; *Stone v. Chicago, etc., R. Co.*, 47 Iowa. 82,

pay fare, renders it the duty of the conductor, in enforcing the reasonable rules and regulations of the company, to eject him from the cars, and the refusal and resistance of the passenger continues until after force has been required and applied, to enforce such rule, he cannot make the continuance of the process of expulsion unlawful, by an offer to pay his fare during its progress. A carrier of passengers is not required unconditionally to accept all persons who offer themselves for transportation, and tender fare; it may lawfully decline to receive or carry those who, after knowledge of the same, refuse to conform to its reasonable rules, or to pay their fare, or purchase tickets before entering the cars, and it may lawfully eject from the trains persons committing these offenses.¹⁴ But refusal to pay fare will not justify the carrier under all circumstances in ejecting the passenger after tender of the fare by a third person before the passenger has been expelled.¹⁵ If a passenger purchase a ticket at the point where he was ejected for non-payment of a fare, the conductor may nevertheless exclude him from the train, if the fare from the station where he first entered the train is not paid or tendered.¹⁶ If a passenger tender the conductor the ticket fare, on his refusal to pay the additional amount required by the rules of the company to be paid by persons paying on the train, the conductor has no right to eject him without first returning the money which he has paid.¹⁷

§ 5. Ejection of intoxicated passengers.—A carrier of passengers may expel a passenger who is intoxicated and in such a condition as to be offensive, or as to make it reasonably certain that by act or speech he will become obnoxious or annoying, to the other

29 Am. Rep. 458; Louisville, etc., R. Co. v. Breckinridge (Ky.), 34 S. W. 702; Pickens v. Richmond, etc., R. Co., 104 N. C. 312.

14. Pease v. Delaware, etc., R. Co., 101 N. Y. 367, 54 Am. Rep. 699.

15. Grey v. New York, etc., R. Co., 30 Hun (N. Y.), 399; Randell v. Chicago, etc., R. Co., 102 Mo. App. 342, 76 S. W. 493; Ham v. Canal Co., 142 Pa. 617, 21 Atl. 1012; Louisville, etc., R. Co. v. Garrett, 8 Lea (Tenn.), 438, 41 Am. Rep. 640; Railway v. Nix, 68 Ga. 572.

16. Stone v. Chicago, etc., R. Co., 47 Iowa, 82, 29 Am. Rep. 458; Manning v. Louisville, etc., R. Co., 132 Mass. 116, 42 Am. Rep. 432; Wardwell v. Chicago, etc., R. Co., 46 Minn. 514, 24 Am. St. Rep. 246; Davis v. Kansas City, etc., R. Co., 53 Mo. 317, 14 Am. Rep. 457. See also Hill v. Syracuse, etc., R. Co., 63 N. Y. 101.

17. Bland v. Southern Pac. R. Co., 55 Cal. 570, 36 Am. Rep. 50, 3 Am. & Eng. R. Cas. 285; Du Laurans v. St. Paul, etc., R. Co., 15 Minn. 49, 2 Am. Rep. 102.

passengers, although he has not actually committed any act of offense or annoyance.¹⁸ An intoxicated person who says he has no ticket but has money to pay his fare, and is apparently helpless, may be excluded from a railway train, without rendering the company liable to damages.¹⁹ A passenger on a street car, who acts in such a manner as to justify the inference that he is intoxicated, and falls into a deep sleep or stupor, which the conductor fails to break by shaking him, may be ejected. But it is not the due and proper care for his safety, required of the company in ejecting him, to put him, on a dark and stormy night, in an unlighted road, some distance from buildings, but where street cars are passing in each direction and teams are likely also to be passing.²⁰ The ejection of an intoxicated passenger and particularly one unable to take care of himself must be done in a reasonable manner, at a proper time and place, and, considering his condition, without exposing him to harm or imperiling his life, or the carrier will be liable, if such ejection is the proximate cause of death or injury of the passenger.²¹ Whether or not the death or injury is due to such wrongful ejection is ordinarily a question for the jury.²² A conductor requiring an intoxicated man to leave the train for non-payment of fare does not render the carrier liable

18. Edgerly v. Union St. R. Co., 67 N. H. 312, 36 Atl. 558; Vinton v. Middlesex R. R. Co., 11 Allen (Mass.), 304, 87 Am. Dec. 714; Murphy v. Union R. Co., 118 Mass. 228; when boisterous, etc., see Louisville, etc., R. Co. v. Logan, 88 Ky. 232, 3 L. R. A. 80; Gulf, etc., R. Co. v. Adam, 3 Tex. Civ. App. Cas. § 422; Railway Co. v. Valleley, 32 Ohio St. 345, 30 Am. Rep. 601; Pittsburgh, etc., R. Co. v. Pillow, 76 Pa. St. 510. So, a rule may be enforced which directs drivers to exclude intoxicated persons from the front platform. O'Neill v. Lynn & B. R. Co., 29 N. E. (Mass.) 630.

19. Freedon v. New York Cent., etc., R. Co., 24 App. Div. (N. Y.) 306, 48 N. Y. Supp. 584; Putnam v. Broadway, etc., R. Co., 55 N. Y. 108.

20. Hudson v. Lynn & B. R. Co., 69 N. E. (Mass.) 647; or at a place from which he could escape only by following the roughly-ballasted railroad track and crossing cattle-guards on the one side and a bridge over a creek on the other, Louisville, etc., R. Co. v. Johnson, 108 Ala. 62, 19 So. 51, 31 L. R. A. 372.

21. Gill v. Rochester, etc., R. Co., 37 Hun (N. Y.), 107; Guy v. New York, etc., R. Co., 30 Hun (N. Y.), 399; Louisville, etc., R. Co. v. Sullivan, 81 Ky. 624, 50 Am. Rep. 186, 16 Am. & Eng. R. Cas. 390; Johnson v. Louisville, etc., R. Co., 104 Ala. 241; St. Louis, etc., R. Co. v. Williams (Tex. Civ. App.), 37 S. W. 992; Texas, etc., R. Co. v. Edmond (Tex. Civ. App.), 29 S. W. 518.

22. See last preceding note.

for the death of the man from exposure, where the conductor did not have reasonable ground to believe that the man was unable to find his way or walk to the nearest house, or to the railroad station, or even to his own father's house, which was not far away.²³ The failure of a conductor to compel a young man twenty years of age, who was somewhat under the influence of liquor, to enter a car, after he had declined to do so and persisted in riding on the platform, will not render the carrier liable for his injuries when thrown from the car, if the conductor did not think he was sufficiently drunk to be unable to care for himself, although the young man's father asked the conductor to get him to come in.²⁴ But the application of the rule of a railroad company excluding intoxicated persons from its cars is at its peril in a given case, and the company is liable for the mistakes of its servants, as, for instance, where the conductor forcibly removed a passenger, believing him to be intoxicated, but the proof showed that he was not, but was afflicted with St. Vitus dance,²⁵ or that he was simply ill and weak.²⁶ The slightest constraining power constitutes an assault under such circumstances and the question whether it was used should be left to the jury.²⁷ The carrier is not liable for the death of one by heart disease, who was rudely and roughly removed from the car by the driver under the mistaken impression that he was drunk, and placed on the sidewalk where soon after he died; there being nothing to show that it was not the disease that killed him, or that the driver's wrongful acts in any manner produced or hastened his death.²⁸

23. Roseman v. Carolina C. R. Co., 112 N. C. 709, 16 S. E. 766, 19 L. R. A. 327, 52 Am. & Eng. R. Cas. 638.

24. Fisher v. West Virginia, etc., R. Co., 42 W. Va. 183, 4 Am. & Eng. R. Cas. N. S. 86, 24 S. E. 570, 33 L. R. A. 69. As to duty of carrier to intoxicated passenger, see Missouri P. R. Co. v. Evans, 71 Tex. 361, 1 L. R. A. 476; Milliman v. New York Cent., etc., R. Co., 66 N. Y. 642; McClelland v. Louisville, etc., R. Co., 94 Ind. 276; Illinois C. R. Co. v. Sheehan, 29 Ill. App. 90; Atchison, etc., R. Co. v. Weber, 33 Kan. 543; Weeks v. New Orleans, etc., R. Co., 32 La. Ann. 615; Hubbard v.

Town of Mason City, 60 Iowa, 400; East Tennessee, etc., R. Co. v. Winters, 85 Tenn. 240; Mathison v. Staten Island M. R. Co., 72 N. Y. Supp. 954, 66 App. Div. (N. Y.) 610.

25. Regner v. Glens Falls, etc., R. Co., 74 Hun (N. Y.), 202, 56 N. Y. St. Rep. 300, 26 N. Y. Supp. 625.

26. Watson v. Oswego St. Ry. Co., 28 N. Y. Supp. 84, 58 N. Y. St. Rep. 356.

27. Watson v. Oswego St. Ry. Co., *supra*; Hart v. Hudson R. Bridge Co., 80 N. Y. 622.

28. Briggs v. Minneapolis, 52 Minn. 36, 53 N. W. 1019.

§ 6. Ejection of disorderly passengers.—A railroad company has the power of expelling from its cars any one who is disorderly, riotous, or who uses indecent or profane language, or so demeans himself as to endanger the safety or interfere with the reasonable comfort and convenience of the other passengers, and may exert all necessary power and means to eject from the cars any one so imperiling the safety of, or annoying, others.²⁹ This police power the conductor, or other servant of the company in charge of the car or train, is bound to exercise with all the means he can command whenever occasion requires, and if this duty is neglected with good cause, and a passenger receives injury, which might have been reasonably anticipated or naturally expected, from one who has been improperly received, or permitted to continue as a passenger, the carrier is responsible.³⁰ But the right of ejection must be reasonably exercised, and not so as to inflict wanton or unnecessary injury upon the offending passenger.³¹

29. Putnam v. Broadway, etc., R. Co., 55 N. Y. 108, 14 Am. Rep. 190; Pittsburgh, etc., R. Co. v. Van Houten, 48 Ind. 90; Robinson v. Rockland, etc., St. R. Co., 87 Me. 387; Vinton v. Middlesex R. Co. 11 Allen (Mass.), 304, 87 Am. Dec. 714; Murphy v. Union R. Co., 118 Mass. 228; Edgerly v. Union St. R. Co., 67 N. H. 312, 36 Atl. 558; Gallegly v. Kansas City, etc., R. Co. (Miss.), 35 So. 420; Atchison, etc., R. Co. v. Wood (Tex. Civ. App.), 77 S. W. 964.

30. N. Y.—Putnam v. Broadway, etc., R. Co., *supra*; People v. Caryl, 3 Park. Crim. Rep. (N. Y.) 326.

U. S.—Brown v. Memphis, etc., R. Co., 7 Fed. 51; Jencks v. Coleman, 2 Sumn. (U. S.) 221; Thurston v. Union Pac. R. Co., 4 Dill. (U. S.) 321.

D. C.—Lemont v. Washington, etc., R. Co., 1 Mackey (D.C.), 180, 47 Am. Rep. 238, 1 Am. & Eng. R. Cas. 263.

Ga.—Peavy v. Georgia R., etc., Co., 81 Ga. 485, 12 Am. St. Rep. 334; Hol-

ley v. Atlanta St. R. Co., 61 Ga. 215, 34 Am. Rep. 97.

Ill.—Chicago, etc., R. Co. v. Griffin, 68 Ill. 499.

Ind.—Baltimore, etc., R. Co. v. McDonald, 68 Ind. 316; Pittsburgh, etc., R. Co. v. Vandyne, 57 Ind. 576, 26 Am. Rep. 68.

Ky.—Louisville, etc., R. Co. v. Logan, 88 Ky. 232, 21 Am. St. Rep. 332.

Me.—Robinson v. Rockland, etc., R. Co., 87 Me. 387.

Mass.—Vinton v. Middlesex R. Co., 11 Allen (Mass.), 304, 87 Am. Dec. 714.

Miss.—New Orleans, etc., R. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689.

Ohio.—Railway Co. v. Valleyley, 32 Ohio St. 345, 30 Am. Rep. 601.

Pa.—Pittsburgh, etc., R. Co. v. Pillow, 76 Pa. St. 510; West Chester, etc., R. Co. v. Miles, 55 Pa. St. 209, 93 Am. Dec. 744.

31. Guy v. New York, etc., R. Co., 30 Hun (N. Y.), 399; Louisville, etc., R. Co. v. Sullivan, 81 Ky. 624, 50 Am. Rep. 186.

§ 7. Ejection for violation of reasonable rules of the carrier.—

A carrier may make reasonable rules and regulations for the conduct of its business and when they are made known passengers are bound to obey them. When it has established, for the convenience of passengers and its own profit, an agency for the delivery of baggage to passengers, it may exclude all other persons, though passengers, from entering to solicit or receive orders from passengers, in competition with the agency established by the carrier, and may remove, without unnecessary force such person or persons conducting any other business in violation of its rules.³² A railroad corporation may set apart one car for women traveling alone, or with male relatives or friends, and may forcibly remove from such car any man having no woman under his care, but for unnecessary force on the part of its employes in such removal, the carrier is liable.³³ It may exclude from the ladies' car a female passenger whose reputation is so notoriously bad as to furnish reasonable grounds that her conduct will be offensive or annoying to other passengers.³⁴ But it may not forcibly remove a male passenger who had peaceably entered such car and without being forbidden, being unable to find a seat elsewhere, without offering him a seat elsewhere.³⁵ A passenger who insisted on tearing out the coupons from a coupon book himself, in willful disregard of the known rule of the company requiring conductors to detach the coupons, and against the remonstrances of the conductor, has no right of action against the railroad, if the conductor refused to receive them and put him off the train.³⁶ The conductor of a train may lawfully stop the same and eject a passenger who holds

32. Barney v. Oyster Bay, etc., Steamboat Co., 67 N. Y. 301; Smallman v. Whilter, 87 Ill. 545, 29 Am. Rep. 76; Commonwealth v. Power, 7 Metc. (Mass.) 596; The D. R. Martin, 11 Blatchf. (U. S.) 233. See Old Colony R. Co. v. Tripp, 147 Mass. 35, 9 Am. St. Rep. 661, 38 Alb. L. J. 45; Summitt v. State, 8 Lea (Tenn.), 413, 41 Am. Rep. 637; Landrigan v. State, 31 Ark. 50, 25 Am. Rep. 547; People ex rel. v. Hudson River Teleph. Co., 10 St. Rep. (N. Y.) 284, 19 Abb. N. C. 478; Fluker v. Georgia R. Co. (Ga.), 2 L. R. A. 844.

33. Peck v. New York Cent., etc., R. Co., 70 N. Y. 587; Chicago, etc., R. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641; McKinley v. Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748.

34. Brown v. Memphis, etc., R. Co., 7 Fed. 51, 1 Am. & Eng. R. Cas. 247.

35. Bass v. Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495, 9 Am. Ry. Rep. 101.

36. Norfolk, etc., R. Co. v. Wysor, 82 Va. 250, 26 Am. & Eng. R. Cas. 234.

a ticket to a station intermediate between the place where the fare is demanded and the next stopping place of the train, under the rules of the company, if the latter refuses to pay the difference of fare between his place of destination and the next stopping place, and may lawfully eject one who holds a ticket to a station at which the train does not stop, upon his refusal to pay fare to a station beyond, but, in the latter case, such ejection should be made at the last station at which the train stops before reaching the passenger's destination, and not between stations.³⁷ A railway conductor who collects from a passenger boarding the train without a ticket a less sum than the full train fare to his destination may within a reasonable time, on discovering the mistake, require him to pay the deficiency, and eject him at the next station on his refusal to pay it, upon first refunding the sum paid less the fare for the distance actually traveled.³⁸ Where a person purchases a ticket, and takes his passage upon a railroad train, and after the train starts upon the road, he gives up his ticket to the conductor, he cannot, at an intermediate station, by virtue of his subsisting contract, leave such train while in the reasonable performance of the contract, and claim passage on another train, but he may be ejected upon refusing to pay fare.³⁹ So, a passenger who has purchased a ticket which entitles him to one continuous passage from point to point, cannot stop off at an intermediate point and then claim the right to resume his journey on another train on the same ticket, and may be ejected for refusal to pay fare.⁴⁰

37. *Fink v. Albany, etc., R. Co.*, 4 *Lans. (N. Y.)* 147; *Noble v. Atchison, etc., R. Co. (Okla.)*, 46 *Pac. 483*; *Logan v. Hannibal, etc., R. Co.*, 77 *Mo. 663*, 12 *Am. & Eng. R. Cas. 141*; *International, etc., R. Co. v. Hassell*, 62 *Tex. 256*, 50 *Am. Rep. 525*, 21 *Am. & Eng. R. Cas. 315*; *Stevens v. Atchison, etc., R. Co.*, 1 *Mo. App. Rep. 247*. Where there is an express contract of the carrier's agent the carrier is bound to stop at the passenger's destination. *Pittsburgh, etc., R. Co. v. Nuzum*, 50 *Ind. 141*, 19 *Am. Rep. 703*. But a conductor's promise to stop, contrary

to the rules, is not binding on the carrier. *Ohio, etc., R. Co. v. Hatton*, 60 *Ind. 12*.

38. *Wardwell v. Chicago, etc., R. Co.*, 46 *Minn. 514*, 24 *Am. St. Rep. 246*.

39. *Cleveland, etc., R. Co. v. Bartram*, 11 *Ohio St. 457*.

40. *Hamilton v. New York Cent. R. Co.*, 51 *N. Y. 100*; *Beebe v. Ayres*, 28 *Barb. (N. Y.) 275*. And see cases generally cited in notes to § 11, chap. 19. But he is entitled to stop over by permission of the conductor. *Tarbell v. Northern Cent. R. Co.*, 24 *Hun (N. Y.), 51*. And where the

§ 8. Defective or invalid tickets.—The courts differ as to the liability of the carrier for the ejection of a passenger who holds and tenders an invalid or defective ticket, transfer or other token, the invalidity of or defect in which is due to the negligence of one of the carrier's agents. Some of the courts hold that it is the duty of the passenger, before going upon the train, to examine his ticket and ascertain therefrom whether or not any mistake has been made by the ticket agent; that the face of the ticket is conclusive evidence to the conductor of the train as to the contract between the passenger and the railroad company; that the conductor can look only to the ticket, and has no right to be governed by any statement or explanation of the passenger; that if the ticket is not upon its face such a ticket as entitles the passenger to ride, the conductor has the right and it is his duty, to eject him from the train; and that his only remedy for the mistake, negligence, or carelessness of the ticket agent is by an action for breach of the contract to recover the amount he was compelled to pay for his fare and a reasonable compensation for the loss of time sustained, but he cannot recover for the tort of the conductor in expelling him. In a recent case where plaintiff, having received from a street car conductor a wrong transfer slip, boarded a car on the connecting line, tendered the transfer, which the conductor refused, and declined to pay her fare, and the conductor then requested her to leave the car, and, on her refusal, used reasonable force to eject her, the authorities holding these views were marshaled in support of the ruling of the court that the plaintiff could not recover for any injuries sustained, it being her duty to peaceably leave the car and seek redress in the courts.⁴¹

time limitation has not expired when his ticket is taken up by the conductor, he is entitled to be carried to his destination, although the ticket expires before it is reached, and he cannot lawfully be ejected on the ground that the time that the ticket had to run had expired. *Auerbach v. New York Cent., etc., R. Co., 89 N. Y. 281, 42 Am. Rep. 290, 6 Am. & Eng. R. Cas. 334.*

41. Ill.—*Riley v. Chicago City Ry. Co., 189 Ill. 384, 59 N. E. 794, affg. 90 Ill. App. 275; Railroad Co. v.*

Connell, 112 Ill. 295; Car Co. v. Reed, 75 Ill. 125; Railroad Co. v. Griffin, 68 Ill. 499; Chicago, etc., R. Co. v. Stratton, 111 Ill. App. 142.

U. S.—Poulin v. Canadian Pac. R. Co., 52 Fed. 197, 3 C. C. A. 23; Railway Co. v. Bennett, 50 Fed. 496, 1 C. C. A. 544.

Kan.—Railroad Co. v. Gants, 38 Kan. 618, 17 Pac. 54.

Conn.—Downs v. Railroad Co., 36 Conn. 287.

Mo.—Woods v. Railway Co., 48 Mo.

The weight of authority in the courts, State and national, however, now is to the effect that the passenger has a right to rely upon the acts and statements of the ticket agents or conductors, and that if expelled from the train when he has acted in good faith and is without fault, the carrier will be liable in damages for such expulsion, whether the action is brought for a breach of the contract or solely for the tort of the conductor; that it is immaterial that the different acts were by different agents of the carrier; that its liability is the same, notwithstanding, for its own convenience, it has intrusted the management of its trains to different conductors. These authorities are cited to support a recent decision to the effect that where a passenger is aboard a street car without a proper transfer ticket, which is due to the mistake or fault of the conductor of the car from which he was transferred, and not to the fault of the passenger, the conductor in charge of the car must accept the reasonable explanations of the passenger in regard to the transfer in dispute, and if he ejects the passenger under such circumstances, the carrier will be liable in an action to recover damages for the ejection.⁴² Passengers on

App. 125; *Percy v. Railroad Co.*, 58 Mo. App. 75.

Md.—*Garrison v. United Rys., etc., Co.* (Md.), 55 Atl. 371; *McClure v. Railroad Co.*, 34 Md. 532; *Western Maryland Co. v. Stocksdale*, 83 Md. 245; *Western Maryland R. Co. v. Schann* (Md.), 55 Atl. 701.

Mich.—*Hufford v. Railway Co.*, 53 Mich. 118, 18 N. W. 580; *Van Dusan v. Railway Co.*, 97 Mich. 439, 56 N. W. 848.

Mass.—*Bradshaw v. Railroad Co.*, 135 Mass. 407.

N. Y.—*Townsend v. New York Cent., etc., Co.*, 56 N. Y. 295.

N. J.—*Petrie v. Railroad Co.*, 42 N. J. L. 449.

Ohio.—*Shelton v. Railroad Co.*, 29 Ohio St. 214.

Or.—*Peabody v. Navigation Co. (Or.)*, 26 Pac. 1053, 12 L. R. A. 823.

W. Va.—*McKay v. Railroad Co.*, 34

W. Va. 65, 11 S. E. 737, 9 L. R. A. 132.

Wis.—*Gorton v. Railway Co.*, 54 Wis. 234, 11 N. W. 482.

42. N. Y.—*Ray v. Cortland, etc., Traction Co.*, 46 N. Y. Supp. 521; *Jenkins v. Brooklyn, etc., R. Co.*, 51 N. Y. Supp. 216; *Eddy v. Syracuse, etc., R. Co.*, 63 N. Y. Supp. 645; *Muckle v. Rochester R. Co.*, 79 Hun (N. Y.), 33, limiting *Townsend v. New York Cent., etc., R. Co.*, 56 N. Y. 295, 15 Am. Rep. 419; *Tarbell v. Northern Cent. R. Co.*, 24 Hun (N. Y.), 51.

U. S.—*Northern Pac. R. Co. v. Pauson*, 70 Fed. 585, 44 U. S. App. 178, 17 C. A. 287, 30 L. R. A. 730, omission of agent to stamp ticket when presented to him for that purpose; *New York, etc., R. Co. v. Winter*, 143 U. S. 60, 12 S. Ct. 356, 36 L. Ed. 71, where conductor punched the ticket instead of giving a lay over ticket.

Ark.—*Hot Springs R. Co. v. Deloney*, 65 Ark. 177, 45 S. W. 351.

railroad trains are not presumed to know the rules and regulations which are made for the guidance of the conductors and other

Cal.—*Sloane v. Southern California R. Co.*, 111 Cal. 668, where conductor took up ticket without giving any check.

Ga.—*Head v. Georgia*, etc., R. Co., 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; *Georgia, etc., R. Co. v. Olds*, 77 Ga. 673; *Georgia, etc., R. Co. v. Dougherty*, 86 Ga. 744, 12 S. E. 747, 22 Am. St. Rep. 499.

Ind.—*Indianapolis St. Ry. Co. v. Wilson* (Ind.), 66 N. E. 950, 67 N. E. 993; *Pittsburg, etc., R. Co. v. Hennigh*, 39 Ind. 509; *Toledo, etc., R. Co. v. McDonough*, 53 Ind. 289; *Louisville, etc., R. Co. v. Conrad*, 4 Ind. App. 83, 30 N. E. 406; *Chicago, etc., R. Co. v. Graham*, 3 Ind. App. 28, 29 N. E. 170, 50 Am. St. Rep. 256; *Cleveland, etc., R. Co. v. Beckett*, 11 Ind. App. 547, 39 N. E. 429; *Evansville, etc., R. Co. v. Cates*, 14 Ind. App. 172, 41 N. E. 712; *Cleveland, etc., R. Co. v. Kinsley*, 27 Ind. App. 135, 60 N. E. 169, 37 Am. St. Rep. 245. See also *Pittsburgh, etc., R. Co. v. Street* (Ind. App.), 59 N. E. 404; *Citizens St. R. Co. v. Clark* (Ind. App.), 71 N. E. 53.

Iowa.—*Ellsworth v. Chicago, etc., R. Co.*, 95 Iowa 98, 63 N. W. 584, 29 L. R. A. 173, where ticket agent antedated limited ticket.

Ky.—*Louisville, etc., R. Co. v. Gaines* (Ky.), 36 S. W. 174. While as between the conductor and a passenger, the conductor may rely on the passenger's ticket as it reads, and refuse to transport him beyond the destination designated thereon, yet the carrier is responsible for the ejection if the agent by mistake gave the passenger a wrong ticket. *Illinois Cent. R. Co. v. Jackson*, 25 Ky. L. Rep. 2087, 79 S. W. 1187; *Lexington, etc.*,

R. Co. v. Lyons, 104 Ky. 28, 46 S. W. 209, 20 Ky. L. Rep. 516.

Md.—*Philadelphia, etc., R. Co. v. Rice*, 64 Md. 63, 21 Atl. 57.

Me.—*Burnham v. Grand Trunk, etc., R. Co.*, 63 Me. 298, 18 Am. Rep. 220.

Mass.—*Murdock v. Boston, etc., R. Co.*, 137 Mass. 293, 50 Am. Rep. 307, where conductor punched ticket instead of giving a stop over ticket.

Mich.—*Hufford v. Grand Rapids, etc., R. Co.*, 64 Mich. 634, 31 N. W. 544, 8 Am. St. Rep. 859; *Rouser v. North Park St. R. Co.*, 97 Mich. 565.

Minn.—*Appleby v. St. Paul City R. Co.*, 54 Minn. 169, 55 N. W. 1117, 40 Am. St. Rep. 308.

Miss.—*Illinois Cent. R. Co. v. Harper* (Miss.), 35 So. 764; *Kansas City, etc., R. Co. v. Rieley*, 68 Miss. 768, 9 So. 443, 13 L. R. A. 38, 34 Am. St. Rep. 309.

Pa.—*Laird v. Pittsburg Traction Co.*, 166 Pa. 4, 31 Atl. 51, transfer check antedated by conductor; *Baltimore, etc., R. Co. v. Bambrey* (Pa.), 16 Atl. 67.

Tenn.—*O'Rourke v. Citizens St. R. Co.*, 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639.

Tex.—*Gulf, etc., R. Co. v. Rather*, 3 Tex. Civ. App. 72, 21 S. W. 951; *Gulf, etc., R. Co. v. Copeland*, 17 Tex. Civ. Ap. 55, 42 S. W. 239; *Texas, etc., R. Co. v. Dennis*, 4 Tex. Civ. App. 90, 23 S. W. 400; *St. Louis, etc., R. Co. v. Mackie*, 71 Tex. 491, 9 S. W. 451, 1 L. R. A. 667, 10 Am. St. Rep. 766; *Missouri, etc., R. Co. v. Martino*, 2 Tex. Civ. App. 634, 18 S. W. 1066, 21 S. W. 781; *Gulf, etc., R. Co. v. Holbrook* (Tex. Civ. App.), 33 S. W. 1028.

employees of the railroad companies, as to the internal affairs of the company, nor are they required to know them.⁴³ When a passenger has purchased a ticket, from a railroad company, purporting to entitle him to passage to a particular place, and has undertaken his journey therefor, and there is nothing on the face of the ticket, and no prior knowledge or notice of rules of the company, which would make such ticket invalid, brought home to the purchaser, he is rightfully a passenger on the train, and the company is liable in an action to recover damages for his ejection.⁴⁴ But where a passenger held an excursion ticket, sold at a reduced rate, which recited that it was not good on a particular train, and, though he did not read the ticket before boarding such train, he was apprised that it did not entitle him to travel thereon,⁴⁵ or where a passenger knew that a mileage book entitling him

Wash.—*Lawshe v. Tacoma R. Co.* (Wash.), 70 Pac. 118.

W. Va.—*Trice v. Chesapeake, etc., R. Co.*, 40 W. Va. 271, 21 S. E. 1022, where ticket agent mistakenly antedated a mileage ticket.

Wis.—*Yorton v. Milwaukee, etc., R. Co.*, 62 Wis. 367, 21 N. W. 518, 23 N. W. 401, trip check given by mistake for stop over check.

Where a "returning" coupon is taken up by the conductor on the "going" trip, and the passenger does not discover the mistake until he presents the "going" coupon on the "returning" trip, with an explanation as to how the conductor made the mistake, if expelled for not paying his fare, he is entitled to recover damages for the expulsion. *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439; *Lake Erie, etc., R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Philadelphia, etc., R. Co. v. Rice*. 64 Md. 63; *Rouser v. North Park St. R. Co.*, 97 Mich. 565; *Baltimore, etc., R. Co. v. Bambrey (Pa.)*, 16 Atl. 67.

Where mistake could have been discovered.—Where the conductor of the outgoing train takes

the return coupon, the railroad company is not liable because the conductor of the returning train refuses to accept the other part of the ticket, and ejects the passenger, if the passenger, before entering the returning train, could, by using ordinary diligence, have discovered the mistake of the other conductor. *Wiggins v. King*, 91 Hun (N. Y.), 340, 36 N. Y. Supp. 768. But where a conductor, by mistake, gives a passenger a transfer which appears on its face to have expired by limitation, and the conductor on the connecting line attempts to eject him, the company is liable where the holder of the transfer could not understand the marks upon the ticket, showing the limitation of the time within which it could be used. *Muckle v. Rochester R. Co.*, 79 Hun (N. Y.) 32, 29 N. Y. Supp. 732.

43. *New York, etc., R. Co. v. Winter*, 143 U. S. 60, 36 L. Ed. 71, 12 S. Ct. 356, 11 Ry. & Corp. L. J. 146.

44. *Erie R. Co. v. Littell*, 128 Fed. 546, 63 C. C. A. 44.

45. *England v. International, etc., R. Co. (Tex. Civ. App.)*, 73 S. W. 24.

to transportation in exchange tickets would not be honored on the train,⁴⁶ or knew that a ticket would not be good on a particular train run on a special schedule unless he had a berth,⁴⁷ he could not recover damages against the carrier for his ejection. But where it was a street car conductor's duty under the railroad law to have given a certain transfer, a passenger had a right to assume, without examination, that he would receive the proper transfer.⁴⁸ Negligence in the issue of the transfer was that of the company, and plaintiff was not bound to examine it.⁴⁹ Where a railroad company fails to run its train on time, and the ticket holder boards the first passenger train thereafter, he is not to be ousted from the train on the ground that the limit of the ticket had expired.⁵⁰ But where a passenger owning an exchange mileage ticket presented it on the train without the necessary exchange ticket, he cannot recover for ejection, though he could not secure the exchange ticket owing to the negligent attendance of the ticket agent.⁵¹

§ 9. Ejection of persons riding on freight trains.—Railroad companies may prohibit the carriage of passengers on freight trains, or prescribe reasonable conditions upon which they may ride on freight trains, and they are not bound to carry passengers save upon strict compliance with their regulations; and the right of expulsion for non-compliance with such regulations by a passenger may be exercised after leaving the station, at any suitable place, under all the circumstances of the particular case.⁵² A regu-

46. Schmidt v. Cleveland, etc., R. Co., 25 Ky. L. Rep. 11, 74 S. W. 674.

47. Ames v. Southern Pac. R. Co., 141 Cal. 728, 75 Pac. 310.

48. Moon v. Interurban St. Ry. Co., 85 N. Y. Supp. 363.

49. Memphis St. Ry. Co. v. Graves, 1 St. Ry. Rep. 760 (Tenn.), 75 S. W. 729.

50. Marx v. Louisiana Western R. Co., 112 La. 1085, 36 So. 862. See, however, Pennsylvania Co. v. Hine, 41 Ohio St. 276.

51. Robb v. Pittsburgh, etc., R. Co., 14 Pa. Super. Ct. 282.

52. Eaton v. Delaware, etc., R.

Co., 57 N. Y. 382, 15 Am. Rep. 515; Burlington, etc., R. Co. v. Rose, 11 Neb. 117; Indianapolis, etc., R. Co. v. Kennedy, 77 Ind. 507, 3 Am. & Eng. R. Cas. 467; Chicago, etc., R. Co. v. Flagg, 43 Ill. 364, 92 Am. Dec. 133, may be expelled at the usual place for the discharge of passengers, but not elsewhere; Law v. Illinois, etc., R. Co., 32 Iowa 534, but the carrier is liable for a forcible ejection while the train is in motion; Dunn v. Grand Trunk R. Co., 58 Me. 187; Thomas v. Chicago, etc., R. Co., 72 Mich. 355; Cleveland, etc., R. Co. v. Bartram, 11 Ohio St. 457; Arnold v.

lation requiring passengers on freight trains to provide themselves with tickets before the train leaves the station, or requiring the production of tickets on the train,⁵³ or the production of a written permit or special kind of ticket,⁵⁴ is a reasonable one, and the conductor may eject a passenger for failure to comply with such regulation notwithstanding a tender of the fare, provided the passenger has had reasonable notice of such regulation. Actual notice of the regulation need not be brought home to the passenger. All that is required is that a suitable general notice to the public be given for such length of time before the regulation is put into operation as to make it reasonably certain that all passengers in the exercise of due diligence must become aware of its existence.⁵⁵ Where a railroad usually or habitually carries passengers by freight trains, it thereby becomes a common carrier of passengers by such trains, and liable for the ejection of a passenger to the same extent that it would be if the ejection were from a passenger train.⁵⁶

§ 10. Manner of ejection.—Although a passenger who refuses to pay his fare may be expelled from the car in a proper manner, he cannot lawfully be expelled while the car is in motion, or in a negligent manner, and if the conductor expel him in these circumstances, the carrier is liable.⁵⁷ Nor can a trespasser be ejected so long as the train or car is moving at a rate which renders the

Illinois, etc., R. Co., 83 Ill. 273, 25 Am. Rep. 383; Marshall v. St. Louis, etc., R. Co., 78 Mo. 616; Hobbs v. Texas, etc., R. Co., 49 Ark. 357, 34 Am. & Eng. R. Cas. 268.

53. Evans v. Memphis, etc., R. Co., 56 Ala. 246, 38 Am. Rep. 771, 18 Am. Ry. Rep. 350; Toledo, etc., R. Co. v. Patterson, 63 Ill. 304; Illinois Cent. R. Co. v. Nelson, 59 Ill. 110; Chicago, etc., R. Co. v. Parks, 18 Ill. 460, 68 Am. Dec. 562; Southern Kansas R. Co. v. Hinsdale, 38 Kan. 507, 34 Am. & Eng. R. Cas. 256; Lane v. East Tennessee, etc., R. Co., 5 Lea (Tenn.), 124, 2 Am. & Eng. R. Cas. 278.

54. Thomas v. Chicago, etc., R. Co., 72 Mich. 355, 40 N. W. 463, 37

Am. & Eng. R. Cas. 108; Falkner v. Ohio, etc., R. Co., 55 Ind. 369.

55. Burlington, etc., R. Co. v. Rose, 11 Neb. 117; Southern Kansas R. Co. v. Hinsdale, 38 Kan. 507, 34 Am. & Eng. R. Cas. 256.

56. Illinois Cent. R. Co. v. Johnson, 67 Ill. 312; Kansas Pac. R. Co. v. Kessler, 18 Kan. 523; Jones v. Wabash, etc., R. Co., 17 Mo. App. 158; Burke v. Missouri Pac. R. Co., 51 Mo. App. 494; McGee v. Missouri Pac. R. Co., 92 Mo. 208, 1 Am. St. Rep. 706; Boehm v. Duluth, etc., R. Co., 91 Wis. 592.

57. Higgins v. Watervliet Turnpike Co., 46 N. Y. 23, 7 Am. Rep. 293; English v. Delaware, etc., Canal Co., 66 N. Y. 454, 23 Am. Rep.

ejection dangerous.⁵⁸ In effecting the removal from the train or car of one who has for any reason forfeited his right to be carried, the servants of the carrier may use the reasonably necessary physical force to eject him;⁵⁹ but the carrier is liable if its servants use excessive or unnecessary force or violence, or eject him without regard to his safety or the preservation of his life.⁶⁰ It is bound

69; *Jackson v. Second Ave. R. Co.*, 47 N. Y. 274; *Holt v. Hannibal*, etc., R. Co., 174 Mo. 524, 74 S. W. 631; *Indianapolis St. R. Co. v. Hockett*, 1 St. Ry. Rep. 115 (Ind.), 67 N. E. 106; *Chicago*, etc., R. Co. v. *Stratton*, 111 Ill. App. 142.

58. *Rounds v. Delaware*, etc., R. Co., 64 N. Y. 138; *Hughes v. New York*, etc., R. Co., 36 N. Y. Super. Ct. 226; *Carr v. Eel River*, etc., R. Co. (Cal.), 33 Pac. 213, 21 L. R. A. 354, note; *Smith v. Louisville*, etc., R. Co., 95 Ky. 11, 22 L. R. A. 72; *St. Louis*, etc., R. Co. v. *Reagan*, 52 Ill. App. 488; *Thompson v. Yazoo*, etc., R. Co., 72 Miss. 715, carrier not liable when train slowly moving; *Pittsburgh*, etc., R. Co. v. *Redding*, 140 Ind. 101, 34 L. R. A. 767, nor when train could not safely be stopped; *St. Louis*, etc., R. Co. v. *Huffman* (Tex. Civ. App.) 32 S. W. 30; *Union Pac. R. Co. v. Mitchell*, 56 Kan. 324; *Chesapeake*, etc., R. Co. v. *Anderson*, 93 Va. 650; *Southern R. Co. v. Hunter*, 74 Miss. 444; *Fink v. Ash*, 99 Ga. 106, trespasser falling off while attempting to avoid missiles thrown by employes; *Farber v. Missouri Pac. R. Co.*, 139 Mo. 272; *Smith v. Savannah*, etc., R. Co., 100 Ga. 96, child pushed off by employe unauthorized to eject.

59. *Lasher v. Third Ave. R. Co.*, 27 Misc. Rep. (N. Y.) 824, 57 N. Y. Supp. 305; *Cherry v. Kansas City*, etc., R. Co., 52 Mo. App. 499; *Coleman v. New York*, etc., R. Co., 106 Mass. 160; *Gallena v. Hot Springs R. Co.*, 13 Fed. 116; *Great Western*

R. Co. v. *Miller*, 19 Mich. 305; *Chicago*, etc., R. Co. v. *Casazzi*, 83 Ill. App. 421; *McGarry v. Holyoke St. R. Co.*, 182 Mass. 123, 65 N. E. 45.

60. *Smith v. Manhattan R. Co.*, 138 N. Y. 623, 33 N. E. 1083, 18 N. Y. Supp. 759; *Hart v. Metropolitan St. R. Co.*, 34 Misc. Rep. (N. Y.) 521, 69 N. Y. Supp. 906; *Weed v. Panama R. Co.*, 17 N. Y. 362, 72 Am. Dec. 474; *Hamilton v. Third Ave. R. Co.*, 13 Abb. Pr. N. S. (N. Y.) 318; *Peters v. N. Y. Cent. R. Co.*, 34 Barb. (N. Y.) 353; *Illinois Cent. R. Co. v. Davenport*, 177 Ill. 110, 52 N. E. 266, affg. 75 Ill. App. 579; *City Electric R. Co. v. Shropshire*, 101 Ga. 33, 28 S. E. 508; *Baltimore*, etc., R. Co. v. *Norris*, 17 Ind. App. 189, 46 N. E. 554, 60 Am. St. Rep. 166; *Savannah*, etc., R. Co. v. *Godkin*, 104 Ga. 655, 30 S. E. 378, 4 Am. Neg. Rep. 253; *Wabash R. Co. v. Kingsley*, 177 Ill. 558, 5 Am. Neg. Rep. 554, 13 Am. & Eng. R. Cas. N. S. 835, 52 N. E. 931; *Welsh v. West Jersey*, etc., R. Co., 62 N. J. L. 655, 5 Am. Neg. Rep. 660, 15 Am. & Eng. R. Cas. N. S. 674; *Pledger v. Chicago*, etc., R. Co. (Neb.), 95 N. W. 1057; *Randall v. Chicago*, etc., R. Co., 102 Mo. App. 342, 76 S. W. 493; *Great Northern R. Co. v. Bruyere*, 114 Fed. 540, 51 C. C. A. 574; *Indiana*, etc., R. Co. v. *Ditto*, 158 Ind. 669, 64 N. E. 222; *Kline v. Central Pac. R. Co.*, 37 Cal. 400, 99 Am. Dec. 282; *St. Louis*, etc., R. Co. v. *Dalby*, 19 Ill. 353; *Moore v. Fitchburg R. Corp.*, 4 Gray (Mass.) 465, 64 Am. Dec. 83; *Great Western R. Co. v. Miller*, 19 Mich.

to exercise reasonable and ordinary care not to injure him.⁶¹ A passenger who is rightfully on a train or car has a right to refuse to be ejected from it, and to make sufficient resistance to denote that he is being removed by compulsion and against his will.⁶² And where unnecessary force is used in ejecting a person from a car or train, he is entitled to recover for the assault, without regard to whether he was entitled to the rights of a passenger.⁶³ Where a passenger is ejected by a railway company from its premises for a supposed violation of its rules, which was not the case, the company is liable for any injury thereby occasioned to him without regard to the degree of care exercised in making the ejection.⁶⁴

§ 11. Place of ejection.—In the absence of a statute providing at what places the carrier may lawfully eject persons from its cars or trains, the passenger who has forfeited his right to travel may be ejected at any point where he will not be subjected to or reasonably liable to peril, but he may not be ejected at any point on the road where he is likely to be injured, such as in a pond of water, on a high trestle, or in a dangerous swamp or other place of danger.⁶⁵ Where a passenger is carried beyond his station

305; *Perkins v. Missouri, etc., R. Co., 55 Mo. 201; Travers v. Kansas Pac. R. Co., 63 Mo. 421; Pennsylvania R. Co. v. Vandiver, 42 Pa. St. 365, 82 Am. Dec. 520.*

61. *Texas, etc., R. Co. v. Lyons (Tex. Civ. App.), 50 S. W. 161.*

62. *Erie R. Co. v. Littell, 128 Fed. 546, 63 C. C. A. 44; Breen v. St. Louis Transit Co., 102 Mo. App. 479, 77 S. W. 78, may reasonably resist. See, also, English v. Delaware, etc., Canal Co., 66 N. Y. 454, 23 Am. Rep. 69.*

63. *Citizens' St. R. Co. v. Clark (Ind. App.), 71 N. E. 53.*

64. *St. Louis, etc., R. Co. v. Osborn, 67 Ark. 399, 55 S. W. 142.*

65. *U. S.—Gallena v. Hot Springs R. Co., 13 Fed. 116, 4 McCrary (U. S.), 371.*

Ind.—Jeffersonville R. Co. v. Rogers, 28 Ind. 1, 92 Am. Dec. 276; Toledo, etc., R. Co. v. Wright, 68

Ind. 586, 34 Am. Rep. 277.

Iowa.—Everett v. Chicago, etc., R. Co., 69 Iowa, 15, 58 Am. Rep. 207, 27 Am. & Eng. R. Cas. 98; Brown v. Chicago, etc., R. Co., 51 Iowa, 235.

Md.—McClure v. Philadelphia, etc., R. Co., 34 Md. 532, 6 Am. Rep. 345.

Mich.—Gankler v. Detroit, etc., R. Co., 9 Detroit L. N. 215 (Mich.), 90 N. W. 660; Great Western R. Co. v. Miller, 19 Mich. 305.

Minn.—Wyman v. Northern Pac. R. Co., 34 Minn. 210, 22 Am. & Eng. R. Cas. 402.

Ohio.—Cincinnati, etc., R. Co. v. Skillman, 39 Ohio St. 444, 13 Am. & Eng. R. Cas. 31.

S. C.—Moore v. Columbia, etc., R. Co., 38 S. C. 1, 58 Am. & Eng. R. Cas. 493.

Utah.—Rudy v. Rio Grande Western R. Co., 8 Utah, 165, 52 Am. & Eng. R. Cas. 351.

But see *Maples v. New York, etc.*

through no fault of his own, he may not be arbitrarily and violently put off where there is no dwelling and remote from any station, and if he is put off under such circumstances he may recover substantial damages.⁶⁶ Where a passenger on a street car is drunk, and cannot be aroused to pay his fare, it is not the due and proper care required of the company in ejecting him, to put him on a dark and stormy night, in an unlighted road, some distance from buildings, but where street cars are passing in each direction, and teams are likely to be passing.⁶⁷ The question as to whether the place where the passenger was ejected was a proper place or an improper one, in such cases, has been usually held to be one of fact for the jury under the circumstances of each case.⁶⁸ In New York and a number of the other States the ejection of passengers at a place other than a usual stopping place or near a dwelling house is prohibited by statute, and the carrier is liable for the ejection of a passenger at a place other than that specified in the statute.⁶⁹ But such statutes are generally held not to apply to

R. Co., 38 Conn. 558, 9 Am. Rep. 434, holding that the carrier had no right to do so elsewhere than at a regular station on the road, and that a regulation requiring it between stations was unreasonable and void.

66. Book v. Chicago, etc., R. Co., 84 Mo. App. 76.

67. Hudson v. Lynn, etc., R. Co. (Mass.), 59 N. E. 647.

68. Illinois Cent. R. Co. v. Latimer, 128 Ill. 163; Chicago, etc., R. Co. v. Boger, 1 Ill. App. 472; Louisville, etc., R. Co. v. Johnson, 108 Ala. 62; Toledo, etc., R. Co. v. Wright, 68 Ind. 586, 34 Am. Rep. 277; Jeffersonville R. Co. v. Rogers, 28 Ind. 1, 92 Am. Dec. 276; Brown v. Chicago, etc., R. Co., 51 Iowa, 235; Lake Shore, etc., R. Co. v. Rosenzweig, 113 Pa. St. 519, 26 Am. & Eng. Cas. 489.

69. N. Y.—Loomis v. Jewett, 35 Hun (N. Y.), 313, whether the place at which a passenger was ejected was "near" a dwelling house is a question of fact for the jury.

Ark.—St. Louis, etc., R. Co. v. Harper, 69 Ark. 186, 61 S. W. 911, 53 L. R. A. 220; Kansas City, etc., R. Co. v. Holden, 66 Ark. 602, 53 S. W. 45; St. Louis, etc., R. Co. v. Branch, 45 Ark. 524, statute is confined to cases where passengers refuse to pay fare.

Cal.—Civil Code, sec. 487.

Fla.—South Florida R. Co. v. Rhodes, 25 Fla. 40, 37 Am. & Eng. R. Cas. 100.

Ill.—Passenger can only be ejected for nonpayment of fare, at a regular station. Toledo, etc., R. Co. v. Patterson, 63 Ill. 304; Chicago, etc., R. Co. v. Roberts, 40 Ill. 503; Chicago, etc., R. Co. v. Parks, 18 Ill. 460, 68 Am. Dec. 562; Chicago, etc., R. Co. v. Flagg, 43 Ill. 364, 92 Am. Dec. 133, a water tank is not a regular station; Illinois Cent. R. Co. v. Latimer, 128 Ill. 163; Illinois Cent. R. Co. v. Sutton, 42 Ill. 438, 92 Am. Dec. 81, statute applies to a person entering the train without having purchased a

trespassers, to whom no duty is owing by the railroad company to put them off at any particular place on its road.⁷⁰

ticket; Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420, 12 Am. Dec. 138, the refusal of a passenger to surrender his ticket is not the same as non-payment of fare and the statute does not apply to such a case; *Chicago, etc., R. Co. v. Boger*, 1 Ill. App. 472, statute does not apply to a passenger who has been ejected at a station and undertakes to board the train again.

N. H.—Baldwin v. Grand Trunk R. Co., 64 N. H. 596, 37 Am. & Eng. R. Cas. 126, passenger can only be ejected at a regular passenger station where tickets are ordinarily sold.

Utah.—Nichols v. Union Pac. R. Co., 7 Utah, 510, statute applies to a person who failed to buy a ticket and refused to pay extra fare.

Vt.—Stephen v. Smith, 29 Vt. 160, ejection must be at usual stopping place.

Wis.—Phettiplace v. Northern Pac. R. Co., 84 Wis. 412, 58 Am. & Eng. R. Cas. 61, ejection can only be made at usual stopping place or near a dwelling house.

70. *Lillis v. St. Louis, etc., R. Co.*, 64 Mo. 464, 27 Am. Rep. 255; *Wyman v. Northern Pac. R. Co.*, 34 Minn. 210, 22 Am. & Eng. R. Cas. 402; *Hardenbergh v. St. Paul, etc., R. Co.*, 39 Minn. 3, 12 Am. St. Rep. 610, 34 Am. & Eng. R. Cas. 359; *Moore v. Columbia, etc., R. Co.*, 38 S. C. 1, 58 Am. & Eng. R. Cas. 493; *Hobbs v. Texas, etc., R. Co.*, 49 Ark. 357, 34 Am. & Eng. R. Cas. 268.

CHAPTER XXII.

LIMITATION OF CARRIER'S LIABILITY.

- SECTION**
- 1. Limitation of carrier's liability generally.
 - 2. Essentials of contract limiting liability for negligence.
 - 3. Limitation of liability for negligence.
 - 4. The New York rule.
 - 5. The English rule.
 - 6. Limitation of liability for negligence as to particular classes of passengers.

§ 1. Limitation of carrier's liability generally.—Notwithstanding some of the earlier cases held that a common carrier could not in any way limit or restrict its common law liabilities,¹ it is now generally maintained that a common carrier, whether a railroad or other carrier or whether a carrier by land or sea, may by express contract or special agreement, limit its liability for injuries not arising from the negligence of itself or its servants, when such exemption is just and reasonable.² But it cannot do so

1. Gould v. Hill, 2 Hill (N. Y.), 625; Cole v. Goodwin, 19 Wend. (N. Y.) 257, 32 Am. Dec. 470; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Thomas v. Boston, etc., R. Corp., 10 Metc. (Mass.) 479, 43 Am. Dec. 444; Roll v. Raguet, 4 Ohio, 400, 22 Am. Dec. 759; Jones v. Voorhees, 10 Ohio, 145.

2. U. S.—New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357; Phoenix Ins. Co. v. Erie, etc., Transp. Co., 117 U. S. 322; Delaware, etc., R. Co. v. Ashley, 67 Fed. 209; Grand Trunk R. Co. v. Stevens, 95 U. S. 658; Liverpool, etc., Steam Co. v. Phoenix Ins. C., 129 U. S. 397.

N. Y.—Kenney v. New York Cent., etc., R. Co., 125 N. Y. 422; Ulrich v. New York Cent., etc., R. Co., 108 N. Y. 80, 2 Am. St. Rep.

369; Brewer v. New York, etc., R. Co., 124 N. Y. 59, 21 Am. St. Rep. 647; Blair v. Erie R. Co., 66 N. Y. 313, 23 Am. Rep. 55; Elliott v. New York Cent., etc., R. Co., 33 St. Rep. (N. Y.) 861; Poucher v. New York Cent. R. Co., 49 N. Y. 263, 10 Am. Rep. 364; Stinson v. New York Cent. R. Co., 32 N. Y. 333, 88 Am. Dec. 332; Smith v. New York Cent. R. Co., 24 N. Y. 222; Bissell v. New York Cent. R. Co., 25 N. Y. 442; Wells v. New York Cent. R. Co., 24 N. Y. 181; Perkins v. New York Cent. R. Co., 24 N. Y. 196, 82 Am. Dec. 282; Seybolt v. New York, etc., R. Co., 95 N. Y. 562, 47 Am. Rep. 75; Coppock v. Long Island R. Co., 89 Hun (N. Y.), 186; Boswell v. Hudson River R. Co., 5 Bosw. (N. Y.) 699.

by mere notice, although brought to the knowledge of the passenger.

Ala.—Mobile, etc., R. Co. v. Hopkins, 41 Ala. 489, 94 Am. Dec. 607; Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49.

Conn.—Griswold v. New York, etc., R. Co., 53 Conn. 371, 55 Am. Rep. 115; Lawrence v. New York, etc., R. Co., 36 Conn. 63.

Del.—Flinn v. Philadelphia, etc., R. Co., 1 Houst. (Del.) 469.

D. C.—Galt v. Adams Express Co., McArthur & M. (D. C.) 138.

Ill.—Toledo, etc., R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Arnold v. Illinois Cent. R. Co., 83 Ill. 273, 25 Am. Rep. 386; Illinois Cent. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; Western Transp. Co. v. Newhall, 24 Ill. 466, 76 Am. Dec. 760.

Ind.—Rosenfeld v. Peoria, etc., R. Co., 103 Ind. 121, 53 Am. Rep. 500; Ohio, etc., R. Co. v. Nickless, 71 Ind. 271; Louisville, etc., R. Co. v. Nicholai, 4 Ind. App. 122; Ohio, etc., R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Louisville, etc., R. Co. v. Taylor, 126 Ind. 126; Adams Express Co. v. Keagan, 29 Ind. 21, 92 Am. Dec. 332; Thayer v. St. Louis, etc., R. Co., 22 Ind. 26, 85 Am. Dec. 409; Indiana Cent. R. Co. v. Mundy, 21 Ind. 48, 83 Am. Dec. 339.

Iowa.—Solan v. Chicago, etc., R. Co. (Iowa), 63 N. W. 692; Rose v. Des Moines Valley R. Co., 39 Iowa, 246. See also Hart v. Chicago, etc., R. Co., 69 Iowa, 485.

Kan.—Kansas City, etc., R. Co. v. Simpson, 30 Kan. 645, 46 Am. Rep. 104.

La.—Higgins v. New Orleans, etc., R. Co., 28 La. Ann. 133.

Me.—Rogers v. Kennebec Steamboat Co., 86 Me. 261.

Md.—Baltimore, etc., R. Co. v. Brady, 32 Md. 333.

Mass.—Hosmer v. Old Colony R. Co., 156 Mass. 506; Quimby v. Boston, etc., R. Co., 150 Mass. 365; Bates v. Old Colony R. Co., 147 Mass. 255; Pemberton Co. v. New York Cent. R. Co., 104 Mass. 144; Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131.

Minn.—Jacobus v. St. Paul, etc., R. Co., 20 Minn. 125, 18 Am. Rep. 360; Christenson v. American Express Co., 15 Minn. 270, 2 Am. Rep. 122.

Miss.—Southern Express Co. v. Moon, 39 Miss. 822.

Mo.—Jones v. St. Louis, etc., R. Co., 125 Mo. 666; Tibby v. Missouri Pac. R. Co., 82 Mo. 292; Bryan v. Missouri Pac. R. Co., 32 Mo. App. 228; Carroll v. Missouri Pac. R. Co., 88 Mo. 239, 57 Am. Rep. 382.

N. H.—Merrill v. American Express Co., 62 N. H. 514; Rand v. Merchants Dispatch Transp. Co., 59 N. H. 363; Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

N. J.—Kinney v. Central R. Co., 32 N. J. L. 407, 90 Am. Dec. 675, 34 N. J. L. 513, 3 Am. Rep. 265.

Ohio.—Knowlton v. Erie R. Co., 19 Ohio St. 260, 2 Am. Rep. 395; Cleveland, etc., R. Co. v. Curran, 19 Ohio St. 1, 2 Am. Rep. 362; Davidson v. Graham, 2 Ohio St. 131.

Pa.—Camden, etc., R. Co. v. Bausch (Pa.), 7 Atl. 731; Buffalo, etc., R. Co. v. O'Hara (Pa.), 9 Am. & Eng. R. Cas. 317; Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315; Pennsylvania R. Co. v. McCloskey, 23 Pa. St. 532; Beckman v. Shouse, 5 Rawle (Pa.), 179, 28 Am. Dec. 653.

S. C.—Zemp v. Wilmington, etc., R. Co., 9 Rich. L. (S. C.) 84.

S. Dak.—Meuer v. Chicago, etc., R. Co., 5 S. Dak. 568.

ger,³ unless such notice is expressly assented to, in which case it is

Tenn.—Louisville, etc., R. Co. v. Gilbert, 88 Tenn. 430; Dillard v. Louisville, etc., R. Co., 2 Lea (Tenn.), 292.

Tex.—International, etc., R. Co. v. Campbell, 1 Tex. Civ. App. 509; Harris v. Howe, 74 Tex. 534, 15 Am. St. Rep. 862; Missouri Pac. R. Co. v. Ivy, 71 Tex. 409, 10 Am. St. Rep. 758; Gulf, etc., R. Co. v. McGown, 65 Tex. 645; Galveston, etc., R. Co. v. Kinnebrew, 7 Tex. Civ. App. 549.

Va.—Virginia, etc., R. Co. v. Sayers, 26 Gratt. (Va.) 328.

Wash.—Muldoon v. Seattle City R. Co., 7 Wash. 528, 38 Am. St. Rep. 901.

W. Va.—Maslin v. Baltimore, etc., R. Co., 14 W. Va. 180, 35 Am. Rep. 748.

Wis.—Davis v. Chicago, etc., R. Co., 93 Wis. 470; Annas v. Milwaukee, etc., R. Co., 67 Wis. 46, 58 Am. Rep. 848.

Eng.—Hall v. Northeastern R. Co., L. R. 10 Q. B. 443; Gallin v. London, etc., R. Co., L. R. 10 Q. B. 212; McCawley v. Furnace R. Co., L. R. 8 Q. B. 57.

The rule is modified as to carriers by water, except as to vessels of any kind used in rivers or inland navigation, by the United States Revised Statutes. Liverpool, etc., Steam Co. v. Phoenix Ins. Co., 129 U. S. 397; Norwich Co. v. Wright, 13 Wall. (U. S.) 104; Thorp v. Hammond, 12 Wall. (U. S.) 408; Walker v. Western Transp. Co., 3 Wall. (U. S.) 150; Moore v. American Transp. Co., 24 How. (U. S.) 1; Propeller Niagara v. Cordes, 21 How. (U. S.) 26.

3. U. S.—The Majestic, 60 Fed. 624; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (U. S.) 383; York Co. v. Illinois Cent. R.

Co., 3 Wall. (U. S.) 107; Hopkins v. Westcott, 6 Blatchf. (U. S.) 64.

N. Y.—Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Bissell v. New York Cent. R. Co., 25 N. Y. 442; Perkins v. New York Cent. R. Co., 24 N. Y. 196, 82 Am. Dec. 282; Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 490, 62 Am. Dec. 125; Rawson v. Pennsylvania R. Co., 2 Abb. Pr. N. S. (N. Y.) 220; Camden, etc., R. Co. v. Belknap, 21 Wend. (N. Y.) 354; Clark v. Faxton, 21 Wend. (N. Y.) 153; Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470; Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; Gould v. Hill, 2 Hill (N. Y.), 624; Limburger v. Westcott, 49 Barb. (N. Y.) 283.

Ala.—Alabama, etc., R. Co. v. Little, 71 Ala. 611; Southern Express Co. v. Crook, 44 Ala. 469, 4 Am. Rep. 140.

Ark.—St. Louis, etc., R. Co. v. Weakly, 50 Ark. 397, 7 Am. St. Rep. 104.

Conn.—Peck v. Weeks, 34 Conn. 149; Derwort v. Loomer, 21 Conn. 245; Hale v. New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398.

Dak.—Hartwell v. Northern Pac. Express Co., 5 Dak. 463.

Del.—Flinn v. Philadelphia R. Co., 1 Houst. (Del.) 469.

Ga.—Phillips v. Georgia R., etc., Co., 93 Ga. 356; Central R. Co. v. Combs, 70 Ga. 533, 48 Am. Rep. 582; Southern Express Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393. Limitation of liability by notice is expressly prohibited by statute.

Ill.—Erie R. Co. v. Willcox, 84 Ill. 239; Field v. Chicago, etc., R. Co., 71 Ill. 458; Oppenheim v. United States Exp. Co., 69 Ill. 62, 18 Am-

treated as a contract between the parties to be governed by the

Rep. 596; Adams Express Co. v. Haynes, 42 Ill. 89.

Ind.—Evansville, etc., R. Co. v. Young, 28 Ind. 516.

Iowa.—See cases cited in last preceding note.

Kan.—Kansas City, etc., R. Co. v. Rodebaugh, 38 Kan. 45, 5 Am. St. Rep. 715; Kansas Pac. R. Co. v. Reynolds, 17 Kan. 251.

Ky.—Louisville, etc., R. Co. v. Brownlee, 14 Bush (Ky.), 590; Adams Express Co. v. Nock, 2 Duv. (Ky.) 562, 87 Am. Dec. 510.

Me.—Fillebrown v. Grand Trunk R. Co., 55 Me. 462, 92 Am. Dec. 606; Sager v. Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659.

Md.—Barney v. Prentiss, 4 Har. & J. (Md.) 317, 7 Am. Dec. 670.

Mass.—Lewis v. New York Sleeping Car Co., 143 Mass. 267, 58 Am. Rep. 135; Gott v. Dinsmore, 111 Mass. 45; Maroney v. Old Colony, etc., R. Co., 106 Mass. 153, 8 Am. Rep. 305; Perry v. Thompson, 98 Mass. 249; Brown v. Eastern R. Co., 11 Cush. (Mass.) 97; Judson v. Western R. Corp., 6 Allen (Mass.), 486, 83 Am. Dec. 646; Malone v. Boston, etc., R. Corp., 12 Gray (Mass.), 388, 74 Am. Dec. 598.

Miss.—Mobile, etc., R. Co. v. Wein er, 49 Miss. 725.

N. H.—Moses v. Boston, etc., R. Co., 32 N. H. 523, 64 Am. Dec. 381.

N. C.—Smith v. North Carolina R. Co., 64 N. C. 235.

Ohio.—Baltimore, etc., R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617; Jones v. Voorhees, 10 Ohio, 145; Graham v. Davis, 4 Ohio St. 362, 62 Am. Dec. 285.

Or.—Seller v. Steamship Pacific, 1 Or. 409.

S. C.—Wallingford v. Columbia, etc., R. Co., 26 S. C. 258; Piedmont

Mfg. Co. v. Columbia, etc., R. Co., 19 S. C. 353; Patton v. Magrath, Dudley L. (S. C.) 159, 31 Am. Dec. 552; Singleton v. Hilliard, 1 Stroh. L. (S. C.) 203. Limitation by notice prohibited by statute.

S. Dak.—Meuer v. Chicago, etc., R. Co., 5 S. Dak. 568. Limitation by notice precluded by statute.

Vt.—Mann v. Birchard, 40 Vt. 326; Kimball v. Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567.

W. Va.—Brown v. Adams Express Co., 15 W. Va. 812.

In England restriction of the common law liability of common carriers by mere notice is prohibited by the Railway and Canal Traffic Act.

A contrary rule is maintained in Pennsylvania, where it is held that the liability of a common carrier may be qualified by express contract or general notice, the onus of proving the qualification being on the party setting it up, but proof of a general notice of limitation of liability must be such as amounts to actual notice. Emblazoning the general object on a check, ticket, or notice, in large letters, but stating the restriction in small ones, is insufficient. But the effect of such notice is no more than to render the bailees private carriers for hire. Verner v. Sweitzer, 32 Pa. St. 208; Camden, etc., R. Co. v. Baldau, 16 Pa. St. 67, 55 Am. Dec. 481; Beckman v. Shouse, 5 Rawle (Pa.), 179, 28 Am. Dec. 653; Atwood v. Reliance Transp. Co., 9 Watts. (Pa.) 87, 34 Am. Dec. 503; Laing v. Colder, 8 Pa. St. 479, 49 Am. Dec. 533; Bingham v. Rogers, 6 W. & S. (Pa.) 495, 40 Am. Dec. 581; Lake Shore, etc., R. Co. v. Rosenzweig, 113 Pa. St. 519.

same rules applicable in case of an express contract.⁴ The burden of proof lies on the carrier to show the assent of the passenger, and either an express stipulation by parol or in writing, or an actual adoption of the notice, must be shown to discharge the carrier from the duties which the law has annexed to his employment; assent is not to be implied or inferred.⁵ But notices limiting the carrier's liability for baggage to a specified amount, unless its value is disclosed and an additional payment made for the excess over the amount named, have generally been held valid when brought to the knowledge of the owner, whether expressly assented to by him or not, the carrier being held entitled to this protection from fraud on the part of the owners of baggage.⁶ A notice, however, printed upon the face of the ticket, unless the passenger's attention was called to it when purchasing, or he had knowledge thereof, is not sufficient; a discovery of the notice by the passenger after he has entered upon his journey, does not affect his rights.⁷

§ 2. Essentials of contract limiting liability for negligence.— In all jurisdictions where the right of the carrier to limit its liability by notice is denied, it is held that an express contract by parol or in writing is necessary to effect such purpose.⁸ Such a contract to be binding upon a party must be made by him, or by some one authorized to act in his behalf. Such authority may

4. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (U. S.) 383; Southern Express Co. v. Crook, 44 Ala. 469, 4 Am. Rep. 140; Western Transp. Co. v. Newhall, 24 Ill. 466, 76 Am. Dec. 760; Newman v. Smoker, 25 La. Ann. 303; Buckland v. Adams Express Co., 97 Mass. 124, 93 Am. Dec. 68; Baltimore, etc., R. Co. v. Brady, 32 Md. 333; Graham v. Davis, 4 Ohio St. 362, 62 Am. Dec. 285. But see Jones v. Voorhees, 10 Ohio, 145.

5. See cases cited last two preceding notes.

6. Hopkins v. Westcott, 6 Blatchf. (U. S.) 64; The Majestic, 60 Fed. 624; Louisville, etc., R. Co. v. Nicholai, 4 Ind. App. 119; Sager

v. Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659; Brown v. Eastern R. Co., 11 Cush. (Mass.) 97; Smith v. North Carolina R. Co., 64 N. C. 235.

7. Rawson v. Pennsylvania R. Co., 48 N. Y. 212; Prentice v. Decker, 49 Barb. (N. Y.) 21; Limburger v. Westcott, 49 Barb. (N. Y.) 283; Sunderland v. Westcott, 40 How. Pr. (N. Y.) 468, 2 Sw. (N. Y.) 260; Kansas City, etc., R. Co. v. Rodebaugh, 38 Kan. 45, 5 Am. St. Rep. 715.

8. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (U. S.) 344. And see cases generally cited in notes 1 and 2, § 1.

sometimes be implied from certain contract relations existing between the parties, as between master and servant, or principal and agent; but no such implication can arise, when the relations of the parties are regulated and defined by statute, as in the case of railway mail agents.⁹ Such a contract may be either oral or written. A parol agreement, when established, is as valid as a written agreement.¹⁰ The fact that a written contract is not signed by the passenger is immaterial when its validity in other respects is established. For example, the failure of a passenger to sign an agreement on the back of a free railroad pass, which expressly declares that it is given to him "provided he signs the agreement," is immaterial where he accepts and uses the pass.¹¹ When a passenger accepts an excursion ticket at a reduced rate he is bound by the limitation as to time limit,¹² and any lawful limitation of liability contained in tickets for ocean voyages are implied.

9. Kenney v. New York Cent., etc., R. Co., 125 N. Y. 422; Brewer v. New York, etc., R. Co., 124 N. Y. 59, 21 Am. St. Rep. 647; Seybolt v. New York, etc., R. Co., 95 N. Y. 562, 47 Am. Rep. 75; Stinson v. New York Cent. R. Co., 32 N. Y. 233, 88 Am. Dec. 332; Blair v. Erie R. Co., 66 N. Y. 313, 23 Am. Rep. 55; Elliott v. New York Cent., etc., R. Co., 33 St. Rep. (N. Y.) 861, 11 N. Y. Supp. 691; Coppock v. Long Island R. Co., 89 Hun (N. Y.), 186. But see Alexander v. Toronto, etc., R. Co., 35 U. C. Q. B. 453.

10. Quimby v. Boston, etc., R. Co., 150 Mass. 365; Lawson v. Chicago, etc., R. Co., 64 Wis. 447, 54 Am. Rep. 634; Illinois Cent. R. Co. v. Morrison, 19 Ill. 136; Western Transp. Co. v. Newhall, 24 Ill. 466, 76 Am. Dec. 760; Phillips v. Georgia, etc., R. Co., 93 Ga. 356; Louisville, etc., R. Co. v. Nicholai, 4 Ind. App. 119; American Transp. Co. v. Moore, 5 Mich. 368; Roberts v. Riley, 15 La. Ann. 103, 77 Am. Dec. 183; Walker v. York, etc., R. Co., 22 Eng. L. & Eq. 315.

11. Quimby v. Boston, etc., R. Co.,

150 Mass. 365, 29 Am. L. Reg. 386, 8 Ry. & Corp. L. J. 68, 30 Cent. L. J. 395, 41 Alb. L. J. 229, 40 Am. & Eng. R. Cas. 693, 23 N. E. 205, 5 L. R. A. 846; Adams Express Co. v. Haynes, 42 Ill. 89; Piedmont Mfg. Co. v. Columbia, etc., R. Co., 19 S. C. 353. But see Kansas City, etc., R. Co. v. Rodebaugh, 38 Kan. 45, 5 Am. St. Rep. 715; Anderson v. Canadian Pac. R. Co., 17 Ont. Rep. 747, 40 Am. & Eng. R. Cas. 624.

In England such contracts by statute must be written or printed and signed by the shipper or passenger. Simms v. Great Western R. Co., 18 C. B. 805, 86 E. C. L. 805, 26 L. J. C. P. 25.

Under the South Dakota statute the passenger's signature is necessary, except that acceptance of a ticket or written contract with knowledge of its terms is an assent to the rate of hire and the time, place, and manner of delivery. Meuer v. Chicago, etc., R. Co., 5 S. Dak. 568. And see Hartwell v. Northern Pac. Express Co., 5 Dak. 463.

12. Johnson v. Philadelphia, etc., R. Co., 63 Md. 106; Pennington v.

edly assented to by acceptance and use of the ticket.¹³ Proof of assent to a verbal contract must be clear and sufficient to satisfy the jury that such a contract exists between the parties; if in writing, the writing must be shown.¹⁴ The contract must be founded on a good or valuable consideration, such as the reduction of the passenger's fare or something equivalent,¹⁵ or conveyance by a particular mode of conveyance.¹⁶ But the performance of a duty which the carrier is already under legal obligation to perform, as the carrying of a mail agent free, is an insufficient consideration.¹⁷ The limitation in such a contract must be such as is deemed just and reasonable in law, and whether it is so or not is usually held to be a question of law under the circumstances of the case.¹⁸ The Texas cases hold that the party who asserts the

v
Philadelphia, etc., R. Co., 62 Md. 95;
Howard v. Chicago, etc., R. Co., 61
Miss. 194.

13. Steers v. Liverpool, etc.,
Steamship Co., 57 N. Y. 1, 15 Am.
Rep. 453; The Majestic, 60 Fed. 624;
O'Regan v. Cunard Steamship Co.,
160 Mass. 361, 39 Am. St. Rep. 484;
Fonseca v. Cunard Steamship Co., 153
Mass. 553, 25 Am. St. Rep. 660.

14. American Transp. Co. v.
Moore, 5 Mich. 368; New Jersey
Steam Nav. Co. v. Merchants' Bank,
6 How. (U. S.) 383; Louisville, etc.,
R. Co. v. Nicholai, 4 Ind. App. 119;
Walker v. York, etc., R. Co., 22 Eng.
L. & Eq. 315.

15. N. Y.—Pendergast v. Union
Ry. Co., 10 App. Div. (N. Y.) 207,
41 N. Y. Supp. 927; Seybolt v. New
York, etc., R. Co., 95 N. Y. 562, 47
Am. Rep. 75; Bissell v. New York
Cent. R. Co., 25 N. Y. 442; Boswell
v. Hudson River R. Co., 5 Bosw. (N.
Y.) 699; Dow. v. Syracuse, etc., R.
Co., 81 App. (N. Y.) 362, 80 N. Y.
Supp. 941.

U. S.—York Co. v. Illinois Cent. R.
Co., 3 Wall. (U. S.) 107.

Ala.—Western R. Co. v. Harwell,
91 Ala. 340.

Ark.—St. Louis, etc., R. Co. v.

Weakly, 50 Ark. 397, 7 Am. St. Rep.
104; Taylor v. Little Rock, etc., R.
Co., 39 Ark. 148.

Ill.—Illinois Cent. R. Co. v. Mor-
rison, 19 Ill. 136.

Kan.—Kansas Pac. R. Co. v. Rey-
nolds, 17 Kan. 251.

Md.—Baltimore, etc., R. Co. v.
Brady, 32 Md. 333.

Mass.—Squire v. New York Cent.
R. Co., 98 Mass. 248, 93 Am. Dec.
162; Perry v. Thompson, 98 Mass.
249.

Tenn.—Louisville, etc., R. Co. v.
Gilbert, 88 Tenn. 430; Dillard v.
Louisville, etc., R. Co., 2 Lea (Tenn.)
288.

Vt.—Kimball v. Rutland, etc., R.
Co., 26 Vt. 247, 62 Am. Dec. 567.

Can.—Alexander v. Toronto, etc., R.
Co., 33 U. C. Q. B. 474, 35 U. C. Q.
B. 453.

Eng.—Gallin v. London, etc., R.
Co., L. R. 10 Q. B. 212; Hall v.
Northeastern R. Co., L. R. 10 Q. B.
437.

16. Arnold v. Illinois Cent. R.
Co., 83 Ill. 273, 25 Am. Rep. 386.

17. Seybolt v. New York, etc., R.
Co., 95 N. Y. 562, 47 Am. Rep. 75.

18. **U. S.**—Muser v. Holland, 17
Blackf. (U. S.) 412; Hart v. Penn-

reasonableness of a contract must allege the facts which make it so, and that it is a question for the jury.¹⁹

§ 3. Limitation of liability for negligence.—The general rule in the Federal and State courts is that the duty of a common carrier of passengers to use extraordinary diligence to protect the lives and persons of its passengers cannot be waived, or its legal liability for the consequences of its own negligence limited, even by express contract; and, hence, a contract by which the carrier undertakes to relieve itself from the consequences of its negligence or that of its servants cannot be enforced. This rule applies to both carriers of goods and carriers of passengers for hire, and with special force to the latter.²⁰ The stringent rule laid down by the authorities cited as to the right to limit the duty and

Pennsylvania R. Co., 112 U. S. 331; *Eells v. St. Louis, etc., R. Co.*, 52 Fed. 903; and cases cited, § 1, note 2.

Ala.—*Louisville, etc., R. Co. v. Oden*, 80 Ala. 38; *South, etc., R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578.

Ind.—See cases cited § 1, note 2.

Kan.—*Sprague v. Missouri Pac. R. Co.*, 34 Kan. 347.

Mo.—*Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239, 57 Am. Rep. 382.

Ohio.—*United States Express Co. v. Backman*, 28 Ohio St. 144.

Tenn.—*MERCHANTS' DISPATCH TRANSP. CO. v. BLOCK*, 86 Tenn. 397, 6 Am. St. Rep. 847; *MARR v. WESTERN UNION TEL. CO.*, 85 Tenn. 542.

Tex.—*FORT WORTH, etc., R. CO. v. GREATHOUSE*, 82 Tex. 104; *MISSOURI PAC. R. CO. v. CORNWALL*, 70 Tex. 611; *MISSOURI PAC. R. CO. v. HARRIS*, 67 Tex. 166.

W. Va.—*MASLIN v. BALTIMORE, etc., R. CO.*, 14 W. Va. 180, 35 Am. Rep. 748.

Wis.—*ADAMS v. MILWAUKEE, etc., R. CO.*, 87 Wis. 485.

Eng.—*SIMONS v. GREAT WESTERN R. CO.*, 18 C. B. 805, 86 E. C. L. 805, 26 L. J. C. P. 25.

19. See Texas cases cited in last preceding note.

20. *U. S.*—*New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331; *Kentucky Bank v. Adams Express Co.*, 93 U. S. 174; *Delaware, etc., R. Co. v. Ashley*, 67 Fed. 209; *Ogdensburg, etc., R. Co. v. Pratt*, 22 Wall. (U. S.) 123; *Southern Express Co. v. Caldwell*, 21 Wall. (U. S.) 264; *The Saratoga*, 20 Fed. 869; *New Jersey Steam Nav. Co. v. Merchants Bank*, 6 How. (U. S.) 344; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 658; *Baltimore, etc., R. Co. v. McLaughlin*, 73 Fed. 519; *The Iowa*, 50 Fed. 561; *Muser v. Holland*, 17 Blatchf. (U. S.) 412; *Express Co. v. Kountze*, 8 Wall. (U. S.) 342; *Ernest v. Southern Express Co.*, 1 Woods (U. S.) 573; *Northern Pac. R. Co. v. Adams*, 116 Fed. 324.

Ala.—*Louisville, etc., R. Co. v. Oden*, 80 Ala. 38; *Louisville, etc., R. Co. v. Meyer*, 78 Ala. 597; *South, etc., Alabama R. Co. v. Henlein*, 56 Ala. 368; *Southern Express Co. v. Capterton*, 44 Ala. 101, 4 Am. Rep. 118; *Southern Express Co. v. Crook*, 44 Ala. 409, 4 Am. Rep. 140; *Mobile*

liability of carriers of passengers is based upon reasons of public policy, as well as a regard for the safety of the passenger on his own account. The State or government as *parens patriae* has an interest in protecting the lives and limbs of its subjects. The employment of the carrier is of such nature as to make it a matter of public concern and for the public good that the essential duties attached to it by statute or the common law should not be the sub-

etc., R. Co. v. Hopkins, 41 Ala. 489, 94 Am. Dec. 607.

Ark.—St. Louis, etc., R. Co. v. Weakly, 50 Ark. 397, 7 Am. St. Rep. 104, 35 Am. & Eng. R. Cas. 635; Little Rock, etc., R. Co. v. Talbot, 39 Ark. 523, 47 Ark. 97; Taylor v. Little Rock, etc., R. Co., 39 Ark. 148.

Colo.—Overland Mail, etc., Co. v. Carroll, 7 Colo. 43; Merchants' Dispatch, etc., Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757.

Conn.—Griswold v. New York, etc., R. Co., 53 Conn. 371, 55 Am. Rep. 115; Camp v. Hartford, etc., Steamboat Co., 43 Conn. 333; Lawrence v. New York, etc., R. Co., 36 Conn. 63.

Del.—Flinn v. Philadelphia, etc., R. Co., 1 Houst. (Del.) 469.

D. C.—Galt v. Adams Express Co., McArthur & M. (D. C.) 138.

Ga.—Central of Ga. Ry. Co. v. Lippman, 110 Ga. 665, 36 S. E. 202; Southern Ry. Co. v. Watson, 110 Ga. 681, 36 S. E. 209; Phillips v. Georgia R., etc., Co., 93 Ga. 356; Western, etc., R. Co. v. Exposition Cotton Mills, 81 Ga. 522; Georgia R. Co. v. Gann, 68 Ga. 350; Berry v. Coopér, 28 Ga. 543.

Ind.—Terre Haute, etc., R. Co. v. Sherwood, 132 Ind. 129; St. Louis, etc., R. Co. v. Smuck, 49 Ind. 302; Adams Express Co. v. Frederick, 38 Ind. 150. And see cases cited § 1, note 2.

Iowa.—See cases cited § 1, note 2.

Kan.—Pacific Express Co. v. Foley, 46 Kan. 457, 26 Am. St. Rep. 107.

Ky.—Louisville, etc., R. Co. v. Bell, 100 Ky. 203; Louisville, etc., R. Co. v. Brownlee, 14 Bush (Ky.) 590; Orndorff v. Adams Express Co., 3 Bush. (Ky.) 194, 96 Am. Dec. 207.

La.—Randall v. New Orleans, etc., R. Co., 45 La. Ann. 778, 13 So. 166; Newman v. Smoker, 25 La. Ann. 303. But see Higgins v. New Orleans, etc., R. Co., 28 La. Ann. 133.

Me.—Fillebrown v. Grand Trunk R. Co., 55 Me. 462, 92 Am. Dec. 606.

Md.—Baltimore, etc., R. Co. v. Brady, 32 Md. 333.

Mass.—Graves v. Lake Shore, etc., R. Co., 137 Mass. 33, 50 Am. Rep. 282; School Dist. v. Boston, etc., R. Co., 102 Mass. 556, 3 Am. Rep. 502; Squire v. New York Cent. R. Co., 93 Mass. 239, 93 Am. Dec. 162. But see cases cited § 1, note 2.

Mich.—Hawkins v. Great Western R. Co., 17 Mich. 57, 97 Am. Dec. 179.

Minn.—Boehl v. Chicago, etc., R. Co., 44 Minn. 191.

Miss.—Johnson v. Alabama, etc., R. Co., 69 Miss. 191, 30 Am. St. Rep. 534.

Mo.—Baker v. Missouri Pac. R. Co., 34 Mo. App. 98; Nickey v. St. Louis, etc., R. Co., 35 Mo. App. 79; Doan v. St. Louis, etc., R. Co., 38 Mo. App. 408; Ball v. Wabash, etc., R. Co., 83 Mo. 574. See also cases cited § 1, note 2.

Neb.—Atchison, etc., R. Co. v. Washburn, 5 Neb. 117.

ject of or dependent on contract, but compliance therewith should be exacted of the carrier without regard to the will or wish of the carrier, or of the persons who transact business with it in the course of its employment.²¹ The established rule in Illinois is that the carrier may by express contract stipulate for exemption from ordinary negligence but not from gross negligence.²² And a distinction has been made in some of the cases in States where a dif-

N. H.—Moses v. Boston, etc., R. Co., 24 N. H. 71, 55 Am. Dec. 222. And see cases cited § 1, note 2.

N. C.—Branch v. Wilmington, etc., R. Co., 88 N. C. 573. But see Seaboard Air Line Ry. v. Main, 132 N. C. 445, 43 S. E. 930, where the purpose of a contract is not to exempt the company from liability for negligence, but to indemnify it in case it should be liable.

Ohio.—Baltimore, etc., R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617; United States Express Co. v. Backman, 28 Ohio St. 144; Cincinnati, etc., R. Co. v. Pontius, 19 Ohio St. 221, 2 Am. Rep. 391. See also cases cited § 1, note 2.

Or.—Richmond v. Southern Pac. R. Co. (Or.), 67 Pac. 947; Seller v. Steamship Pacific, 1 Or. 409.

Pa.—Pennsylvania R. Co. v. Fries, 87 Pa. St. 234; Adams Express Co. v. Sharpless, 77 Pa. St. 516; Grogan v. Adams Express Co., 114 Pa. St. 523, 60 Am. Rep. 360; Pennsylvania R. Co. v. Raiordon, 119 Pa. St. 577, 4 Am. St. Rep. 670; Adams Express Co. v. Holmes (Pa.), 8 Cent. Rep. 155. And see cases cited § 1, note 2.

R. I.—Ballou v. Earle, 17 R. I. 441, 33 Am. St. Rep. 881.

S. C.—Johnstone v. Richmond, etc., R. Co. (D. C.), 17 S. E. 512; Wallingford v. Columbia, etc., R. Co., 26 S. C. 258; Piedmont Mfg. Co. v. Columbia, etc., R. Co., 19 S. C. 353; Oliver v. Columbia, etc., R. Co., 61 S. C.

Tenn.—Louisville, etc., R. Co. v. Sowell, 90 Tenn. 17; Louisville, etc., R. Co. v. Manchester Mills, 88 Tenn. 653. And see cases cited § 1, note 2.

Tex.—Missouri, etc., R. Co. v. Flood (Tex. Civ. App.), 70 S. W. 1106; Fort Worth, etc., R. Co. v. Greathouse, 82 Tex. 104. And see cases cited § 1, note 2, § 2, note 11. Fort Worth, etc., R. Co. v. Rogers, 21 Tex. Civ. App. 605, 53 S. W. 366.

Utah.—Williams v. Railroad Co., 18 Utah, 210.

Vt.—Mann v. Birchard, 40 Vt. 326.

Va.—Norfolk, etc., R. Co. v. Tanner (Va.), 41 S. E. 721; Richmond, etc., R. Co. v. Payne, 86 Va. 481.

Wash.—Muldoon v. Seattle City R. Co., 7 Wash. 528, 38 Am. St. Rep. 901.

W. Va.—Maslin v. Baltimore, etc., R. Co., 14 W. Va. 180, 35 Am. Rep. 748.

Wis.—Abrams v. Milwaukee, etc., R. Co., 87 Wis. 485. And see cases cited § 1, note 2.

See also cases generally cited in note 95, chap. 10, § 16, Carriers of Goods.

21. Louisville, etc., R. Co. v. Taylor, 126 Ind. 126; Jacobus v. St. Paul, etc., R. Co., 20 Minn. 125, 18 Am. Rep. 360; Gulf, etc., R. Co. v. McGown, 65 Tex. 640. And cases generally cited in last preceding note.

22. Belt Ry. Co. v. Banicki, 102 Ill. App. 642; Illinois Cent. R. Co. v. Anderson, 184 Ill. 294, 56 N. E. 331;

ferent rule prevails between ordinary and gross negligence.²³ But the best considered cases disapprove of the distinctions sought to be made between ordinary and gross negligence as being too artificial and vague for clear definition or practical application.²⁴

Wabash, etc., R. Co. v. Jaggerman, 115 Ill. 407; *Chicago, etc., R. Co. v. Chapman*, 133 Ill. 96, 23 Am. St. Rep. 587; *Boscowitz v. Adams Express Co.*, 93 Ill. 523, 34 Am. Rep. 191; *Illinois Cent. R. Co. v. Jonte*, 13 Ill. App. 424; *Erie R. Co. v. Wilcox*, 84 Ill. 239; *Adams Express Co. v. Stettanners*, 61 Ill. 184, 14 Am. Rep. 57; *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474, 92 Am. Dec. 85; *Illinois Cent. R. Co. v. Morrison*, 19 Ill. 136; *Adams Express Co. v. Haynes*, 42 Ill. 89. And cases cited § 1, note 2.

23. N. Y.—*Steers v. Liverpool, etc., Steamship Co.*, 57 N. Y. 1, 15 Am. Rep. 453; *French v. Buffalo, etc., R. Co.*, 4 Keyes (N. Y.) 108; *Boswell v. Hudson River R. Co.*, 5 Bosw. (N. Y.) 699; *Smith v. New York Cent. R. Co.*, 29 Barb. (N. Y.) 132; *Bissell v. New York Cent. R. Co.*, 29 Barb. (N. Y.) 602.

Ind.—*Thayer -v. St. Louis, etc., R. Co.*, 22 Ind. 26, 85 Am. Dec. 409; *Indiana Cent. R. Co. v. Mundy*, 21 Ind. 48, 83 Am. Dec. 339; *Indianapolis, etc., R. Co. v. Remmy*, 13 Ind. 518.

Ky.—*Illinois Cent. R. Co. v. Stewart*, 23 Ky. L. Rep. 637, 63 S. W. 596; *Chesapeake & O. R. Co. v. Dodge*, 23 Ky. L. Rep. 1959, 66 S. W. 606.

Md.—*Baltimore, etc., R. Co. v. Brady*, 32 Md. 333.

Pa.—*Pennsylvania R. Co. v. McCloskey*, 23 Pa. St. 532; *Bingham v. Rogers*, 6 W. & S. (Pa.) 495, 40 Am. Dec. 581; *Atwood v. Reliance Transp. Co.*, 9 Watts (Pa.) 89, 34 Am. Dec. 503; *Beckman v. Shouse*, 5 Rawle (Pa.) 179, 25 Am. Dec. 653.

S. Dak.—*Meuer v. Chicago, etc., R. Co.*, 5 S. Dak. 568.

W. Va.—*Baltimore, etc., R. Co. v. Skeels*, 3 W. Va. 556.

Wis.—*Annas v. Milwaukee, etc., R. Co.*, 67 Wis. 46, 58 Am. Rep. 848; *Lawson v. Chicago, etc., R. Co.*, 64 Wis. 455, 54 Am. Rep. 634; *Richardson v. Chicago, etc., R. Co.*, 61 Wis. 596; *Black v. Goodrich Transp. Co.*, 55 Wis. 322, 42 Am. Rep. 713.

Eng.—*Great Western R. Co. v. Glenister*, 29 L. T. N. S. 422.

24. Perkins v. New York Cent. R. Co., 24 N. Y. 196; *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 495; *Steamboat New World v. King*, 16 How. (U. S.) 474; *Philadelphia, etc., R. Co. v. Derby*, 14 How. (U. S.) 468; *Stringer v. Alabama, etc., R. Co.*, 99 Ala. 397, 13 So. 75; *Purple v. Union Pac. R. Co.*, 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700; *Denver, etc., R. Co. v. Peterson* (Colo.), 69 Pac. 578; *Griswold v. New York, etc., R. Co.*, 53 Conn. 371, 55 Am. Rep. 115; *Briggs v. Taylor*, 28 Vt. 180; *Ohio, etc., R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336; *Ohio, etc., R. Co. v. Selby*, 47 Ind. 484, 17 Am. Rep. 719; *Rose v. Des Moines Valley R. Co.*, 37 Iowa, 246; *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, 50 Am. Dec. 659; *Quimby v. Boston, etc., R. Co.*, 150 Mass. 365; *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125, 18 Am. Rep. 360; *Bryan v. Missouri Pac. R. Co.*, 32 Mo. App. 228; *Atchison, etc., R. Co. v. Washburn*, 5 Neb. 117; *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180, 35 Am. Rep. 748.

§ 4. The New York rule.—The early New York cases, following the decisions of the United States Supreme Court, held that a common carrier of passengers might limit its liability by contract, but not for the negligence of itself or its servants.²⁵ And other cases held that the carrier might exempt itself from liability for the ordinary negligence of itself or its servants, but not for gross negligence.²⁶ The courts finally made a distinction between the negligence of the carrier itself and that of its servants and asserted the rule that the carrier of passengers might enter into special contracts with its passengers for exemption from any degree of liability on the part of its servants, but that no contract could exempt it from liability for its own personal negligence, or the negligence of the directors or managing officers directly representing the company when the carrier is a corporation.²⁷ The principle is that the parties cannot contract that they themselves may with impunity be guilty of willful misconduct, or of that degree of recklessness which is its equivalent. To this extent, no doubt, carriers of passengers are precluded from absolving themselves by contract from their responsibilities. But the rule has no application to contracts exempting them from liability for the acts of third persons.²⁸ This rule has been followed in New

25. Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 490, 62 Am. Dec. 125; Stoddard v. Long Island R. Co., 5 Sandf. (N. Y.) 180; Moore v. Evans, 14 Barb. (N. Y.) 524; Parsons v. Monteath, 13 Barb. (N. Y.) 353.

26. Steers v. Liverpool, etc., Steamship Co., 57 N. Y. 1, 15 Am. Rep. 453; Smith v. New York Cent. R. Co., 29 Barb. (N. Y.) 132; Boswell v. Hudson Riv. R. Co., 5 Bosw. (N. Y.) 699. But in Perkins v. New York Cent. R. Co., 24 N. Y. 196, it was held that there was no reason why the carrier should be responsible for the gross negligence, which is another name for criminal negligence, of its servants, more than for slight negligence.

27. Wilson v. New York Cent., etc., R. Co., 97 N. Y. 87; Blair v. Erie R. Co., 66 N. Y. 313, 23 Am. Rep.

55; Stinson v. New York Cent. R. Co., 32 N. Y. 333, 88 Am. Dec. 332; Perkins v. New York Cent. R. Co., 24 N. Y. 196, 82 Am. Dec. 282; Smith v. New York Cent. R. Co., 24 N. Y. 222; Bissell v. New York Cent. R. Co., 25 N. Y. 442; Wells v. New York Cent. R. Co., 24 N. Y. 181; Coppock v. Long Island R. Co., 89 Hun (N. Y.) 186, 34 N. Y. Supp. 1039; French v. Buffalo, etc., R. Co., 4 Keyes (N. Y.) 108; Poucher v. New York Cent. R. Co., 49 N. Y. 263, 10 Am. Rep. 364.

28. Perkins v. New York Central R. Co., 24 N. Y. 196, wherein SELDEN, C. J., says: "There is some difficulty in applying these principles to railroad companies on account of the artificial nature of the corporations. As they can act only through agents, it may with equal plausibility be said,

Jersey,²⁹ and applied in other States as to limitations contained in passes, while the general rule has been approved as to passengers for hire.³⁰ This distinction between the negligence of the carrier and that of its servants is, however, expressly disapproved of in other cases which maintain the general rule, it being held that the negligence of the agent of whatever grade, as to matters within the scope of his employment, with reference to passengers, is the negligence of the corporation itself, which fixes a liability which the carrier cannot be permitted to avoid by contract.³¹ But, although the courts of New York have carried the power of the common carrier to make special contracts to the extent of enabling it to exonerate itself from the effects of even gross negligence of its servants, this effect has never been given to a contract general

on the one hand, that every act of their authorized agents, and, on the other, that no such act, is to be regarded as a direct act of the corporation. But a distinction is no doubt made between the directors or managing officers of a corporation and its subordinate agents. As the former exercise all the powers of the corporation, and are its only direct medium of communication with outside parties, they must, in respect to all its external relations, be considered as identical with the corporation itself. No contract, therefore, can exempt a railroad company from liability for the willful or wanton misconduct or gross recklessness of its directors; but the rule extends to no other officer or agent of the company."

As to the general scope of the rule, the same Justice, in *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442, says: "The principle being established that parties may lawfully enter into contracts of this nature, there is no limit to the extent and variety of modification which may be given to such contracts. The passenger may assume all risks arising from the condition of the tracks, or

from the condition of the locomotive, or of the cars, or all risks from the negligence of the agents, of all of them, or of any class of them. There is no danger which the party may encounter, resulting from the journey, which he may not assume the responsibility of, and he may assume all or any portion of it."

29. *Kinney v. Central R. Co.*, 32 N. J. L. 407, 90 Am. Dec. 675; *Ashmore v. Pennsylvania Steam Towing, etc., Co.*, 28 N. J. L. 180.

30. *Griswold v. New York, etc., R. Co.*, 53 Conn. 371, 55 Am. Rep. 115; *Higgins v. New Orleans, etc., R. Co.*, 28 La. Ann. 133; *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261; *Quinnby v. Boston, etc., R. Co.*, 150 Mass. 365; *Muldoon v. Seattle, etc., R. Co.*, 7 Wash. 528, 38 Am. St. Rep. 901; *Annas v. Milwaukee, etc., R. Co.*, 67 Wis. 46, 58 Am. Rep. 848.

31. *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 378; *Walsh v. Pittsburg, etc., R. Co.*, 10 Ohio St. 75, 75 Am. Dec. 490; *Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Illinois Cent. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260; *Gulf, etc., R. Co. v. McGown*, 65 Tex. 465.

in its terms or by implication. The rule has been firmly maintained that contracts will not be construed to exempt the carrier from liability for negligence unless expressed in unequivocal terms. General words in the contract of a carrier of persons or of goods, limiting its responsibility, will not be construed as exempting it from liability for negligence, if capable of other construction.³²

§ 5. The English rule.—The English rule, prior to the passage of the Railway and Canal Traffic Act in 1854, except in a few of the early cases, was that common carriers could, by express contract or notice, exempt themselves from liability for any degree of negligence.³³ After the passage of that act the rule was established by the courts that a carrier might exempt itself from liability for negligence by express contract, but not by notice, provided the limitations contained in the contract were just and warrantable,³⁴ but liability for wilful misconduct could not be avoided by contract.³⁵

§ 6. Limitation of liability for negligence as to particular classes of passengers.—The application by the courts of the rules as to contracts limiting the carrier's liability for negligence has depended in many instances upon the relation existing between the carrier and the passenger, whether the passenger was a gratuitous passenger or a passenger for hire, an employe of the carrier, or an employe of third persons contracting with the carrier.

32. Zimmer v. New York, etc., R. Co., 137 N. Y. 460; Kenney v. New York Cent., etc., R. Co., 125 N. Y. 422; Brewer v. New York, etc., R. Co., 124 N. Y. 59, 21 Am. St. Rep. 647; Nicholas v. New York Cent., etc., R. Co., 89 N. Y. 370; Holsapple v. Rome, etc., R. Co., 86 N. Y. 275; Mynard v. Syracuse, etc., R. Co., 71 N. Y. 180, 27 Am. Rep. 28; Blair v. Erie R. Co., 66 N. Y. 313, 23 Am. Rep. 55; Mag-nin v. Dinsmore, 56 N. Y. 168; Stinson v. New York Cent. R. Co., 32 N. Y. 333, 83 Am. Dec. 332; Perkins v. New York Cent. R. Co., 24 N. Y. 196, 82 Am. Dec. 282; Elliott v. New

York Cent., etc., R. Co., 33 St. Rep. (N. Y.) 861; Smith v. New York Cent. R. Co., 29 Barb. (N. Y.) 132.

33. Slims v. Great Northern R. Co., 14 C. B. 647, 78 E. C. L. 647; York, etc., R. Co. v. Crisp, 14 C. B. 527, 78 E. C. L. 527.

34. Aldridge v. Great Western R. Co., 15 C. B. N. S. 582, 109 E. C. L. 582; Simons v. Great Western R. Co., 18 C. B. 805, 86 E. C. L. 805, 26 L. J. C. P. 25; Lewis v. Great Western R. Co., 5 H. & N. 867.

35. Great Western R. Co. v. Glen-ister, 29 L. T. N. S. 422.

As to gratuitous passengers it has been held that a stipulation in a free railway pass, requiring the user to assume the risk of personal injury due to the carrier's negligence, or that of its servants, is binding on the person accepting the privilege, although notice of such stipulation may not have been brought home to such person, the rule of public policy making such conditions void as to passengers for hire being held not to apply to passes.³⁶ In some of the States the same rule has been applied to gratuitous passengers as to passengers for hire, whether the rule denied the right of the carrier to stipulate for exemption from negligence or allowed it wholly or partly to do so.³⁷ A contract by an express messenger, relieving a railroad company from liability for personal injuries to him while riding on its train in the performance of his duties, caused by the ordinary negligence of the railroad's employes, is valid, and not contrary to public policy.³⁸ But an express messenger is not bound by such a stipulation in a contract between a railroad company and his employer, when it does not appear that he had any knowledge or information of the provisions

- 36.** *Blank v. Illinois Cent. R. Co.*, 182 Ill. 332, 55 N. E. 332; *Russell v. Pittsburgh, etc., R. Co.*, 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253; *Boering v. Chesapeake Beach Ry. Co.*, 193 U. S. 442, 24 S. Ct. 515, 48 L. Ed. 742, affg. 20 App. D. C. 500; *Northern Pac. R. Co. v. Adams*, 192 U. S. 440, 24 S. Ct. 408, 48 L. Ed. 513; *Quimby v. Boston, etc., R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; *Muldoon v. Seattle City R. Co.*, 10 Wash. 311, 38 Pac. 995; *Griswold v. New York, etc., R. Co.*, 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; *Illinois Cent. R. Co. v. Read*, 37 Ill. 484, 510, 87 Am. Dec. 260; *Duncan v. Maine Cent. R. Co.*, 113 Fed. 508; *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261; *Higgins v. New Orleans, etc., R. Co.*, 28 La. Ann. 133; *Annas v. Milwaukee, etc., R. Co.*, 67 Wis. 46, 58 Am. Rep. 848; *Baltimore, etc., R. Co. v. Voigt*, 176 U. S. 498, 20 S. Ct. 385, 44 L. Ed. 560; *Payne v. Terre Haute, etc., R. Co.*,

157 Ind. 616, 62 N. E. 472; *Chicago, etc., R. Co. v. Hambel* (Neb.), 89 N. W. 643.

- 37.** *Ulrich v. New York Cent., etc., R. Co.*, 108 N. Y. 80, 2 Am. St. Rep. 369; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196, 82 Am. Dec. 282; *Wells v. New York Cent. R. Co.*, 24 N. Y. 181; *Mobile, etc., R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Rose v. Des Moines Valley R. Co.*, 39 Iowa, 246; *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125, 18 Am. Rep. 360; *Bryan v. Missouri Pac. R. Co.*, 32 Mo. App. 228; *Camden, etc., R. Co. v. Bausch* (Pa.), 7 Atl. 731; *Kinney v. Central R. Co.*, 32 N. J. L. 407, 90 Am. Dec. 675, 34 N. J. L. 513, 3 Am. Rep. 265; *Gulf, etc., R. Co. v. McGown*, 65 Tex. 640.

- 38.** *Peterson v. Chicago, etc., R. Co.*, 119 Wis. 197, 96 N. W. 532. And see *Hosmer v. Old Colony R. Co.*, 156 Mass. 506; *Bates v. Old Colony R.*

of the contract between the two companies.³⁹ A contract, however, by which an express messenger, as a condition of his employment, assumes all risk of personal injury while riding on any transportation line, and agrees to release and indemnify the company or any transportation company with which it may contract from any claim which might be made on account of any such injury, must be construed to apply to an injury resulting from negligence of a railroad company in whose car he is riding in the course of his employment, since, not being a passenger while so riding, no claim could be made against the company except on the ground of negligence, and is effective to prevent such messenger from recovering from a railroad company for injury in a collision due to the negligence of the railroad's employes.⁴⁰ Where, by agreement between a railroad company and a land-owner, the railroad agreed, in consideration of a grant of a right of way, to give the land-owner transportation for life, on the sole condition that her right to transportation should be forfeited if tickets were presented by any one save herself, and the tickets given the land-owner bore a provision exempting the railroad from liability for injuries, such condition was not binding on the land-owner in an action by her for injuries owing to the road's negligence, since it was without consideration, and her acceptance of the tickets did not indicate an intention on her part to assent to the terms thereof.⁴¹ Where a passenger bought from a railroad company an excursion ticket at a reduced rate, with indorsement that the person accepting it assumes all risk of accident and damage, the acceptance of the ticket was a waiver of the common law rule making the carrier liable for the passenger's safety, and he must affirmatively prove negligence on the part of the carrier, and cannot avail himself of

Co., 147 Mass. 255; *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 44 Am. St. Rep. 335.

39. *Kenney v. New York Cent., etc., R Co.*, 125 N. Y. 422; *Brewer v. New York, etc., R. Co.*, 124 N. Y. 59, 21 Am. St. Rep. 647. And see *Blair v. Erie R. Co.*, 66 N. Y. 313, 23 Am. Rep. 55. But see *Blank v. Illinois Cent. R. Co.*, 182 Ill. 332, 55 N. E. 232.

40. *Long v. Lehigh Valley R. Co.*

(U. S. C. C. A. N. Y.), 130 Fed. 870.

41. *Dow v. Syracuse, etc., R. Co.*, 81 App. Div. (N. Y.) 362, 80 N. Y. Supp. 941. See also *Corcoran v. New York Cent., etc., R. Co.*, 25 App. Div. (N. Y.) 479, 49 N. Y. Supp. 701, 164 N. Y. 587, 58 N. E. 1086; *Trolan v. New York Cent., etc., R. Co.*, 31 App. Div. (N. Y.) 320, 52 N. Y. Supp. 257; *Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Vanderbilt v. Schreyer*, 91 N. Y. 392.

the presumption of negligence arising in favor of the passenger where an injury occurs.⁴² Persons accompanying stock and traveling on drovers' passes have been usually regarded as passengers for hire and the limitation of liability contained in such passes determined by the rule prevailing as to passengers for hire. Clauses limiting the carrier's liability for personal injuries due to the negligence of itself or its servants have been held void in certain jurisdictions,⁴³ while in other jurisdictions they have been held valid and sufficient to relieve the carrier from liability.⁴⁴ A contract made between a sleeping car company and an employe releasing the sleeping car company and all transportation companies from all liability for personal injuries while traveling over such lines inures to the benefit of a railway company transporting the car in which the employe was injured.⁴⁵

42. *Crary v. Lehigh Valley R. Co.*, 203 Pa. 525, 53 Atl. 563, 59 L. R. A. 815. See also *New Jersey Steam Nav. Co. v. Merchants Bank*, 6 How. (U. S.) 344, 12 L. Ed. 465.

43. *Illinois Cent R. Co. v. Anderson*, 184 Ill. 294, 56 N. E. 331; *Bolton v. Missouri Pac. R. Co.*, 172 Mo. 92, 72 S. W. 530; *Feldschneider v. Chicago, etc., R. Co. (Wis.)*, 99 N. W. 1034; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Ohio, etc., R. Co. v. Nickless*, 71 Ind. 271; *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Pennsylvania R. Co. v. Henderson*, 51

Pa. St. 315; *Flinn v. Philadelphia, etc., R. Co.*, 1 Houst. (Del.) 469; *Missouri Pac. R. Co. v. Ivy*, 71 Tex. 409, 10 Am. St. Rep. 758.

44. *Poucher v. New York Cent. R. Co.*, 49 N. Y. 263, 10 Am. Rep. 364; *Stinson v. New York Cent. R. Co.*, 32 N. Y. 333, 88 Am. Dec. 332; *Smith v. New York Cent. R. Co.*, 24 N. Y. 222; *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442; *Gallin v. London, etc., R. Co.*, L. R. 10 Q. B. 212.

45. *Russell v. Pittsburgh, etc., R. Co.*, 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253.

CHAPTER XXIII.

PRESUMPTIONS AND BURDEN OF PROOF.

- SECTION**
1. Presumptions as to negligence from mere proof of injury.
 2. Acts of servants or defects in instrumentalities of transportation.
 3. Presumption arising from collisions.
 4. Presumptions arising from derailment of train or car.
 5. Presumption arising from defects in means of transportation.
 6. Presumption of negligence as to injuries to persons other than passengers.
 7. Reasons for presumption of negligence.
 8. Rebutting presumption.
 9. Other presumptions.
 10. Presumptions as to contributory negligence.
 11. Presumption arising from instinct of self preservation.
 12. The burden of proving negligence.
 13. The burden of proof as to contributory negligence.

§ 1. Presumptions as to negligence from mere proof of injury.

—It has been frequently held that the mere fact of an accident occurring whereby injury is suffered by a passenger while on his journey is sufficient to raise a presumption of negligence and is of itself presumptive evidence of negligence on the part of the carrier.¹ Negligence is not generally presumed, however, from the

1. When negligence presumed from mere happening of accident:

N. Y.—*Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380, 56 N. E. 988; *Gilmore v. Brooklyn Heights R. Co.*, 6 App. Div. (N. Y.) 117, 39 N. Y. Supp. 417; *Horowitz v. Hamburg-American Packet Co.*, 18 Misc. Rep. (N. Y.) 24, 41 N. Y. Supp. 54; *Hege-man v. Western R. Corp.*, 16 Barb. (N. Y.) 333; *Gonzales v. New York, etc., R. Co.*, 39 How. Pr. (N. Y.) 407.

U. S.—*The Warren Adams*, 38 U. S. App. 356, 74 Fed. 413; *Gleeson*

v. Virginia Midland R. Co., 140 U. S. 435; *Carter v. Kansas City Cable R. Co.*, 42 Fed. 37; *New Jersey R. Co. v. Pollard*, 22 Wall. (U. S.) 341.

Ala.—*Louisville, etc., R. Co. v. Jones*, 83 Ala. 376.

Cal.—*Bush v. Barnett*, 96 Cal. 202.

D. C.—*City, etc., R. Co. v. Svedborg*, 20 App. D. C. 543.

Ga.—*Electric R. Co. v. Carson*, 98 Ga. 652; *City, etc., R. Co. v. Findley*, 76 Ga. 311; *Southwestern R. Co. v. Singleton*, 67 Ga. 306; *Gardner v. Waycross Air Line R. Co.*, 97 Ga. 482.

Ill.—*Chicago City R. Co. v. Mead*,

fact of damage or proof of the occurrence of an injury.² The pre-

206 Ill. 174, 69 N. E. 19; Springer v. Schultz, 205 Ill. 144, 68 N. E. 753, affg. 105 Ill. App. 540; New York, etc., R. Co. v. Blumenthal, 160 Ill. 40; Illinois Cent. R. Co. v. Beebe, 69 Ill. App. 363; Elgin City R. Co. v. Wilson, 56 Ill. App. 364; West Chicago St. R. Co. v. Kennelly, 66 Ill. App. 244.

Ind.—Indianapolis St. Ry. Co. v. Schmidt (Ind.), 71 N. E. 201; Louisville, etc., Ferry Co. v. Nolan, 135 Ind. 60; Louisville, etc., R. Co. v. Snyder, 117 Ind. 435, 10 Am. St. Rep. 60.

Kan.—Atchison, etc., R. Co. v. Elder, 57 Kan. 312.

Ky.—Central Pass. R. Co. v. Kuhn, 86 Ky. 578, 9 Am. St. Rep. 309.

Md.—Baltimore, etc., R. Co. v. Swann, 81 Md. 400, 31 L. R. A. 313; Philadelphia, etc., R. Co. v. Anderson, 72 Md. 519, 20 Am. St. Rep. 483; North Baltimore Pass. R. Co. v. Kaskell, 78 Md. 517.

Minn.—Graham v. Burlington, etc., R. Co., 39 Minn. 81.

Mont.—Hamilton v. Great Falls St. R. Co., 17 Mont. 334.

Miss.—Vicksburg, etc., R. Co. v. Phillips, 64 Miss. 693.

Mo.—Madden v. Missouri Pac. R. Co., 50 Mo. App. 666; Och v. Missouri, etc., R. Co., 130 Mo. 27, 36 L. R. A. 442.

N. J.—Consolidated Tract. Co. v. Thalheimer, 59 N. J. L. 474.

Pa.—Fredericks v. Northern Cent. R. Co., 157 Pa. 103, 22 L. R. A. 306; Thomas v. Philadelphia, etc., R. Co., 148 Pa. 180, 15 L. R. A. 416; Dampan v. Pennsylvania R. Co., 166 Pa. St. 520; Laing v. Colder, 8 Pa. St. 479, 49 Am. Dec. 533; Clow v. Pittsburgh Traction Co., 158 Pa. 410;

Allam v. Pennsylvania R. Co., 3 Pa. Super. Ct. 335.

S. C.—Zemp v. Wilmington, etc., R. Co., 9 Rich. L. (S. C.) 84, 64 Am. Dec. 763.

Ohio.—Cincinnati St. R. Co. v. Kelsey, 9 Ohio C. C. 170.

Tex.—Bonner v. Grumbach, 2 Tex. Civ. App. 482; Missouri Pac. R. Co. v. Scott, 4 Tex. Civ. App. 77.

Neb.—Lincoln Tract. Co. v. Heller (Neb.), 100 N. W. 197; Spellman v. Lincoln Rapid Trans. Co., 36 Neb. 890, 20 L. R. A. 316; Lincoln St. R. Co. v. McClellan, 54 Neb. 672, 74 N. W. 1074.

U. S.—Carter v. Kansas City Cable R. Co., 42 Fed. 37, street car sliding down hill owing to slippery condition of track from frost.

2. When negligence not presumed from mere happening of accident:

N. Y.—Holbrook v. Utica, etc., R. Co., 12 N. Y. 236, 64 Am. Dec. 502; Buck v. Manhattan R. Co., 15 Daly (N. Y.), 550.

Ala.—McDonald v. Montgomery St. R. Co., 11 Ala. 161, 20 So. 317; Louisville, etc., R. Co. v. Allen, 78 Ala. 494, 28 Am. & Eng. R. Cas. 514.

D. C.—Metropolitan R. Co. v. Snashall, 3 App. D. C. 420; Adams v. Washington, etc., R. Co., 9 App. D. C. 26.

Ill.—Chicago City R. Co. v. Rood, 163 Ill. 477; West Chicago St. R. Co. v. Kennelly, 1 Chie. L. J. Wkly. 436; Illinois Cent. R. Co. v. Hobbs, 58 Ill. App. 130.

Ind.—Dresslar v. Citizens St. R. Co., 19 Ind. App. 383, 47 N. E. 651.

Iowa.—Case v. Chicago, etc., R. Co., 64 Iowa, 762, 19 Am. & Eng. R. Cas. 142.

Kan.—Jackson v. Kansas City R.

sumption of the proper performance of duty applies in cases of alleged negligence, as in all other cases, yet the circumstances

Co., 31 Kan. 761, 15 Am. & Eng. R. Cas. 178.

Md.—*State v. Baltimore*, etc., R. Co., 58 Md. 221; *Barnard v. Philadelphia*, etc., R. Co., 60 Md. 555, 15 Am. & Eng. R. Cas. 484; *Philadelphia*, etc., R. Co. v. *Stebbing*, 62 Md. 504, 19 Am. & Eng. R. Cas. 36.

Mich.—*Myunning v. Detroit*, etc., R. Co., 59 Mich. 257, 23 Am. & Eng. R. Cas. 317; *Brown v. Congress*, etc., R. Co., 49 Mich. 153, 8 Am. & Eng. R. Cas. 383.

Mo.—*Buesching v. St. Louis Gas Light Co.*, 6 Mo. App. 85.

Ohio.—*Cleveland*, etc., R. Co. v. *Crawford*, 24 Ohio St. 631, 15 Am. Rep. 633.

Pa.—*Delaware*, etc., R. Co. v. *Napheys*, 90 Pa. Ct. 135, 1 Am. & Eng. R. Cas. 52; *Fleming v. Pittsburgh*, etc., R. Co., 158 Pa. 130, 22 L. R. A. 351; *Herstine v. Lehigh Valley R. Co.*, 151 Pa. 144; *Farley v. Philadelphia Traction Co.*, 132 Pa. St. 58; *Federal St.*, etc., R. Co. v. *Gibson*, 96 Pa. St. 83.

R. I.—*Elliott v. Newport St. R. Co.*, 18 R. I. 707, 23 L. R. A. 208.

S. C.—*Carter v. Columbia*, etc., R. Co., 19 S. C. 20, 15 Am. & Eng. R. Cas. 414.

S. Dak.—*Saunders v. Chicago*, etc., R. Co., 6 S. Dak. 40.

Tenn.—*East Tennessee*, etc., R. Co. v. *Stewart*, 13 Lea (Tenn.), 432, 21 Am. & Eng. R. Cas. 614.

Tex.—*Texas Pac. R. Co. v. Buckalew*, 3 Tex. Civ. App. 272; *Missouri Pac. R. Co. v. Freeman*, 73 Tex. 311.

Wash.—*Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Am. St. Rep. 72, 28 Pac. 1021.

Wis.—*Stimson v. Milwaukee*, etc., R. Co., 75 Wis. 381.

A presumption of negligence does not arise:

Coupling made in an ordinary manner.—*Yazoo*, etc., R. Co. v. *Humphrey*, 83 Miss. 721, 36 So. 154.

Passenger thrown from seat in a car in rounding a curve.—*Wilder v. Metropolitan St. R. Co.*, 10 App. Div. (N. Y.) 364, 41 N. Y. Supp. 931, affd. 161 N. Y. 665, 57 N. E. 1128.

Passenger falling from street car.—*Paynter v. Bridgton*, etc., Tract. Co., 67 N. J. L. 619, 52 Atl. 367; *Chicago City R. Co. v. Catlin*, 70 Ill. App. 97; *Etson v. Fort Wayne*, etc., R. Co., 110 Mich. 494, 68 N. W. 298.

Passenger falling from train.—*Mitchell v. Western*, etc., R. Co., 30 Ga. 22; *Chicago*, etc., R. Co. v. *Mock*, 88 Ill. 87; *Baltimore*, etc., *Turnpike Road v. Cason*, 72 Md. 377; *State v. Baltimore*, etc., R. Co., 58 Md. 221; *Metropolitan R. Co. v. Snashall*, 22 Wash. L. Rep. (D. C.) 377; *East Tennessee*, etc., R. Co. v. *Mitchell*, 11 Heisk. (Tenn.) 400; *Chamberlain v. Milwaukee*, etc., R. Co., 7 Wis. 425.

Passenger injured in alighting from car.—*Peck v. St. Louis Transit Co.*, 178 Mo. 617, 77 S. W. 736; *Pennsylvania R. Co. v. Lyons*, 129 Pa. St. 113, 15 Am. St. Rep. 701; *Delaware*, etc., R. Co. v. *Napheys*, 90 Pa. St. 141; *Mitchell v. Chicago*, etc., R. Co., 51 Mich. 236, 47 Am. Rep. 566.

Passenger injured in attempting to get on car.—*Illinois Cent. R. Co. v. Hobbs*, 58 Ill. App. 130; *Stager v. Ridge Ave. Pass. R. Co.*, 119 Pa. St. 70; *Chicago*, etc., R. Co. v.

under which an injury occurred may be such as to create the presumption of negligence.³ In such cases the rule, *res ipsa loquitur*, applies, and, when that which caused the injury is shown to have been under the management and control of the carrier or its

Trotter, 60 Miss. 442; Weber v. New Orleans, etc., R. Co., 104 La. 367, 28 So. 892.

Passenger falling over satchel in aisle.—Farley v. Philadelphia Tract. Co., 132 Pa. St. 58; Stimson v. Milwaukee, etc., R. Co., 75 Wis. 381.

Passenger injured by missile thrown from outside.—Thomas v. Philadelphia, etc., R. Co., 148 Pa. St. 180; Pennsylvania, etc., R. Co. v. McKinney, 124 Pa. St. 462.

Passenger injured by rock falling from hill.—Fleming v. Pittsburgh, etc., R. Co., 158 Pa. St. 130, 38 Am. St. Rep. 835.

Accident caused by act of God.—Gillespie v. St. Louis, etc., R. Co., 6 Mo. App. 554, washing away of embankment by an unusual storm; McClary v. Sioux City, etc., R. Co., 3 Neb. 44, 19 Am. Rep. 631, upsetting of train by a cyclone.

Accident caused by act of stranger.—Federal St., etc., R. Co. v. Gibson, 96 Pa. St. 83, passenger struck by a passing loaded truck; Chicago City R. Co. v. Rood, 163 Ill. 477.

Sawdust blowing from elevated railroad.—Wadsworth v. Boston El. R. Co., 60 N. E. 421, 182 Mass. 572.

Ordinary burning out of a fuse.—Cassady v. Old Colony St. R. Co. (Mass.), 68 N. E. 10.

Sudden stopping of street car but not more than usually violent.—Johnson v. Interurban St. R. Co., 88 N. Y. Supp. 866.

Falling of article placed by passenger in car rack.—Morris v.

New York Cent., etc., R. Co., 106 N. Y. 678, 11 St. Rep. (N. Y.) 204.

Passenger injured at station or while passing to train or boat.—Pennsylvania Co. v. Marion, 104 Ind. 239; Hayman v. Pennsylvania R. Co., 118 Pa. St. 508; Welfare v. London, etc., R. Co., L. R. 4 Q. B. 693. But see Baltimore, etc., R. Co. v. State, 63 Md. 135; Louisville, etc., R. Co. v. Reynolds, 24 Ky. L. Rep. 1402, 71 S. V. 516.

3. Seybolt v. New York, etc., R. Co., 95 N. Y. 562, 18 Am. & Eng. R. Cas. 162; Lowery v. Manhattan R. Co., 99 N. Y. 158; Wiedmer v. New York Elev. R. Co., 41 Hun (N. Y.), 284; Holbrook v. Utica, etc., R. Co., 12 N. Y. 236; 64 Am. Dec. 502, note; Texas, etc., R. Co. v. Suggs, 62 Tex. 323; Piggott v. Eastern, etc., R. Co., 3 C. B. 229; Dougherty v. Missouri R. Co., 81 Mo. 325, 21 Am. & Eng. R. Cas. 497, 51 Am. Rep. 239; Bedford, etc., R. Co. v. Rainbolt, 99 Ind. 551, 21 Am. & Eng. R. Cas. 466; Kearney v. London, etc., R. Co., L. R. 5 Q. B. 411, 6 Q. B. 759; Scott v. London, etc., Docks Co., 3 Hurl. & Colt. 596; Robinson v. New York Cent. R. Co., 20 Blatchf. (U. S.) 338; Mulcairns v. Janesville, 67 Wis. 24. Cleveland, etc., R. Co. v. Crawford, 24 Ohio St. 631, 15 Am. Rep. 633:

"There is no presumption of negligence as against either party except such as arises from the facts proved. Indeed, the presumption of law is that neither party was guilty of negligence, and such presumption must prevail until overcome by proof."

servants, and furnished and applied by it, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care, and there is said to be a presumption of negligence sufficient to entitle plaintiff to go to the jury. The reasons of the rule are that the carrier is liable for the negligence of its employes as well as for its own, and that it or its servants being in the exclusive management and control of that which caused the injury, the injury is more naturally to be attributed to its own acts or omissions than to those of a stranger, and its means and sources of knowledge are superior to those of the plaintiff. Therefore, in the absence of an explanation showing by proof that the accident was caused by another, or by some other cause for which the carrier was not responsible, as the presence of *vis major* or the tortious act of a stranger, there is a presumption of negligence on its part.⁴ The presumption of negligence thus arises where a passenger is struck by objects projecting from trains passing on adjoining tracks, as where a passenger was struck upon the arm by a swing door on a passing freight train;⁵ where he was struck with a heavy object projecting from a stationary car on an ad-

4. Jones v. Union Ry. Co., 18 App. Div. (N. Y.) 267; Kaiser v. Latimer, 40 App. Div. (N. Y.) 149, 57 N. Y. Supp. 833, but where the proof of negligence rests upon the plaintiff, a presumption of defendant's negligence, arising from the facts, does not change the burden of proof; Chicago Union Tract. Co. v. Crosby, 109 Ill. App. 644; Feital v. Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720; White v. Boston, etc., R. Co., 144 Mass. 404, 11 N. E. 552; Hicks v. New York, etc., R. Co., 164 Mass. 424, 41 N. E. 721; Fitch v. Mason City, etc., Tract. Co. (Iowa), 100 N. W. 618; Howser v. Cumberland, etc., R. Co., 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154; Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 11 S. Ct. 859; Volkmar v. Manhattan R. Co., 134 N. Y. 418, 31 N. E.

870; Cummings v. National Furnace Co., 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; Kirst v. Milwaukee, etc., R. Co., 46 Wis. 489, 1 N. W. 89; Iron R. Co. v. Mowrey, 36 Ohio St. 418, 38 Am. Rep. 597; Ryder v. Kinsey, 62 Minn. 85, 64 N. W. 94; Scott v. London Docks Co., 3 H. & C. 596; Carpe v. London, etc., R. Co., 5 Q. B. 747; Kearney v. London, etc., R. Co., L. R. 6 Q. B. 759; Kinney v. London, etc., R. Co., L. R. 5 Q. B. 411; Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. 146, 29 L. R. A. 718; Allen v. Northern Pac. R. Co., 35 Wash. 221, 77 Pac. 204.

5. Breen v. New York Cent., etc., R. Co., 109 N. Y. 297. But see Hanson v. Lancashire, etc., R. Co., 20 W. R. 297.

joining track;⁶ and where he was struck with a bar of iron projecting from a construction train on an adjoining track.⁷ The rule that a presumption of negligence on the part of a carrier arises when a passenger is injured in the course of transportation cannot be invoked, without evidence tending to connect the carrier or its employes, or some of the appliances of transportation with the happening of the injury. To throw the burden upon the carrier, it must first be shown that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business or in the appliances of transportation.⁸

§ 2. Acts of servants or defects in instrumentalities of transportation.—The rule that proof of the occurrence of an accident causing injury to a passenger arising from any disarrangement or displacement of the track or car of a railroad company, operated by electricity, steam, cable power, or otherwise, or from a defect in any of those things which the carrier is bound to supply, is in itself presumptive evidence of the negligence of the carrier, is generally held, except that in certain jurisdictions proof is also required on the part of the passenger that the accident occurred without fault on his part.⁹ Such proof being made casts the bur-

6. Holbrook v. Utica, etc., R. Co.,
12 N. Y. 236, 64 Am. Dec. 502.

7. Walker v. Erie R. Co., 63 Barb. (N. Y.) 260.

8. Ault v. Cowan, 20 Pa. Super. Ct. 616.

9. Bosqui v. Sutro R. Co., 63 Pac. 682, 131 Cal. 390; **Hastings v. Central, etc., R. Co.,** 40 N. Y. Supp. 93; **Brimmer v. Illinois Cent. R. Co.,** 101 Ill. App. 198; **Davis v. Paducah Ry. & Light Co.,** 24 Ky. Law Rep. 135, 68 S. W. 140; **Cleveland City Ry. Co. v. Osborn,** 66 Ohio St. 45, 63 N. E. 604; **Clow v. Pittsburgh Tract. Co.,** 158 Pa. 410, 27 Atl. 1004; **Elgin City R. Co. v. Wilson,** 56 Ill. App. 364; **Curtis v. Rochester & Syracuse R. Co.,** 18 N. Y. 534; **Bowen v. New York Cent. R. Co.,** 18 N. Y. 408; **Adam v. Union Ry. Co.,** 80 N. Y. Supp. 264.

Where a car is started with great violence it is a fair inference that such violence could not have been the result of anything else than the improper application of the power to move the car, and negligence on the part of the railway company. **Grotsch v. Steinway R. Co.,** 19 App. Div. (N. Y.) 130, 45 N. Y. Supp. 1075. See **Jonas v. Long Island R. Co.,** 47 N. Y. Supp. 149, 21 Misc. Rep. (N. Y.) 306; **Ferry v. Manhattan R. Co.,** 118 N. Y. 497, 29 N. Y. St. Rep. 933; **Martin v. Second Avenue R. Co.,** 3 App. Div. (N. Y.) 448, 38 N. Y. Supp. 220.

A presumption of negligence arises:

Conductor violently striking passenger in the face.—Kohner v.

den on the defendant to show that it and its agents were without

Capital Traction Co., 22 App. D. C. 181, 62 L. R. A. 875.

Passenger injured in fight between drunken passengers.—Pittsburg, etc., R. Co. v. Pillow, 76 Pa. St. 510.

Gate on rear platform of street car swung open while the car was in motion.—Aston v. St. Louis Transit Co. (Mo. App.), 79 S. W. 999.

Train parting while in transit.—Feldschneider v. Chicago, etc., R. Co. (Wis.), 99 N. W. 1034.

Escape of electricity in car.—D'Arcy v. Westchester Elec. R. Co., 82 App. Div. (N. Y.) 263, 81 N. Y. Supp. 952.

Sudden stopping of a train, or cable or street car.—Chicago Union Tract. Co. v. Mommsen, 107 Ill. App. 353; Wylde v. Northern R. Co., 14 Abb. Pr. N. S. (N. Y.) 213; Clow v. Pittsburgh Tract. Co., 158 Pa. St. 410.

Overheating of plate over a wheel.—Powell v. Hudson Valley R. Co., 88 App. Div. (N. Y.) 133, 84 N. Y. Supp. 337.

Passenger struck by mail pouch suspended at side of track.—McCord v. Atlanta, etc., Air Line R. Co. (N. C.), 45 S. E. 1031.

Passenger jumping from car because of well-grounded fear of collision.—Palmer v. Warren St. R. Co., 206 Pa. 574, 56 Atl. 79, 63 L. R. A. 507.

Sudden stopping of horses and inability to apply the brake.—Nolan v. Brooklyn City R. Co., 87 N. Y. 63.

Sudden and unexpected release of a brake.—Gilmore v. Brooklyn Heights R. Co., 6 App. Div. (N. Y.) 117, 39 N. Y. Supp. 417.

Sudden starting of car while passenger is alighting.—United Rys., etc., Co. v. Beidelman (Md.), 52 Atl. 913; Consolidated Tract. Co. v. Thalheimer, 59 N. J. L. 474, 37 Atl. 132; Scott v. Bergen Co. Tract. Co. (N. J.), 43 Atl. 1060, 4 Chic. L. J. Wkly. 79; North Chicago St. R. Co. v. Schwartz, 82 Ill. App. 493; Armstrong v. Metropolitan St. R. Co., 23 App. Div. (N. Y.) 137, 48 N. Y. Supp. 597; Roberts v. Johnson, 58 N. Y. 613; Murphy v. St. Louis, etc., R. Co., 43 Mo. App. 342; Continental Pass. R. Co. v. Swain, 13 W. N. C. (Pa.) 41. But see Brown v. Congress St., etc., R. Co., 49 Mich. 153.

Handrail charged with electricity.—Dallas Consol. St. Elec. R. Co. v. Broadhurst (Tex.), 68 S. W. 315.

Passenger injured by escaping electricity.—Eickhof v. Chicago, etc., R. Co., 77 Ill. App. 196; Denver Tramway Co. v. Reid, 4 Am. Electl. Cas. 332, 4 Colo. App. 53, 35 Pac. 269; Burt v. Douglass Co. St. R. Co., 83 Wis. 229, 18 L. R. A. 479.

Passenger thrown from car by sudden lurch of moving train.—Murphy v. Coney Island, etc., R. Co., 36 Hun (N. Y.), 199; Lavis v. Wisconsin Cent. R. Co., 54 Ill. App. 636; Condy v. St. Louis, etc., R. Co., 85 Mo. 79; Dougherty v. Missouri R. Co., 81 Mo. 325, 51 Am. Rep. 239.

Act of servant.—Memphis, etc., Packet Co. v. McCool, 83 Ind. 392, 43 Am. Rep. 71; Murphy v. Atlanta, etc., R. Co., 89 Ga. 832, suddenly opening a closed door.

Violent jolt or jar from coupling cars or otherwise.—Cook v. Long Island R. Co., 19 N. Y. Supp.

fault.¹⁰ For instance, when plaintiff, who was a passenger, was injured by the sudden and unexplained stopping of defendant's street car, and on the trial introduced proof of such occurrence, and rested; defendant then produced four of its employes, who testified to the use of the best known appliances, careful supervision, and skillful service; the court held that a dismissal of plaintiff's complaint was error, since under the doctrine of *res ipsa loquitur* proof of the accident cast the burden of explanation on the defendant.¹¹ In a case where it was shown that an injury

648; Georgia Pac. R. Co. v. Love, 91 Ala. 432; Gardner v. Waycross Air Line R. Co., 97 Ga. 482. But see Herstine v. Lehigh Valley R. Co., 151 Pa. St. 244.

Falling of baggage.—Horowitz v. Hamburg-American Packet Co., 18 Misc. Rep. (N. Y.) 24.

Falling of merchandise piled on boat.—Memphis, etc., Packet Co. v. McCool, 83 Ind. 392, 43 Am. Rep. 71.

Falling of ventilator window.—Och v. Missouri, etc., R. Co., 130 Mo. 37. But see Murray v. Metropolitan Dist. R. Co., 27 L. T. N. S. 762.

Falling of lamp shade.—White v. Boston, etc., R. Co., 144 Mass. 404.

Kicking of passenger by horse.—Budd v. United Carriage Co., 25 Or. 314.

Dress catching on broken curtain hook.—Kelley v. New York, etc., R. Co., 109 N. Y. 44.

Overturning of stage coach or carriage.—Stokes v. Saltonstall, 13 Pet. (U. S.) 192; McKinney v. Neil, 1 McLean (U. S.), 540; Bush v. Barnett, 96 Cal. 202; Lawrence v. Green, 70 Cal. 417, 59 Am. Rep. 428; Boyce v. California Stage Co., 25 Cal. 460; Fairchild v. California Stage Co., 13 Cal. 599; Wall v. Livezay, 6 Colo. 465; Payne v. Halstead, 44 Ill. App. 97; Anderson v. Scholey, 114 Ind. 553; Stockton v.

Frey, 4 Gill (Md.), 406, 45 Am. Dec. 138; Higley v. Gilmer, 3 Mont. 90, 35 Am. Rep. 450; Tennery v. Pippinger, 1 Phila. (Pa.) 543; McCall v. Forsyth, 4 W. & S. (Pa.) 179; Farish v. Reigle, 11 Gratt. (Va.) 697, 62 Am. Dec. 666.

10. Texas & P. R. Co. v. Gardner (Tex.). 114 Fed. 186; Calumet Elec. St. Ry. Co. v. Jennings, 83 Ill. App. 612; McCurrie v. Southern Pac. Co., 122 Cal. 561, 55 Pac. 324; Bassett v. Los Angeles Tract. Co. (Cal.), 22 Am. & Eng. R. Cas. N. S. 5, 65 Pac. 470; Olsen v. Citizens' Ry. Co., 152 Mo. 426, 54 S. W. 470; Clark v. Railroad Co., 127 Mo. 210, 29 S. W. 1016; Hill v. Ninth Ave. R. Co., 109 N. Y. 239, 16 N. E. 61; Smedley v. Hentonville, etc., R. Co., 184 Pa. St. 620, 39 Atl. 544, 9 Am. & Eng. R. Cas. N. S. 649; Steele v. Consolidated Tract. Co., 30 Pittsb. (Pa.) L. J. N. S. 290; Scott v. Bergen Co. Tract. Co., 63 N. J. L. 407, 43 Atl. 1060, 48 Atl. 1118.

11. Langley v. Metropolitan St. Ry. Co. 74 N. Y. Supp. 857, 36 Misc. Rep. (N. Y.) 804. But see Hoffman v. Third Ave. R. R. Co., 45 App. Div. (N. Y.) 586, 61 N. Y. Supp. 590, holding that the fact that a street car, when going through a crowded street, at a rate faster than a person can walk, comes to a stop suddenly, without any act of the gripman, does not of itself give rise to a presump-

to a passenger was caused by an act of the carrier in operating the instrumentalities employed in his business, it was held that there was a presumption of negligence, which threw on the carrier the burden of showing that the injury was sustained without negligence on his part; and hence a verdict for injuries against a street railroad would not be reversed, because the evidence failed to show that the rate of speed of the car at the time of the accident was excessive, or that the excessive rate of speed or other negligence of defendant was the proximate cause of the injury, since it was sufficient that the evidence failed to show that it was not so.¹² But to enable a passenger to recover for injuries from a street railway company operating its cars by cable, it is not enough to show that there was a jerk in the cable which threw the plaintiff from the car, but it must affirmatively appear that the jerk was an extraordinary or unusual one, or attributable to a defect in the track, an imperfection in the car or apparatus, or to a dangerous rate of speed, or to unskillful handling of the car by the gripman.¹³

§ 3. Presumption arising from collisions.—The presumption of negligence on the part of the carrier has been generally held to arise in cases of collisions between trains or cars, whether operated by the same or different carriers, and in cases of collisions of trains or cars with some obstruction on or near the track.¹⁴

tion of negligence on the part of the car company, though a passenger is injured by falling from her seat, in consequence of the sudden stopping; also *Black v. Third Ave. R. Co.*, 2 App. Div. (N. Y.) 629; *Nelson v. Lehigh Val. R. R. Co.*, 25 Id. 535.

12. Bassett v. Los Angeles Tract. Co., 133 Cal. 1, 65 Pac. 470, 22 Am. & Eng. R. Cas. N. S. 5.

13. Bartley v. Metropolitan St. R. Co., 148 Mo. 124, 5 Am. Neg. Rep. 635, 49 S. W. 840. See also *Hayes v. Forty-second*, etc., St. R. Co., 97 N. Y. 259; *Muller v. Second Ave. R. Co.*, 16 J. & S. (N. Y.) 546; *Holland v. West End St. R. Co.*, 155 Mass. 357; *Baltimore*, etc., R. Co. v. *Cason*, 72 Md. 377; *Barth v. Houghton Co. St. R. Co.* (Mich.), 93 N. W.

620, 9 Det. Leg. News, 595; *Adams v. Washington*, etc., R. Co., 9 App. D. C. 34, 24 Wash. L. Rep. 634; *Metropolitan R. Co. v. Snashall*, 3 App. D. C. 420; *Stager v. Ridge Ave. Pass. R. Co.*, 119 Pa. St. 70; *Denver*, etc., R. Co. v. *Fotheringham* (Colo.), 68 Pac. 978.

14. Collision with other trains.—*N. Y.—Seybolt v. New York*, etc., R. Co., 95 N. Y. 562, 47 Am. Rep. 75; *Bowles v. Rome*, etc., R. Co., 46 Hun (N. Y.), 324.

U. S.—Kansas City, etc., R. Co. v. *Stoner*, 49 Fed. 209; *New Jersey R. Co. v. Pollard*, 22 Wall. (U. S.) 341.

Ala.—Georgia Pac. R. Co. v. Love, 91 Ala. 432.

§ 4. Presumptions arising from derailment of train or car.— Proof of the derailment of a train or car causing injuries to a passenger raises a presumption of the carrier's negligence and justifies the conclusion, in the absence of evidence to the contrary, that it resulted either from improper construction, failure to keep in proper repair, or negligence in operation. Whenever a car or train leaves the track it proves that either the track or

Ill.—Chicago City R. Co. v. Engel, 35 Ill. App. 490.

Ind.—Louisville, etc., R. Co. v. Taylor, 126 Ind. 126.

Iowa.—Tuttle v. Chicago, etc., R. Co., 48 Iowa, 236.

Minn.—Graham v. Burlington, etc., R. Co., 39 Minn. 81.

Miss.—New Orleans, etc., R. Co. v. Allbritton, 38 Miss. 242, 75 Am. Dec. 98.

Mo.—Clark v. Chicago, etc., R. Co., 127 Mo. 197; Magoffin v. Missouri Pac. R. Co., 102 Mo. 540; Wilkerson v. Corrigan Consol. St. R. Co., 26 Mo. App. 144.

Ohio.—Iron R. Co. v. Mowery, 36 Ohio St. 418, 38 Am. Rep. 597.

Pa.—Rowdin v. Pennsylvania R. Co., 208 Pa. 623, 57 Atl. 1125.

Collision between street cars.

—Loudoun v. Eighth Ave. R. Co., 162 N. Y. 380; Falke v. Second Ave. R. Co., 38 App. Div. (N. Y.) 49, 55 N. Y. Supp. 984; Kay v. Metropolitan St. R. Co., 29 App. Div. (N. Y.) 466, 51 N. Y. Supp. 724; Anderson v. Brooklyn Heights R. Co., 32 App. Div. (N. Y.) 266, 52 N. Y. Supp. 984; Savage v. Marlborough St. R. Co., 186 Mass. 203, 71 N. E. 531; Magrane v. St. Louis, etc., R. Co., 183 Mo. 119, 81 S. W. 1158; Robinson v. St. Louis, etc., R. Co. (Mo. App.) 77 S. W. 493; Palmer v. Warren St. R. Co., 206 Pa. 574, 63 L. R. A. 507; North Baltimore Pass. R. Co. v. Kaskell (Md.), 28 Atl. 410; North Chicago St. R. Co. v. Cotton,

140 Ill. 486; Smith v. St. Paul City R. Co., 32 Minn. 1, 50 Am. Rep. 550; Hamilton v. Great Falls St. R. Co., 17 Mont. 334; Miller v. St. Louis, etc., R. Co., 5 Mo. App. 471; Clow v. Pittsburgh Tract. Co., 158 Pa. St. 410.

Collision between street car and wagon.—Shay v. Camden, etc., R. Co. (N. J.), 49 Atl. 547; Hill v. Ninth Ave. R. Co., 109 N. Y. 239. But see Potts v. Chicago City R. Co., 33 Fed. 610; North Side St. R. Co. v. Want (Tex. App.), 15 S. W. 40; Quinlan v. Sixth Ave. R. Co., 4 Daly (N. Y.), 488, where a runaway team struck a street car.

Collision between railroad train and street car.—Central Pass. R. Co. v. Kuhn, 86 Ky. 578 9 Am. St. Rep. 309.

Steamboat colliding with wharf.—Bartlett v. New York, etc., Ferry, etc., Co., 57 N. Y. Super. Ct. 48.

Collision with animal on track.—Bowen v. New York Cent. R. Co., 18 N. Y. 408, 72 Am. Dec. 529; Louisville, etc., R. Co. v. Hendricks, 128 Ind. 462; Louisville, etc., R. Co. v. Ritter, 85 Ky. 368; Sullivan v. Philadelphia, etc., R. Co., 30 Pa. St. 234, 72 Am. Dec. 698; Mexican Cent. R. Co. v. Lauricella, 87 Tex. 277, 47 Am. St. Rep. 103; Fordyce v. Jackson, 56 Ark. 594.

Collision between vessels.—Sherlock v. Alling, 44 Ind. 184.

machinery, or some portion thereof, is not in a proper condition, or that the machinery is not properly operated, and presumptively proves that the carrier, whose duty it is to keep the track and machinery in the proper condition and to operate it with the necessary prudence and care, has in some respect violated its duty. The carrier is bound to show and give some explanation of the cause of the accident.¹⁵

15. Where cause is not shown.

—*N. Y.*—Stevenson v. Second Ave. R. Co., 35 App. Div. (N. Y.) 474, 54 N. Y. Supp. 815; Armstrong v. Metropolitan St. R. Co., 23 App. Div. (N. Y.) 137, 48 N. Y. Supp. 597; Pollock v. Brooklyn, etc., R. Co., 15 N. Y. Supp. 189, 39 St. Rep. (N. Y.) 568; Seybolt v. New York, etc., R. Co., 95 N. Y. 562, 47 Am. Rep. 75; Edgerton v. New York, etc., R. Co., 39 N. Y. 27; Webster v. Elmira, etc., R. Co., 85 Hun (N. Y.), 167, 32 N. Y. Supp. 590. Compare Deyo v. New York Cent. R. Co., 34 N. Y. 9.

U. S.—Albion Lumber Co. v. De Nobra, 72 Fed. 739.

Ala.—Montgomery, etc., R. Co. v. Mallette, 92 Ala. 209; Louisville, etc., R. Co. v. Jones, 83 Ala. 376.

Ark.—Eureka Springs R. Co. v. Timmons, 51 Ark. 459; Little Rock, etc., R. Co. v. Miles, 40 Ark. 298, 48 Am. Rep. 10.

Cal.—Mitchell v. Southern Pac. R. Co., 87 Cal. 62.

Ga.—Electric Car Co. v. Carson, 98 Ga. 652, 27 S. E. 156; Central R. Co. v. Freeman, 75 Ga. 331; Central R. Co. v. Sanders, 73 Ga. 513; Yonge v. Kinney, 28 Ga. 111.

Ill.—Peoria, etc., R. Co. v. Reynolds, 88 Ill. 418; Elgin City R. Co. v. Wilson, 56 Ill. App. 364; Pittsburgh, etc., R. Co. v. Thompson, 56 Ill. 138.

Ind.—Ohio, etc., R. Co. v. Voight, 122 Ind. 288; Louisville, etc., R. Co. v. Jones, 108 Ind. 551.

Iowa.—Cronk v. Wabash R. Co., 123 Iowa, 349, 98 N. W. 884; Pershing v. Chicago, etc., R. Co., 71 Iowa, 561.

Kan.—Atchison, etc., R. Co. v. Elder, 57 Kan. 312; Southern Kansas R. Co. v. Walsh, 45 Kan. 653.

Ky.—Louisville, etc., R. Co. v. Smith, 2 Duv. (Ky.) 556.

Me.—Stevens v. European, etc., R. Co., 66 Me. 74.

Mass.—Feital v. Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720.

Mo.—Heyde v. St. Louis Transit Co., 102 Mo. App. 537, 77 S. W. 127; Furnish v. Missouri Pac. R. Co., 102 Mo. 438, 22 Am. St. Rep. 781; Dimitt v. Hannibal, etc., R. Co., 40 Mo. App. 654; Hipsley v. Kansas City, etc., R. Co., 88 Mo. 348.

Neb.—Spellman v. Lincoln Rap. T. Co., 36 Neb. 890, 38 Am. St. Rep. 753.

N. J.—Bergen County Tract. Co. v. Demarest, 62 N. J. L. 755, 42 Atl. 729.

Ohio.—Cincinnati St. R. Co. v. Kelsey, 9 Ohio C. C. 170, 2 Ohio Dec. 440; Cincinnati, etc., R. Co. v. Brown, 2 Ohio Dec. 494.

Pa.—Reading City Pass. R. Co. v. Eckart (Pa.), 4 Atl. 530.

W. Va.—Carrico v. West Virginia Cent., etc., R. Co., 39 W. Va. 86.

Tex.—Texas, etc., R. Co. v. Suggs, 62 Tex. 323; Bonner v. Grumbach, 2 Tex. Civ. App. 482; Fordyce v. Withers, 1 Tex. Civ. App. 540. But see San Antonio, etc., R. Co. v. Robinson, 73 Tex. 277; Texas Pac. R.

§ 5. Presumption arising from defects in means of transportation.—The presumption of negligence on the part of the carrier, as a general rule, arises in cases of injuries to passengers arising from defects in the means of transportation.¹⁶ But the presumption of negligence does not arise where, although there was some

Co. v. Buckelew, 3 Tex. Civ. App. 272, proof of circumstances necessary.

Eng.—*Bird v. Great Northern R. Co.*, 28 L. J. Exch. 3; *Great Western R. Co. v. Fawcett*, 8 L. T. N. S. 31; *Dawson v. Manchester, etc.*, R. Co., 5 L. T. N. S. 682, 7 H. & N. 1037.

Defective rail.—*N. Y.*—*Curtis v. Rochester, etc.*, R. Co., 18 N. Y. 534, 75 Am. Dec. 258; *Brignoli v. Chicago, etc.*, R. Co., 4 Daly (N. Y.), 182.

Ala.—*Alabama, etc.*, R. Co. v. Hill, 93 Ala. 514, 30 Am. St. Rep. 65.

Ark.—*George v. St. Louis, etc.*, R. Co., 34 Ark. 613.

Ill.—*Heagle v. Indianapolis, etc.*, R. Co., 76 Ill. 501; *Galena, etc.*, R. Co. v. *Yarwood*, 17 Ill. 509, 65 Am. Dec. 682.

Ind.—*Cleveland, etc.*, R. Co. v. *Newell*, 75 Ind. 542; *Pittsburgh, etc.*, R. Co. v. *Williams*, 74 Ind. 462.

Eng.—*Pym v. Great Northern R. Co.*, 2 F. & F. 619; *Carpue v. London, etc.*, R. Co., 5 Q. B. 747, 48 E. C. L. 747.

Defective or misplaced switch.—*Klinger v. United Tract. Co.*, 92 App. Div. (N. Y.) 100, 87 N. Y. Supp. 864; *Curtis v. Rochester, etc.*, R. Co., 18 N. Y. 534, 75 Am. Dec. 258; *Denver, etc.*, R. Co. v. *Woodward*, 4 Colo. 1; *Moore v. Des Moines, etc.*, R. Co., 69 Iowa, 491; *Baltimore, etc.*, R. Co. v. *Worthington*, 21 Md. 275, 83 Am. Dec. 578; *Logan v. Metropolitan St. R. Co.*, 183 Mo. 582, 82 S. W. 126.

Landslide in cut.—*Gleeson v.*

Virginia Midland R. Co., 140 U. S. 435.

Washout of embankment.—*Brehm v. Great Western R. Co.*, 34 Barb. (N. Y.) 256; *Philadelphia, etc., R. Co. v. Anderson*, 94 Pa. St. 351, 39 Am. Rep. 787; *Great Western R. Co. v. Fawcett*, 9 Jur. N. S. 339.

Giving way of bridge or trestle.—*Louisville, etc., R. Co. v. Pedigo*, 108 Ind. 481, 27 Am. & Eng. R. Cas. 310; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 57 Am. Rep. 120; *Bedford, etc., R. Co. v. Rainbolt*, 99 Ind. 551; *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442; *Baltimore, etc., R. Co. v. Noell*, 32 Gratt. (Va.) 394; *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. (Va.) 431. And see *Sawyer v. Hannibal, etc.*, R. Co., 37 Mo. 240, 90 Am. Dec. 382, where a bridge was burned by the public enemy.

16. N. Y.—*Miller v. Ocean Steamship Co.*, 118 N. Y. 199; *Holbrook v. Utica, etc.*, R. Co., 12 N. Y. 236, 64 Am. Dec. 502; *Hitchcock v. Brooklyn City R. Co.*, 44 Hun (N. Y.), 627, 8 St. Rep. (N. Y.) 848.

Ind.—*Louisville, etc., Ferry Co. v. Nolan*, 135 Ind. 60.

Md.—*Baltimore, etc., R. Co. v. State*, 63 Md. 135.

Minn.—*Wilson v. Northern Pac. R. Co.*, 26 Minn. 278, 37 Am. Rep. 410.

Mo.—*Madden v. Missouri Pac. R. Co.*, 50 Mo. App. 666.

Pa.—*Clow v. Pittsburgh Tract. Co.*, 158 Pa. St. 410; *Fleming v. Pittsburgh, etc., R. Co.*, 158 Pa. St. 130, 38 Am. St. Rep. 835; *Laing v.*

defect in the means of transportation, the accident causing the injury could not have occurred had there not been an improper exposure to danger on the part of the passenger; as where a pas-

Colder, 8 Pa. St. 479, 49 Am. Dec. 533.

Va.—*Baltimore, etc., R. Co. v. Noell*, 32 Gratt. (Va.) 394; *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. (Va.) 431, 26 Am. Rep. 384.

Eng.—*Harrison v. London, etc., R. Co.*, 1 C. & E. 540.

A presumption of negligence arises from:

Hand rail on street car giving way.—*McCarty v. St. Louis, etc., R. Co.*, (Mo. App.), 80 S. W. 7.

Defect in carrier's appliances.

—*Whalen v. Consol. Tract. Co.*, 61 N. J. L. 606, 40 Atl. 645, 11 Am. & Eng. R. Cas. N. S. 207, 4 Am. Neg. Rep. 422, 41 L. R. A. 836; *Kefauver v. Philadelphia, etc., R. Co.*, 122 Fed. 966.

Breaking down of means of transportation.—*Choquette v. Southern Elec. R. Co.*, 80 Mo. App. 515, 2 Mo. A. Repr. 655.

Car appearing to be on fire.—*Poulson v. Nassau Elec. R. Co.*, 18 App. Div. (N. Y.) 221, 45 N. Y. Supp. 941.

Improper condition of street railway track.—*Casper v. Dry Dock, etc., R. Co.*, 23 App. Div. (N. Y.) 451, 48 N. Y. Supp. 352.

Breaking of trolley pole.—*Keator v. Scranton Tract. Co.*, 191 Pa. 102, 44 W. N. C. 128, 6 Am. Neg. Rep. 187, 44 L. R. A. 546, 43 Atl. 86.

Breaking of an appliance.—*Murray v. Pawtuxet Val. St. R. Co.*, 25 R. I. 209, 55 Atl. 491.

Breaking of axle.—*Hegeman v. Western R. Corp.*, 13 N. Y. 9, 64 Am. Dec. 517; *Alden v. New York Cent. R. Co.*, 26 N. Y. 102, 82 Am. Dec.

401; *Ohio, etc., R. Co. v. Voight*, 122 Ind. 288; *Meier v. Pennsylvania R. Co.*, 4 U. C. C. P. 543; *Dawson v. Manchester, etc., R. Co.*, 7 H. & N. 1037; *Western Maryland R. Co. v. State*, 95 Md. 637, 53 Atl. 969.

Breaking of car wheel.—*Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613.

Breaking of coupling pin.—*McLean v. Burbank*, 11 Minn. 277; *Goodrich v. Pennsylvania, etc., Canal Co.*, 29 Hun (N. Y.) 50.

Breaking of bolt.—*Germain v. Montreal, etc., R. Co.*, 6 L. C. Rep. 172.

Falling of sleeping car berth.—*Cleveland, etc., R. Co. v. Walrath*, 38 Ohio St. 461.

Explosion of boiler of locomotive.—*Robinson v. New York Cent., etc., R. Co.*, 20 Blatchf. (U. S.) 338.

Explosion of lamp.—*Wilkie v. Bolster*, 3 E. D. Sm. (N. Y.) 327.

Breaking of axle of stage coach.—*Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799; *Christie v. Griggs*, 2 Campb. 79; *Israel v. Clark*, 4 Esp. N. P. 259.

Wheel coming off.—*Ware v. Gay*, 11 Pick. (Mass.) 106.

Explosion of boiler of steam-boat.—*Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Spear v. Philadelphia, etc., R. Co.*, 119 Pa. St. 61; *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71; *The Steamboat New World v. King*, 16 How. (U. S.) 469; *Dunlap v. Steamboat Reliance*, 2 Fed. 249; *The Reliance*, 4 Woods (U. S.) 420; *Fay v. Davidson*, 13 Minn. 523.

Breaking of paddle wheel.—

senger's arm was out of the window when struck,¹⁷ or an active and voluntary movement on his part contributed to the accident,¹⁸ or he was riding in an improper place.¹⁹ It is only in respect to those accidents which happen to the passenger when he passively trusts himself to the safety of the carrier's means of transportation, or to the skill, diligence, and care of its servants, that the rule applies.²⁰ The fact that a passenger is injured while necessarily standing on the platform of a car is not in itself a cause for action against a railway company, if the accident is caused by the act of the plaintiff himself, or that of another passenger.²¹

§ 6. Presumption of negligence as to injuries to persons other than passengers.—It has been held by the courts in certain jurisdictions that this presumption of negligence arises only when there exists a contractual relation, like that of passenger and

Yerkes v. Keokuk Northern Line Packet Co., 7 Mo. App. 265.

Breaking of ship's mooring to wharf.—**Miller v. Ocean Steamship Co.**, 118 N. Y. 199.

Falling of gang plank.—**Eagle Packet Co. v. Defries**, 94 Ill. 598, 34 Am. Rep. 245.

Falling of berth on boat.—**Smith v. British, etc., Packet Co.**, 46 N. Y. Super. Ct. 86.

But a presumption of negligence does not arise from:

Rail breaking and car running off the track.—**Cole v. New York Cent. R. Co.**, 48 N. Y. 679.

Passenger thrown from platform in starting of car.—**Hayes v. Forty-Second St., etc., R. Co.**, 97 N. Y. 259.

Passenger thrown down by jerk in rounding curve.—**Ayers v. Rochester R. Co.**, 156 N. Y. 104.

Failure to carry to destination.—**Mt. Adams, etc., R. Co. v. Isaacs**, 18 Ohio C. C. 177.

17. Holbrook v. Utica, etc., R. Co., 12 N. Y. 238, 64 Am. Dec. 502; **Pittsburgh, etc., R. Co. v. Andrews**, 39 Md. 329, 71 Am. Rep. 568.

18. Pennsylvania Co. v. Marion, 104 Ind. 239; Miller v. St. Louis R. Co., 5 Mo. App. 471.

19. Tuley v. Chicago, etc., R. Co., 41 Mo. App. 432.

20. Indianapolis, etc., R. Co. v. Rutherford, 29 Ind. 82, 92 Am. Dec. 336; **Morel v. Mississippi Valley L. Ins. Co.**, 4 Bush (Ky.) 535; **Todd v. Old Colony R. Co.**, 3 Allen (Mass.) 21, 80 Am. Dec. 49; **Pittsburg, etc., R. Co. v. McClurg**, 56 Pa. St. 294; **Texas, etc., R. Co. v. Overall**, 82 Tex. 247; **Weaver v. Baltimore, etc., R. Co.**, 22 Wash. L. Rep. (D. C.) 393.

21. Rolette v. Great Northern R. Co. (Minn.), 97 N. W. 431. See also **Willis v. Long Island R. Co.**, 34 N. Y. 670; **Louisville, etc., R. Co. v. Bisch**, (Ind.), 22 N. E. 662; **Cleveland, etc., R. Co. v. Moneyhun** (Ind.), 44 N. E. 1106, 34 L. R. A. 141; **Camden, etc., R. Co. v. Hoosey**, 99 Pa. 492, 44 Am. Rep. 120; **Worthington v. Railway Co.**, 64 Vt. 107, 23 Atl. 590, 15 L. R. A. 326; **Ward v. Railway Co.**, 102 Wis. 215, 78 N. W. 442; **Fisher v. Railway Co. (W. Va.)**, 24 S. E. 570, 33 L. R. A. 69.

carrier between the parties, and that it does not apply to persons holding other relations.²² But it is held elsewhere that a contractual relation is not essential, and that the same presumption arises when such relation does not exist.²³ In an action against a street railway company where the plaintiff's evidence showed that his wagon was standing on one of the defendant's tracks, and that in front of him were two cars, and that, as the second car moved up a grade, the trolley wheel slipped, and the car slipped backward and struck the car back of it, when either the force of the collision drove the rear car against the wagon, or the motorman of that car moved it backward to avoid a collision, it was held that the evidence raised a presumption of negligence on the part of the defendant, and made it incumbent on him to show due care.²⁴ So, where the plaintiff, while walking across the street, was struck by a stick which flew from the hands of the defendant's car conductor, who was using it to free the trolley, which had caught in the frog at the junction of some over-head wires;²⁵ where plaintiff's horse was frightened by a loud and unusual noise proceeding from an electric car, and a volume of smoke issuing therefrom,

22. *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. 613; *Young v. Bransford*, 12 Lea (Tenn.) 232. In an action against the company brought by a person not a passenger, the law has been held in some cases not to raise a presumption of negligence against the defendant. In such cases, on the issue of defendant's negligence, the burden of proof rests on the plaintiff, and he cannot recover without establishing the fact alleged by a fair preponderance of evidence. *Button v. Hudson River R. Co.*, 18 N. Y. 248; *Philadelphia City Pass. Ry. Co. v. Henrice*, 92 Pa. St. 431; *North Chicago City Ry. Co. v. Louis* (Ill.), 27 N. E. 451; *O'Neil v. Dry Dock*, etc., R. Co., 129 N. Y. 125; *Thomas v. Citizens' Pass. Ry. Co.*, 132 Pa. St. 504; *Roller v. Sutter St. R. Co.*, 66 Cal. 230; *North Side St. Ry. Co. v. Want* (Tex.), 15 S. W.

40; *Gumb v. Twenty-third St. Ry. Co.*, 58 N. Y. Super. Ct. 1; *Girard College Pass. Ry. Co. v. Middleton*, 3 W. N. C. (Pa.) 486; *Potts v. Chicago City Ry. Co.*, 33 Fed. Rep. 610.

23. *Rose v. Stephens Transp. Co.*, 11 Fed. 483; *Judson v. Giant Powder Co.*, 107 Cal. 549.

24. *Campbell v. Consol. Tract. Co.*, 201 Pa. 167, 50 Atl. 829.

25. *Manning v. West End St. R. Co.*, 166 Mass. 230, 44 N. E. 135; *Denver Consol. Elec. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566, holding that the jury may infer the unfitness of a switch stick from the fact that it flew from the hands of a conductor and injured a person on the street while it was being used to free a trolley from a frog in the wires, as this may show that there was unnecessary danger in its use without India rubber gloves.

and the horse ran away, and plaintiff was injured;²⁶ and where plaintiff was injured while driving under defendant's elevated railroad, by an iron bar falling from such railroad, raises a presumption of negligence on the part of the defendant.²⁷ The unexplained breaking of an ear and guy used by an electric railway company raises a presumption of negligence on the part of the company.²⁸ And that an electric wire had become disconnected or detached from its fastening, and hung down in a public alley so as to endanger public travel,²⁹ and the falling of a trolley wire into the street,³⁰ raises a presumption of negligence on the part of the company which maintains such wire. But the mere breaking of a trolley wire does not raise a presumption of negligence against a traction company in an action for personal injuries resulting from the fright of a horse caused by the breaking of such wire.³¹ Where the span wire of an electric railroad breaks and falling to the sidewalk strikes and burns a pedestrian, the doctrine, *res ipsa loquitur*, applies, and there is a presumption of negligence on the defendant's part which it is called upon to explain or rebut.³² Where plaintiff's horse upon stepping upon a rail of defendant's electric railroad, sprung into the air and fell upon the track where it died in a few minutes, and plaintiff in putting his hands on the hames of the harness received a severe shock, the facts were sufficient to justify the inference that the accident was due to the agency of the defendant.³³ The unexplained breaking down of a scaffold while an employe is thereon is presumptive evidence of the master's negligence.³⁴ Evidence that plaintiff while somewhat intoxicated signaled a west-bound car, and to reach it crossed over the other track on which a car was approaching at a fast trot, about

26. Richmond Ry. & Elec. Co. v. Hudgins (Va.), 41 S. E. 736.

27. Hogan v. Manhattan R. Co., 149 N. Y. 23, 43 N. E. 403.

28. Uggla v. West End St. R. Co., 4 Am. Electl. Cas. 389, 160 Mass. 351, 35 N. E. 1126.

29. Denver Consol. E. Co. v. Simpson, 21 Colo. 371, 31 L. R. A. 566, 41 Pac. 499.

30. O'Flaherty v. Nassau Elec. R. Co., 34 App. Div. (N. Y.) 75, 7 Am. Electl. Cas. 535, 54 N. Y. Supp. 96, affd. 59 N. E. 1128, 165 N. Y. 624.

31. Kepner v. Harrisburg Tract. Co., 183 Pa. 24, 38 Atl. 416.

32. Jones v. Union Ry. Co., 18 App. Div. (N. Y.) 267, 46 N. Y. Supp. 321.

33. Clarke v. Nassau Elec. R. Co., 9 App. Div. (N. Y.) 51, 41 N. Y. Supp. 78.

34. Solarz v. Manhattan R. Co., 29 N. Y. Supp. 1123, 59 N. Y. St. Rep. 537, 8 Misc. Rep. (N. Y.) 856, 31 Abb. N. C. 426.

300 feet away, and that as he took hold of the west-bound car he fell, and the east-bound car passed over his foot, raises the presumption that there was negligence on the part of those in charge of the east-bound car which was the cause of the accident.³⁵ But, an accident to a person waiting for a street car, who is struck by the sudden switching of the car upon a side track, does not make a *prima facie* case of negligence on the part of the carrier.³⁶ The mere fact that an employe is killed by a fall from a hand car while crossing a bridge of his employer's railroad is not evidence that the killing was caused by the negligence of the employer's agents or servants.³⁷ Negligence on the part of the driver of a horse car cannot be inferred from his mere failure to stop the car within a very short distance from a child who has fallen upon the track.³⁸ Negligence on the part of an employer cannot be inferred from the mere fact that an accident happened to an employe.³⁹ The doctrine, *res ipsa loquitur*, does not apply in an action for personal injuries by the conductor of a cable car of one company against another company, based on the fact that the latter company was repairing the crossing of the lines of the two companies, where the circumstances would justify the inference that the accident, which was caused by the displacement of the slot in which the grip ran, was caused by the negligence of the gripman of the plaintiff's car in disregarding directions to run slowly over the crossing.⁴⁰ A *prima facie* case is not made out against a street railroad company in an action for personal injuries, based upon the breach of an *ultra vires* city ordinance, by the mere introduction of the ordinance in evidence without objection, in the absence of proof that defendant agreed to be bound by it.⁴¹ The statutes in some States provide that in certain cases proof of injury shall raise a presumption of negligence, which it devolves upon the defendant to rebut.⁴² Proof of the violation of such a statute is evi-

35. *Forwood v. Toronto*, 22 Ont. Rep. 351, 56 Am. & Eng. R. Cas. 445.

36. *Donovan v. Hartford St. R. Co.*, 65 Conn. 201, 32 Atl. 350.

37. *Jones v. Alabama Mineral R. Co.*, 107 Ala. 400, 18 So. 30.

38. *Lavin v. Second Ave. R. Co.*, 12 App. Div. (N. Y.) 381, 42 N. Y. Supp. 512.

39. *Lincoln St. R. Co. v. Cox*, 48 Neb. 807, 67 N. W. 740, 4 Am. & Eng. R. Cas. N. S. 273.

40. *Bailey v. Citizens' R. Co.*, 152 Mo. 449, 52 S. W. 406.

41. *Sanders v. Southern Elec. R. Co.*, 147 Mo. 411, 48 S. W. 855.

42. *Chicago, etc., R. Co. v. Trottet*, 60 Miss. 442; *Mobile, etc., R. Co. v. Dale*, 61 Miss. 206, 20 Am. & Eng.

dence simply of one of the elements of negligence, that defendant failed to exercise ordinary care, and the elements of duty and proximate cause of the injury have still to be established.⁴³

§ 7. Reasons for presumption of negligence.—The reasons for the presumption of negligence from the circumstances attending the injury to a passenger have been variously stated by the courts. In some cases the presumption is based upon the ground that the carrier not only has the entire control of the vehicle, but also of the track upon which it runs, and it owes a duty to the passenger to keep both in a perfect and safe condition for the transportation of passengers with entire safety, so far as human prudence can accomplish these results, and that the happening of an accident causing injury to the passenger is *prima facie* evidence of a violation of this duty in some respect.⁴⁴ In other cases it is said that where an act takes place which usually, and according to the ordinary course of things, would not happen if proper care was exer-

R. Cas. 651; Vicksburg, etc., R. Co. v. Phillips, 64 Miss. 693, 30 Am. & Eng. R. Cos. 587; Columbus, etc., R. Co. v. Kennedy, 78 Ga. 646, 31 Am. & Eng. R. Cas. 92; Central R. Co. v. Brinson, 64 Ga. 475, 8 Am. & Eng. R. Cas. 343; Vickers v. Atlanta, etc., R. Co., 64 Ga. 306, 8 Am. and Eng. R. Cas. 337. In Mississippi and Georgia the presumption against the railroad company arises in all cases of injury. In other states where there is such a statute the presumption arises only in cases of injury to property by fire.

43. Briggs v. New York Cent. R. Co., 72 N. Y. 26; McGrath v. New York, etc., R. Co., 63 N. Y. 522; Philadelphia, etc., R. Co. v. Stebbing, 62 Md. 504, 19 Am. & Eng. R. Cas. 36; Correll v. Baltimore, etc., R. Co., 38 Iowa, 120; Hoppe v. Chicago, etc., R. Co., 61 Wis. 357; New Orleans, etc., R. Co. v. Toulme, 59 Miss. 284; Pennsylvania R. Co. v. Hensil, 70 Ind. 569; Chicago, etc., R. Co. v. Boggs, 101 Ind. 522, 51 Am. Rep. 761; Au-

gusta, etc., R. Co. v. McElmurry, 24 Ga. 75; Philadelphia, etc., R. Co. v. Kerr, 25 Md. 521; Hanlon v. South Boston, etc., R. Co., 129 Mass. 31; Hayes v. Michigan, etc., R. Co., 111 U. S. 228, 15 Am. & Eng. R. Cas. 394; Clark v. Boston, etc., R. Co., 64 N. H. 323, 31 Am. & Eng. R. Cas. 548; Atlanta, etc., R. Co. v. Wyly, 65 Ga. 120, 8 Am. & Eng. R. Cas. 262; Karle v. Kansas City, etc., R. Co., 55 Mo. 476; Quincy, etc., R. Co. v. Wellhoener, 72 Ill. 60. In Tennessee only is proof of a violation of the statute at the time of the injury held to be conclusive evidence of defendant's liability. Tennessee R. Co. v. Walker, 11 Heisk (Tenn.) 383; Nashville, etc., R. Co. v. Thomas, 5 Heisk (Tenn.) 262; Collins v. East Tennessee R. Co., 9 Heisk, 841.

44. Edgerton v. New York, etc., R. Co., 39 N. Y. 229; Curtiss v. Rochester, etc., R. Co., 18 N. Y. 534; Walker v. Erie R. Co., 63 Barb. (N. Y.) 260; Dougherty v. Missouri Pac. R. Co., 9 Mo. App. 484.

cised, it is to be presumed that such care was not observed.⁴⁵ In other cases the reason for the presumption is put upon the ground that the carrier usually has almost exclusively the means of knowing what actually occasioned the injury, either within its possession or under its control, and likewise the means of explaining how it occurred, while the passenger as a rule is without knowledge of the facts necessary to establish the carrier's negligence.⁴⁶

§ 8. Rebutting presumption.—There must be reasonable evidence of negligence, but when the thing causing the injury is shown to be under the control of the carrier, and the accident is such as, in the ordinary course of business, does not happen if reasonable care is used, it does, in the absence of explanation by the carrier, afford sufficient evidence that the accident arose from a want of care on its part and thus cast upon the carrier the burden of disproving it.⁴⁷ To rebut such presumption the carrier must show that the injury was caused without its fault or negligence or that the accident occurred from circumstances against which human prudence and foresight could not guard,⁴⁸ or was caused by an act

45. Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Breen v. New York Cent., etc., R. Co., 109 N. Y. 297; Holbrook v. Utica, etc., R. Co., 12 N. Y. 236, 64 Am. Dec. 502; Rose v. Stephens, etc., Transp., 20 Blatchf. (U. S.) 411.

46. Delaware, etc., R. Co. v. Napheys, 90 Pa. St. 135; Stevens v. European, etc., R. Co., 66 Me. 64; Saltonstall v. Stockton, Taney (U. S.) 11, 13 Pet. (U. S.) 181.

47. Breen v. New York Cent., etc., R. Co., 109 N. Y. 297; Bush v. Barnett, 96 Cal. 202; Feital v. Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720; Bonner v. Grumbach, 2 Tex. Civ. App. 482; Thatcher v. Great Western R. Co. 4 U. C. C. P. 543; Flauvery v. Waterford, etc., R. Co., 11 Ir. R. C. L. 30.

48. N. Y.—Bowen v. New York Cent. R. Co., 18 N. Y. 408, 72 Am. Dec. 529; Curtis v. Rochester, etc., R. Co., 18 N. Y. 534, 75 Am. Dec. 258;

Holbrook v. Utica, etc., R. Co., 12 N. Y. 26, 64 Am. Dec. 502; Wilkie v. Bolster, 3 E. D. Sm. (N. Y.) 327; Brehm v. Great Western R. Co., 34 Barb. (N. Y.) 256.

Ala.—St. Louis, etc., R. Co. v. Mitchell, 57 Ark. 418.

Cal.—Bush v. Barnett, 96 Cal. 202; Fairchild v. California Stage Co., 13 Cal. 599.

Ga.—Yonge v. Kinney, 28 Ga. 111.

Ill.—Toledo, etc., R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Pittsburgh, etc., R. Co. v. Thompson, 56 Ill. 138; Galena, etc., R. Co. v. Yarwood, 17 Ill. 509, 65 Am. Dec. 682; Heazle v. Indianapolis, etc., R. Co., 76 Ill. 501.

Ind.—Cleveland, etc., R. Co. v. Newell, 104 Ind. 264, 54 Am. Rep. 312.

Ky.—Central Pass. R. Co. v. Kuhn 86 Ky. 578, 9 Am. St. Rep. 309; Louisville, etc., R. Co. v. Ritter, 85 Ky. 368.

of God or *vis major*,⁴⁹ or by the tortious act of a stranger against which the utmost care and diligence could not have guarded,⁵⁰ or by the contributory negligence of the passenger,⁵¹ or by the violation of some regulations of the carrier known to the passenger.⁵² The presumption that a person on a train used for the carrying of passengers is, in the absence of countervailing circumstances, a passenger and rightfully there, may be rebutted, and does not apply to one seen to go on the platform of a mail car, or of some other car not run for the accommodation or use of passengers.⁵³

§ 9. Other presumptions.—Evidence showing that plaintiff was riding on a ticket purchased at defendant's ticket office, and at the time of the collision was a passenger on the train of the defendant, which was being operated over its railroad, is *prima facie* proof that the train was being operated by and in charge of defendant's servants.⁵⁴ Where plaintiff took passage on defendant's freight train under an agreement with the brakeman, and did not ride in the caboose but on a coal car, it was not to be presumed that the brakeman had authority to make such agreement, or that plaintiff acquired the relation of passenger by getting on the car, but the burden was on plaintiff to prove such facts.⁵⁵ Courts will take

La.—*Julien v. Steamer Wade* *Hampton*, 27 La. Ann. 377.

Md.—*Stockton v. Frey*, 4 Gill (Md.) 406, 45 Am. Dec. 138.

Mass.—*Ware v. Gay*, 11 Pick. (Mass.) 106.

Minn.—*Eldridge v. Minneapolis*, etc., R. Co., 32 Minn. 253.

Mo.—*Sawyer v. Hannibal*, etc., R. Co., 37 Mo. 240, 90 Am. Dec. 382.

Pa.—*Reading City Pass. R. Co. v. Eckert* (Pa.), 4 Atl. 530; *Pittsburg*, etc., R. Co. v. *Pillow*, 76 Pa. St. 510; *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225, 3 Am. Rep. 581; *Sullivan v. Philadelphia*, etc., R. Co., 30 Pa. St. 234, 72 Am. Dec. 698; *Laing v. Colder*, 8 Pa. St. 483, 49 Am. Dec. 533.

Va.—*Baltimore*, etc., R. Co. v. *Wrightman*, 29 Gratt. (Va.) 431, 26 Am. Rep. 384; *Farish v. Reigle*, 11 Gratt. (Va.) 697, 62 Am. Dec. 666.

49. *Gillespie v. St. Louis*, etc., R. Co., 6 Mo. App. 554; *Ellet v. St. Louis*, etc., R. Co., 76 Mo. 518; *McClary v. Sioux City*, etc., R. Co., 3 Neb. 44, 19 Am. Rep. 631.

50. *Deyo v. New York Cent. R. Co.*, 34 N. Y. 9; *Worth v. Chicago*, etc., R. Co., 51 Fed. 171; *Fredericks v. Northern Cent. R. Co.*, 157 Pa. St. 103; *Latch v. Rummer R. Co.*, 27 L. J. Exch. 155.

51. *Louisville*, etc., R. Co. v. *Ritter*, 85 Ky. 368. See *Contributory Negligence*, chap. 25.

52. *Chicago*, etc., R. Co. v. *Winfrey* (Neb.), 93 N. W. 526.

53. *People v. Douglass*, 87 Cal. 281, 25 Pac. 417; *Bryant v. Chicago*, etc., R. Co., 53 Fed. 997.

54. *Lake Erie & W. R. Co. v. DeLong*, 109 Ill. App. 241.

55. *Missouri*, etc., R. Co. v. *Huff* (Tex. Civ. App.), 81 S. W. 525, nor

judicial notice of the functions of such railway officers as ticket agents, conductors and drivers,⁵⁶ and passengers are presumed to know these functions,⁵⁷ and the regulations of the companies to which they trust themselves.⁵⁸ But there is no presumption that a passenger knew that he must give up his ticket before leaving a boat, having purchased the ticket on the boat.⁵⁹

§ 10. Presumptions as to contributory negligence.—The presumption of contributory negligence on the part of the person injured usually follows the rule as to the burden of proof. In jurisdictions where the burden is on the plaintiff to prove affirmatively his freedom from contributory negligence, the presumption, in the absence of proof, is that plaintiff was guilty of contributory negligence.⁶⁰ In those jurisdictions where the burden is not on the plaintiff to prove affirmatively his freedom from contributory negligence, but is on the defendant to prove such contributory negligence, if he would avail himself of that as a defence, the presumption, as a matter of course, in the absence of proof, is that plaintiff was not guilty of contributory negligence. The presumption thus raised in either case is rebutted when testimony to the contrary is presented sufficient to overcome such presumption.⁶¹ In New York it has been held that, in an action to recover damages for an injury occurring through negligence, it is not to be presumed that plaintiff was free from fault;⁶² and that no presumption exists, in the absence of proof, that an injured person was exercising due

would an inference arise that the brakeman had authority to agree to carry passengers merely because his employer knew that such acts were done, as they might be done while the company was endeavoring to enforce rules forbidding such acts.

56. Seamon v. Koehler, 122 N. Y. 646, 33 St. Rep. (N. Y.) 729, 25 N. E. 353; Dye v. Virginia Midland R. Co., 19 Wash. L. Rep. (D. C.) 369.

57. Dye v. Virginia Midland R. Co., *supra*.

58. Southern R. Co. v. Kendrick, 40 Miss. 387, 90 Am. Dec. 332; Macon, etc., R. Co. v. Johnson, 38 Ga.

409; Dye v. Virginia Midland R. Co., *supra*.

59. Standish v. Narragansett Steamship Co., 111 Mass. 512, 15 Am. Rep. 66; Griffith v. Cave, 22 Cal. 534, 83 Am. Dec. 82.

60. See cases cited from the states which hold the rule stated as to the burden of proof of contributory negligence, § 13, *post*.

61. See cases cited from the jurisdictions holding the rule stated as to the burden of proof as to contributory negligence, § 13, *post*.

62. Warner v. New York Cent. R. Co., 44 N. Y. 465.

care at the time of the injury.⁶³ It has also been held in that State that, in the absence of proof of any circumstances importing negligence on the injured person's part, such negligence cannot be presumed.⁶⁴ And in a death case it was held that, in the absence of direct evidence of negligence on the part of the deceased, it may be presumed in his favor that he was desirous of preserving himself from injury.⁶⁵ In North Carolina, where the burden of proving freedom from contributory negligence is on the plaintiff, it is nevertheless held that the presumption is against contributory negligence, if there is no evidence of the fact, even in the absence of a statute making it a matter of affirmative defense.⁶⁶ The United States courts hold the same rule.⁶⁷ In other States where contributory negligence is a matter of affirmative defense it has been held that there are no presumptions against a plaintiff in an action for death or injuries resulting from negligence, of a want of due care and diligence, nor has he the burden of proving their exercise affirmatively;⁶⁸ that a woman will not be presumed to have been guilty of contributory negligence from the mere fact that she fell from the platform of a street car;⁶⁹ that it is not *prima facie* the fault of a passenger where he is injured by riding on the foot-board of a trolley car;⁷⁰ that the presumption is that a person thrown from his load and fatally injured at a railroad crossing was exercising ordinary care and caution;⁷¹ and that it must be presumed that a person who received injuries causing death, when no one saw the accident, was exercising due care, if there is no evidence to the contrary.⁷²

63. Reynolds v. New York Cent., etc., R. Co., 58 N. Y. 248.

64. Button v. Hudson River R. Co., 18 N. Y. 248. See Massoth v. Delaware & Hudson Canal Co., 64 N. Y. 524, holding that there is no presumption of law that a person about to cross a railroad track in a vehicle driven by another fails to look for a train.

65. Morrison v. New York Cent., etc., R. Co., 63 N. Y. 643.

66. Norton v. North Carolina R. Co., 122 N. C. 910, 29 S. E. 886.

67. Texas & P. R. Co. v. Gentry, 160 U. S. 353; Baltimore & Ohio R.

Co. v. Griffith, 159 U. S. 603; Grand Trunk R. Co. v. Ives, 144 U. S. 408.

68. Bromley v. Birmingham M. R. Co. (Ala.), 11 So. 341.

69. Metropolitan R. Co. v. Snashall (D. C. App.), 22 Wash. L. Rep. 377.

70. Elliott v. Newport St. R. Co. (R. I.), 23 L. R. A. 208, 28 Atl. 338, 18 R. I. 707.

71. Lillstrom v. Northern Pac. R. Co. (Minn.), 20 L. R. A. 587, 55 N. W. 624.

72. Reichla v. Gruensfelder, 52 Mo. App. 43.

§ 11. Presumption arising from instinct of self-preservation.

—There seems to be a conflict of authority as to whether it should be presumed, in the absence of evidence, that a traveler, who was killed at a street crossing stopped, looked, and listened before crossing the track. In Kansas it has been held that “the very definition of ordinary care implies a presumption that it will usually be exercised. It is because people ordinarily, in crossing a railroad track, look and listen for their own protection, that a failure to do so is held to be negligence. It can never be presumed in the absence of evidence that a person fails to do that which people ordinarily do to avoid injury.”⁷³ In an Illinois case the court said: “The rule in this State undoubtedly is that in suits for personal injuries caused by the negligence of another, the plaintiff must allege and prove that he was at the time in the exercise of due care, and, when the action is for causing the death of another, the burden is upon the administrator to show that the deceased exercised ordinary care to avoid the injury.”⁷⁴ But in the latter class of cases and especially where no one saw the killing, direct testimony as to such care is not necessary, but it may be inferred from the circumstances of the case as shown by the evidence.⁷⁵ In a Pennsylvania case the court said: “The common law presumption is that everyone does his duty until the contrary is proved, and in the absence of all evidence on the subject, the presumption is that the decedent observed the precautions which the law prescribed. In the case at bar, no witness was called who saw the occurrence. There is no evidence whatever whether in fact the decedent did stop, and look and listen. The presumption is that he did. Proof of that fact was no part of the plaintiff’s case. The presumption is of fact merely, and may be rebutted, but we are without evidence on the subject.”⁷⁶ In New York it has been held that the burden of proof is on the plaintiff to show that in approaching a railroad crossing he looked and listened for the approaching train. The court said, “In the case of a death by accident at a railroad crossing it must often happen that the circumstances immediately preceding it, and the acts and conduct

73. Chicago, R. I. & P. Ry. Co. v. Hinds, 56 Kan. 758, 44 Pac. 993; Dewald v. Railway Co., 44 Kan. 587, 24 Pac. 1101. And see McBride v. Northern Pac. R. Co., 19 Oreg. 64, 23 Pac. 814.

74. Illinois Cent. R. Co. v. Nowicki, 148 Ill. 29, 35 N. E. 358.

75. Chicago & A. R. Co. v. Cary, 115 Ill. 115, 3 N. E. 519.

76. Schum v. Pennsylvania R. Co., 107 Pa. St. 8, 52 Am. Rep. 468.

of the deceased, are left in great obscurity. But the rules of law governing the right of recovery are the same as in other cases, although slighter evidence of compliance with the duty cast upon a plaintiff might be deemed sufficient than where the injured person was alive and competent to testify."⁷⁷ In a recent Iowa case the court said: "The origin of the rule in this State as to the presumption of action dictated by the instinct of self-preservation is due to the doctrine that the burden of showing affirmatively freedom from contributory negligence is on the plaintiff, and was introduced in order to avoid the evident injustice of such a doctrine in cases where there was no evidence whatever one way or the other as to the exercise of care by the injured party, and no such evidence was obtainable by reason of the death of the party injured, and absence of any proof as to the circumstances attending the injury. The rule has no application where there is direct evidence of contributory negligence at the instant of the accident."⁷⁸ It has never been held that the presumption from the instinct of self-preservation constitutes affirmative proof of any specific act, or the exercise of any specific care.⁷⁹ In view of the fact that the rule generally applied to the conduct of persons crossing the tracks of steam railroads that the omission to "stop, look, and listen" before crossing the tracks is negligence, as matter of law, is only applicable to street railways where the attendant circumstances are such that reasonable care and prudence would dictate such precautions, and the mandatory duty to look and listen is not applied with the same rigidity to pedestrians crossing street railroad tracks at the intersecting streets, it being the duty of the railroad company to have its cars under control as they approach such crossings, it would seem that where there is no evidence upon the question as to whether a person who was killed at a street railroad crossing looked and listened before crossing the track, that the presumption would be even stronger in favor of his having taken the necessary precautions to prevent injury. The presumption that the decedent who was killed at a crossing per-

77. Rodrian v. New York, etc., R. Co., 125 N. Y. 526, 26 N. E. 741.

78. Ames v. Waterloo, etc., R. T. Co., 1 St. Ry. Rep. 199 (Iowa), 95 N. W. 161; Bell v. Incorporated Town of Clarion, 113 Iowa, 126.

79. Ames v. Waterloo, etc., R. T.

Co., *supra*; Metz v. St. Paul City R. Co. (Minn.), 92 N. W. 502; McGee v. Consol. St. R. Co., 102 Mich. 107; Watkins v. Union Tract. Co., 194 Pa. St. 564; Nugent v. Tract. Co., 181 Pa. St. 160.

formed his legal duty of stopping, looking, and listening is rebutted when it appears from the evidence that he stopped on the track immediately in front of an approaching locomotive.⁸⁰ If a person about to cross a track could have seen an approaching train if he had stopped and looked, it will be presumed, in the absence of contradictory evidence, that he did not look, or that, if he did look, he did not heed.⁸¹

§ 12. The burden of proving negligence.—The burden of proof is upon the plaintiff, as a general rule, to prove, in an action to recover damages for a personal injury sustained, the negligence of the carrier, and in the absence of any presumption of negligence on the part of the defendant, the plaintiff must prove by a fair preponderance of the evidence facts which show that the negligence of the defendant was the proximate cause of the injury.⁸² Having done this, the plaintiff is entitled to recover, except where the rule of law is maintained that plaintiff also has the burden of proving his own freedom from contributory negligence.⁸³ But the plaintiff is not

80. Pennsylvania R. Co. v. Moody, 126 Pa. St. 244, 17 Atl. 590; Bellefontaine R. Co. v. Schneider, 24 Ohio St. 670.

81. Pennsylvania R. Co. v. Righter, 42 N. J. L. 180; Myers v. Baltimore & O. R. Co., 150 Pa. St. 386, 24 Atl. 747; Miller v. Truesdale, 56 Minn. 274, 57 N. W. 661; Kallmerten v. Cowen, 111 Fed. 297, 49 C. C. A. 746.

82. Searles v. Manhattan R. Co., 101 N. Y. 661, 25 Am. & Eng. R. Cas. 358; Cordell v. New York Cent., etc., R. Co., 75 N. Y. 330; Seybolt v. New York, etc., R. Co., 95 N. Y. 562, 47 Am. Rep. 75, 18 Am. & Eng. R. Cas. 162; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 291; Oysterbank v. Gardner, 49 N. Y. Super. Ct. 263; McCaig v. Erie R. Co., 8 Hun (N. Y.), 599; Cox v. Wilmington City R. Co. (Del.), 53 Atl. 569; Pennsylvania, etc., R. Co. v. Spearen, 47 Pa. St. 300; Holbrook v. Utica, etc., R. Co., 12 N. Y. 236; Curtis v.

Rochester, etc., R. Co., 18 N. Y. 524; Cleveland, etc., R. Co. v. Troesch, 68 Ill. 545; Allyn v. Boston, etc., R. Co., 105 Mass. 77; Brown v. Congress, etc., St. R. Co., 49 Mich. 153; Chicago, etc., R. Co. v. Smith, 46 Mich. 504; Willoughby v. Chicago, etc., R. Co., 37 Iowa, 432; Button v. Frink, 51 Conn. 342; Herschberger v. Lynch, 11 Atl. Rep. (Pa.) 642; Mynning v. Detroit, etc., R. Co., 67 Mich. 677; Chicago, etc., R. Co. v. Felton, 125 Ill. 458; Chicago, etc., R. Co. v. Mock, 88 Ill. 87; Hewes v. Philadelphia, etc., R. Co., 76 Md. 154; Crandall v. Goodrich Transp. Co., 16 Fed. 75; Allen v. Willard, 57 Pa. St. 374; Chicago, etc., R. Co. v. Trotter, 61 Miss. 417; Herstine v. Lehigh Valley R. Co., 151 Pa. St. 244.

83. The burden of proving the absence of contributory negligence is placed upon the plaintiff in a number of States. See § 13, *post*, and cases there cited.

bound to make out his case beyond all reasonable doubt, or so as to exclude every other possible theory.⁸⁴ It is necessary for plaintiff to establish by a preponderance of evidence circumstances from which it may be inferred that there is a reasonable probability that the accident resulted from the want of ordinary care, or negligence, of the defendant, or that it could not have been produced except by the operation of abnormal causes.⁸⁵ The plaintiff must prove something which warrants the inference of negligence on the defendant's part, and not leave his case upon facts just as consistent with care and prudence as with the opposite, or so that there may not appear reasonable grounds upon which to impute negligence to the defendant.⁸⁶ It is not necessary to prove every act of negligence charged or every material fact alleged by the plaintiff, but the jury need only to be satisfied by a preponderance of the evidence of the negligence of the defendant.⁸⁷ When plaintiff has introduced evidence sufficient, as a matter of law, to charge the defendant with negligence, or has shown facts sufficient to create a presumption of negligence, the burden of proof shifts to the defendant.⁸⁸ Where the plaintiff is a passenger on a street car, a *prima facie* case of negligence is made out by showing the happening of the accident during the course of transportation; and, if the injury was caused by apparatus wholly under its control, furnished and applied by it, a presumption of negligence on the part of the company is raised, and the burden is on the latter to prove itself not guilty of negligence.⁸⁹ But, where the agencies which, united,

84. Seybolt v. New York, etc., R. Co., 95 N. Y. 562; Whitney v. Clifford, 57 Wis. 156; Welch v. Jugenheimer, 56 Iowa, 11, 41 Am. Rep. 77; Elliot v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668; Stratton v. Central City Horse R. Co., 95 Ill. 525, 1 Am. & Eng. R. Cas. 115.

85. Hayes v. Michigan Cent. R. Co., 111 U. S. 228, 241; 15 Am. & Eng. R. Cas. 394; Philadelphia v. Stebbing, 62 Md. 504, 19 Am. & Eng. R. Cas. 36; Seybolt v. New York, etc., R. Co., *supra*.

86. Hayes v. Forty-second St., etc., R. Co., 97 N. Y. 259; McCaig v. Erie R. Co., 8 Hun (N. Y.), 599.

87. Johnson v. Agricultural Ins.

Co., 25 Hun (N. Y.), 251; Pittsburgh, etc., R. Co. v. Gray, 59 N. E. (Ind. App.) 1000; Seybolt v. New York, etc., R. Co., 95 N. Y. 562.

88. Pennsylvania Canal Co. v. Bently, 66 Pa. St. 30; Missouri Pac. R. Co. v. Foreman, 73 Tex. 311; Bischoff v. Schultz, 5 N. Y. Super. Ct. 757; Giles v. Diamond State Iron Co., 8 Atl. Rep. (Del.) 368.

89. Chicago City Ry. Co. v. Morse, 98 Ill. App. 662, affd. 197 Ill. 327, 64 N. E. 304; Brimer v. Illinois Cent. R. Co., 101 Ill. App. 198; Davis v. Paducah Ry. & Light Co., 24 Ky. Law Rep. 135, 68 S. W. 140; Chicago City Ry. Co. v. Carroll, 102 Ill. App. 202.

caused an injury to a passenger, were not all within the control of the carrier, the burden of proof is on the plaintiff to show the negligence of the defendant which caused the injury, since in such case negligence could not be inferred from the mere fact of injury.⁹⁰ In an action for personal injuries sustained by the plaintiff by his being thrown from a street car on its jumping the track, though plaintiff made a *prima facie* case by proof that the car was going at a "pretty good rate," and that the accident happened at a point where there were side tracks leading into the car stable, the burden nevertheless remained on him, when the proof was all in, to show negligence on the part of the defendant.⁹¹ A common carrier can only rebut the presumption that an injury to its passengers from an accident to its conveyance was due to its negligence, by showing that the accident occurred from circumstances against which human foresight and prudence could not guard.⁹² The burden of proof that a non-obvious risk of an employment was in a given case assumed by the servant rests on the carrier.⁹³

§ 13. The burden of proof as to contributory negligence.— The courts of the several States hold conflicting views upon the question as to whether the burden of proving contributory negligence, or its absence, is upon the plaintiff or the defendant. In a number of the States it is held that, inasmuch as the plaintiff cannot recover unless the injured party was in the exercise of ordinary care at the time of the injury, he must prove affirmatively that the injury occurred without negligence on his part,⁹⁴ and in some of these States, it is held that he must both allege and prove his freedom from contributory negligence.⁹⁵ In New York the rule

90. Elwood v. Chicago City Ry. Co., 90 Ill. App. 397.

91. Hollahan v. Metropolitan St. Ry. Co., 73 App. Div. (N. Y.) 164, 76 N. Y. Supp. 751.

92. Bowen v. New York Cent. R. Co., 18 N. Y. 408.

93. Dowd v. New York, etc., R. Co., 170 N. Y. 459.

94. Archer v. New York, etc., R. Co., 106 N. Y. 589; Warner v. New York Cent., R. Co., 44 N. Y. 465; Kuhnen v. Union R. Co., 10 App. Div. (N. Y.) 195, 41 N. Y. Supp. 774; Deyo v. New York Cent. R. Co.,

34 N. Y. 9; Young v. Citizens' St. R. Co., 148 Ind. 54, 44 N. E. 927, 47 N. E. 142; Park v. O'Brien, 23 Conn. 339; Sirk v. Marion St. R. Co., 39 N. E. (Ind.) 421; Bonce v. Dubuque St. Ry. Co., 53 Iowa, 278, 36 Am. Rep. 221; Taylor v. Carew Mfg. Co., 143 Mass. 470; Mynning v. Detroit, etc., R. Co., 67 Mich. 677; City of Vicksburg v. Hennessey, 54 Miss. 391; Owens v. Richmond, etc., R. Co., 88 N. C. 502; Cox v. South Shore & B. St. Ry. Co. (Mass.), 65 N. E. 823.

95. Cincinnati, etc., R. Co. v. Butler, 103 Ind. 31, 23 Am. & Eng.

is that, in all actions to recover damages resulting from the negligence of the carrier, the burden of proof is on the plaintiff to show affirmatively by a preponderance of evidence the absence of negligence on the part of the injured person contributing proximately to the injury, as well as the existence of negligence on the part of the defendant.⁹⁶ For instance, it is held that in an action for negligence causing death, the burden is on the plaintiff to show, either by direct evidence or the drift of surrounding circumstances, that the deceased was without fault in approaching defendant's track, though there were no eye witnesses, and the precise cause and manner of the accident are unknown.⁹⁷ In Georgia it is held that, if it is shown that an employe for whose death an action is brought has disobeyed the orders of his superior, the burden is upon the plaintiff to show that such disobedience did not contribute in any degree to the jury.⁹⁸ In Maine, in an action for an injury caused by a collision at a railroad crossing, between the train and plaintiff driving in a carriage, plaintiff must show affirmatively the company's negligence and his own want of contributory negligence.⁹⁹ The Indiana courts maintain the necessity of both an averment and proof of the injured person's freedom from negligence.¹ But, in those States where the burden of proof is upon the plaintiff to show that the injured person was free from fault, the law does not always require proof of due care and diligence on the part of the plaintiff. Under certain circumstances

R. Cas. 262; Louisville, etc., R. Co. v. Orr, 84 Ind. 50; Hinckley v. Cape Cod, etc., R. Co., 120 Mass. 257; Galena, etc., R. Co. v. Fay, 16 Ill. 558, 63 Am. Dec. 323; Greenleaf v. Illinois, etc., R. Co., 29 Iowa, 14, 4 Am. Rep. 181; Slossen v. Burlington, etc., R. Co., 55 Iowa, 294, 7 Am. & Eng. R. Cas. 509; Kennard v. Burton, 25 Me. 39; Moore v. Shreveport, 3 La. Ann. 645.

96. Button v. Hudson River R. Co., 18 N. Y. 248; Winterfield v. Second Ave. R. Co., 20 N. Y. Supp. 801, 49 N. Y. St. R. 435; Leavitt's Code of Neg. p. 254. But see Keegan v. Western R. Co., 8 N. Y. 115. It is not enough to prove facts from which either the conclusion of negligence or

the absence of negligence may with equal fairness be drawn, but the burden is upon the plaintiff to satisfy the jury that there was no contributory negligence on the part of the injured person, Hart v. Hudson R. Co., 84 N. Y. 56. The rule is the same in Illinois, North Chicago St. Ry. Co. v. Louis, 27 N. E. (Ill.) 451, revg. on other grounds, 35 Ill. 477.

97. Tolman v. Syracuse, etc., R. Co., 98 N. Y. 198, 50 Am. Rep. 649.

98. Prather v. Richmond & D. R. Co., 80 Ga. 427, 9 S. E. 530.

99. Lesan v. Maine Cent. R. Co., 77 Me. 85.

1. Cincinnati, etc., R. Co. v. McMullen, 117 Ind. 439, 20 N. E. 287.

it may be assumed that he observed ordinary care for his safety.² The absence of any fault on the part of the person injured may be inferred from the circumstances of the case, and the ordinary habits, conduct and motives of men.³ It is proper to consider the natural instinct of self preservation and the known disposition of men to save themselves from harm, which raises a presumption of want of contributory negligence.⁴ But, a bare presumption is not sufficient, there must be some tangible proof or the attending circumstances must be such as to show that the party was not in default.⁵ In some cases it has been held that there is a presumption that he was not using ordinary care.⁶ It has been held by the United States Supreme Court, however, that, irrespective of statute law on the subject, the burden of proof as to plaintiff's freedom from contributory negligence does rest upon the plaintiff; that plaintiff may establish the negligence of the defendant, his injury in consequence thereof, and his case is made out; if there are circumstances which convict him of concurrent negligence, the defendant must prove them and thus defeat the action.⁷ The question of contributory negligence is thus made a defense in the Federal courts, the burden of supporting which is upon the defendant.⁸ This rule that the burden of proof of contributory negligence

2. Missouri Furnace Co. v. Abend, 107 Ill. 44, 47 Am. Rep. 425.

3. Johnson v. Hudson River R. Co., 20 N. Y. 65; Texas & New Orleans Ry. Co. v. Crowder, 63 Tex. 502.

4. Denver Tramway Co. v. Reid, 4 Am. Electl. Cas. 332, 4 Col. App. 53, 35 Pac. 269.

5. Squire v. Central Park, etc., R. Co., 36 N. Y. Supp. 459; Button v. Hudson River R. Co., 18 N. Y. 248.

The presumption that men will naturally avoid rather than court or defy danger is not sufficient to overcome the necessity for some proof of the absence of contributory negligence by one killed by a train at a street crossing. Pittsburgh, etc., R. Co. v. Bennett (Ind. App.) 35 N. E. 1033. Though it is unnecessary, in an action for a death caused by negligence, to produce direct evidence of a lack of contributory negligence on the part of the deceased, it is neces-

sary to show facts and circumstances from which it may be reasonably inferred that he was exercising proper care. Lerrickio v. Brooklyn H. R. Co., 44 App. Div. (N. Y.) 628, 60 N. Y. Supp. 247.

6. Indiana, etc., R. Co. v. Green, 106 Ind. 279, 25 Am. & Eng. R. Cas. 322, 55 Am. Rep. 736; State v. Maine, etc., R. Co., 76 Me. 357, 19 Am. & Eng. R. Cas. 312, 49 Am. Rep. 622.

7. Washington, etc., R. Co. v. Gladmon, 82 U. S. (15 Wall.) 401, 21 L. Ed. 114; Indianapolis, etc., R. Co. v. Horst, 93 U. S. 298, 23 L. Ed. 900; Hough v. Railway Co., 100 U. S. 226, 25 L. Ed. 618; Coasting Co. v. Tolson, 139 U. S. 557, 35 L. Ed. 274, 11 Sup. Ct. Rep. 655.

8. Chesapeake & O. R. Co. v. Steele, 84 Fed. 93, 54 U. S. App. 550, 29 C. C. A. 81.

is upon the defendant is not varied by the fact that the plaintiff alleges that he was in the exercise of due care, or by any other state of the pleadings.⁹ The rule that there is a presumption of ordinary care in favor of plaintiff and defendant both, or no presumption of negligence as against either party, except such as arises from the facts proved, and that it devolves upon the plaintiff to prove a want of ordinary care, or negligence, on the part of the defendant, and on the defendant to prove a want of ordinary care, or negligence, on the part of the plaintiff, contributing to his injury, is held by the courts in a majority of the States and by most text writers.¹⁰ If the plaintiff's case has shown that under the

9. Fitchburg R. Co. v. Nichols, 50 U. S. App. 297, 85 Fed. 945, 29 C. C. A. 500; Denver & R. G. R. Co. v. Ryan, 28 Pac. (Colo.) 79. Nor is plaintiff's burden of showing that he was not guilty of contributory negligence, in those jurisdictions where he is required to make such proof, shifted by the fact that defendant unnecessarily pleaded plaintiff's contributory negligence. Hawes v. Burlington, etc., Ry. Co., 64 Iowa, 315.

10. Mobile, etc., R. Co. v. Jay, 65 Ala. 113; Hobson v. New Mexico & A. R. Co., 11 Pac. (Ari.) 545, holding that when the evidence for plaintiff does not show want of care, the *onus* is on defendant to prove his want of care; Thompson v. Duncan, 76 Ala. 334; Missouri Pac. Ry. Co. v. McCally, 41 Kan. 639, 21 Pac. 574; Fulks v. St. Louis, etc., Ry. Co., 19 S. W. (Mo.) 818; Crumpley v. Hannibal, etc., R. Co., 19 S. W. (Mo.) 820; Anderson v. Chicago, etc., R. Co., 52 N. W. (Neb.) 840; San Antonio, etc., Ry. Co. v. Bennett, 76 Tex. 151; Spurrier v. Front St. Cable Ry. Co., 29 Pac. (Wash.) 346; Waterman v. Chicago, etc., R. Co., 52 N. W. (Wis.) 247; Western Union Tel. Co. v. Eyser, 2 Colo. 154; Texas, etc., R. Co. v. Orr, 46 Ark. 194; Sanders v. Reister, 1 Dak. 172, 46 N. W. 685;

Hopkins v. Utah N. Ry. Co., 2 Idaho, 280, 13 Pac. 345; Kansas City, etc., R. Co. v. Phillibert, 25 Kan. 586; Paducah, etc., R. Co. v. Hoehl, 12 Bush (Ky.), 47; Freck v. Philadelphia, etc., R. Co., 39 Md. 576; Davis v. Kansas City Ry. Co., 46 Mo. App. 189; Higby v. Gilmore, 3 Mont. 97; Lincoln v. Walker, 18 Neb. 247, 20 N. W. 114; Cox v. Norfolk, etc., R. Co., 123 N. C. 613, 31 S. E. 851; Gram v. Northern, etc., R. Co., 1 N. Dak. 260, 45 N. W. 974; Cassidy v. Angel, 12 R. I. 449, 34 Am. Rep. 691; Smith v. Chicago, etc., Ry. Co., 4 S. Dak. 80, 55 N. W. 720; Reddon v. Union Pac. Ry. Co., 5 Utah, 355, 15 Pac. 265; Baltimore, etc., R. Co. v. Whittington, 30 Gratt. (Va.) 809; Norfolk, etc., R. Co. v. Burge, 84 Va. 70, 4 S. E. 25; Northern, etc., R. Co. v. O'Brien, 1 Wash. 607, 21 Pac. 35; Sheff v. Huntington, 16 W. Va. 317; Hulehan v. Green Bay, etc., R. Co., 68 Wis. 527, 32 N. W. 532; McDougal v. Central R. Co., 63 Cal. 431; Kentucky Cent. R. Co. v. Thomas, 79 Ky. 160; Hoicum v. Weitherick, 22 Minn. 152; Smith v. Eastern R. Co., 35 N. H. 356; New Jersey Express Co. v. Nichols, 33 N. J. L. 434; Baltimore, etc., R. Co. v. Whitacre, 35 Ohio St. 627; Grant v. Baker, 12 Or. 329; Bradwell v. Pitts-

circumstances the defendant owed him a duty and that that duty has not been performed, and that the injury has resulted therefrom, the obligation is then upon the defendant to prove plaintiff's contributory negligence as a defence to the action.¹¹ In other words, when the plaintiff has shown the negligence of the defendant as a proximate cause sufficient to account for the injury, upon evidence which clearly makes a *prima facie* case, without showing fault on his part or anything raising a presumption thereof, it devolves upon defendant to show plaintiff's contributory negligence affirmatively in order to prevent a recovery.¹² But if plaintiff's testimony raises a presumption of contributory negligence on his part, the burden rests upon him to remove that presumption.¹³ It is a rule of universal application that if plaintiff's dec-

burg, etc., Ry. Co., 139 Pa. St. 404; Carter v. Columbia, etc., R. Co., 19 S. C. 20, 45 Am. Rep. 754; Hill v. New Haven, 37 Vt. 501; Indianapolis St. Ry. Co. v. Robinson, 61 N. E. (Ind.) 936. As to the proof required of plaintiff when the burden is on the defendant, it was said in Lincoln v. Walker, *supra*, "In view of the conflict in the authorities, we are compelled to adopt such rule as may seem most consonant with justice. This being so, there certainly is no presumption that the plaintiff was negligent. We therefore hold the rule to be, that, if the plaintiff can prove his case without showing contributory negligence, it is a matter of defence to be proved by the defendant." Stevens v. Missouri Pac. R. Co., 67 Mo. App. 356; Omaha St. R. Co. v. Martin, 48 Neb. 65, 4 Am. & Eng. R. Cas. N. S. 1, 66 N. W. 1007; McDonald v. Montgomery St. R. Co., 110 Ala. 161, 20 So. 317.

11. Oldfield v. New York, etc., R. Co., 14 N. Y. 310; Johnson v. Hudson River R. Co., 20 N. Y. 65; Button v. Hudson River R. Co., 18 N. Y. 248; Wilds v. Hudson R. Co., 24 N. Y. 230; Washington, etc., R. Co. v.

Gladmon, 15 Wall. 401; Buesching v. Gaslight Co., 73 Mo. 229; Pennsylvania R. v. Weber, 76 Pa. St. 157; Kansas City, etc., R. Co. v. Flynn, 78 Mo. 195; Abbott v. Chicago, etc., R. Co., 30 Minn. 482; McDougal v. Central R. Co., 63 Cal. 431; Dallas, etc., R. Co. v. Spicker, 61 Tex. 427; Pittsburgh, etc., R. Co. v. Wright, 80 Ind. 182, 5 Am. & Eng. R. R. Cas. 628.

12. Milwaukee, etc., R. Co. v. Hunter, 11 Wis. 160, 78 Am. Dec. 699; Johnson v. Hudson River R. Co., *supra*; Hoyt v. Hudson, 41 Wis. 105, 22 Am. Rep. 714; Prideaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Dallas, etc., R. Co. v. Spicker, 61 Tex. 427, where the court said: "It would seem that a plaintiff would be entitled in every case of this character to recover upon evidence which clearly makes a *prima facie* case, unless such case be rebutted by testimony offered by himself or by defendant."

13. Baltimore, etc., R. Co. v. Whitacre, 35 Ohio St. 627; Hobson v. New Mexico, etc., R. Co., *supra*; Cassidy v. Angell, *supra*; San Antonio, etc., R. Co. v. Bennett, *supra*.

larations or evidence establishes his own contributory negligence, it bars his recovery, no matter where the burden of proof rests.¹⁴

- 14.** Washington, etc., R. Co. v. Gladmon, *supra*; Freck v. Phila, *supra*; McQuillen v. Central Pac. R. Co., 50 Cal. 7; Lincoln v. Walker, *supra*; Boss v. Providence, etc., R. Co., 21 Am. & Eng. R. Cas. (R. I.) 364; New Jersey Exp. Co. v. Nichols, 23 N. J. L. 434; Winship v. Enfield, 42 N. H. 197; Baltimore, etc., R. Co. v. Whitacre, 35 Ohio St. 627.

CHAPTER XXIV.

EVIDENCE.

- SECTION** 1. Authority, competency, and negligence of servants.
2. Condition of means of transportation.
3. Evidence of other and similar accidents.
4. Subsequent repairs and precautions.
5. Custom or habit of carrier or passenger.
6. Tickets as evidence of contract for transportation.
7. Declarations and admissions of injured passengers.
8. Declarations and admissions of employees.
9. Declarations and conduct of other persons.

§ 1. Authority, competency, and negligence of servants.—
A person with a conductor's cap and badge, acting on a moving train as conductor, or one on the train in the dress of and acting as brakeman and addressed as such by other employes, or one apparently at work on a locomotive, with his coat off, will be presumed in the absence of other evidence, to be in the employ of the carrier.¹ Evidence of former specific acts of negligence is admissible to show the incompetency of a servant,² and also negligence on the carrier's part in employing and retaining him.³ But a single exceptional act of negligence will not be sufficient to prove incompetency.⁴ Evidence of particular instances of care are admissible to disprove evidence of carelessness shown by particular instances.⁵ Evidence of carelessness and recklessness of the carrier's servant

1. Hoffman v. New York Cent., (U. S.), 540; Peck v. Neil, 3 McLean (U. S.), 22; Stokes v. Saltonstall, 13 Pet. (U. S.) 181; Detroit, etc., R. Co. v. Van Steinburg, 17 Mich. 99; Nashville, etc., R. Co. v. Johnson, 15 Lea (Tenn.), 677.
2. Vicksburg, etc., R. Co. v. Patton, 31 Miss. 156, 66 Am. Dec. 552.
3. Dallas City R. Co. v. Beeman, 74 Tex. 291.
4. Plummer v. Ossipee, 59 N. H. 55.
5. McKinney v. Neil, 1 McLean

at other places on the trip on which plaintiff was injured is competent upon the main allegation of negligence.⁶ But proof of carelessness or unskillful management at other times or on other occasions is inadmissible to prove negligence at the time of the accident.⁷ Evidence of the care taken in the selection of servants is not admissible on the question of their negligence.⁸ A habit of intoxication on the part of an employe may be shown to prove negligence and it raises a presumption which stands until rebutted.⁹ That the servant had a drink just before starting on the trip is admissible, as bearing on his condition at the time of the accident.¹⁰ Evidence of the use of reckless language is competent for the purpose of showing rashness or unfitness.¹¹

§ 2. Condition of means of transportation.—Evidence to show the defective condition of the track is limited to showing its condition, at the time of the accident, at the place of the accident or in the immediate vicinity, the latter being admissible to show by inference its condition at the place of the accident, or as corroborative evidence.¹² Evidence of the general condition of the roadbed

6. Pyne v. Broadway, etc., R. Co., 19 N. Y. Supp. 217; Reichman v. Second Ave. R. Co., 1 N. Y. Supp. 836. See Nashville, etc., R. Co. v. Johnson, 15 Lea (Tenn.), 677, evidence that a section boss permitted other portions of the road on his section to get out of repair admissible to show negligence in the repair of the road at the place of the accident.

7. Cohn v. New York Cent., etc., R. Co., 6 App. Div. (N. Y.) 196, 39 N. Y. Supp. 986; Maguire v. Middlesex R. Co., 115 Mass. 239; Peck v. Neil, 3 McLean (U. S.), 22; Hayes v. St. Louis R. Co., 15 Mo. App. 583; Southern R. Co. v. Kendrick, 40 Miss. 374; Mississippi Cent. R. Co. v. Miller, 40 Miss. 45; Gulf, etc., R. Co. v. Rowland, 82 Tex. 166.

8. Augusta, etc., R. Co. v. Randal, 85 Ga. 297.

9. Pennsylvania R. Co. v. Books, 57 Pa. St. 339; Williams v. Missouri Pac. R. Co., 109 Mo. 475; Hob-

son v. New Mexico, etc., R. Co. (Ariz.) 11 Pac. 545; Fitzpatrick v. Bloomington City R. Co., 73 Ill. App. 516, not admissible on the question of negligence, but it is competent to show his condition on the day of the injury.

10. Pyne v. Broadway, etc., R. Co., 19 N. Y. Supp. 217. Where plaintiff gave evidence that on other days the driver started his car suddenly and used intoxicants while on duty, and the court, of its own motion, ordered this evidence stricken out, so far as defendant's objection applied, and it was not again referred to during the trial, any error in its reception was cured. Ganiard v. Rochester, etc., R. Co., 2 N. Y. Supp. 470.

11. Nashville, etc., R. Co. v. Messino, 1 Snead. (Tenn.) 221.

12. *N. Y.—Reed v. New York Cent. R. Co.*, 45 N. Y. 574, evidence of the defective condition of the road at a point half a mile distant from

and track, over which a train had to pass before reaching the place where a derailment occurred, is admissible for the purpose of showing negligence in operating the train, such as the too rapid running of the train over an imperfect track.¹³ When the stability of a bridge as a whole is involved in the charge of negligence, it is competent to give evidence of the condition, at the time of the accident, of the portions of the bridge left standing, and not immediately involved in the wreck.¹⁴ Evidence of the condition of the track some time after the accident is admissible, where it is shown that the track was in the same condition then as at the time of the accident.¹⁵ On an issue as to the negligent operation of an electric car at the time of an accident, testimony that another car, moving over the same part of the road, a month later, was negligently operated, was inadmissible, where it did not appear that such car was similar to the one on which the accident occurred, or that it was operated under like conditions.¹⁶ Official

the place of the accident inadmissible; *Murphy v. New York Cent. R. Co.*, 66 Barb. (N. Y.) 125.

U. S.—*Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 545, evidence of general condition of the track in the vicinity of the place of derailment admissible.

Ala.—*Richmond, etc., R. Co. v. Vance*, 93 Ala. 144; *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, general bad condition at or near the place and within 30 feet admissible.

Dak.—*Pattee v. Chicago, etc., R. Co.*, 5 Dak. 267.

Iowa.—*Fitch v. Mason City, etc., Tract. Co.*, 116 Iowa, 716, 89 N. W. 33; *Allison v. Chicago, etc., R. Co.*, 42 Iowa, 274, evidence as to defects within 16 rods admissible.

Kan.—*Union Pac. R. Co. v. Hand*, 7 Kan. 380.

Ky.—*Ohio Valley R. Co. v. Watson*, 93 Ky. 654.

Mich.—*Laughlin v. Grand Rapids St. R. Co.*, 62 Mich. 220; *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 539.

Mo.—*Stöher v. St. Louis, etc., R.*

Co.

91 Mo. 509; *Sidekum v. Wabash, etc., R. Co.*, 93 Mo. 400.

N. C.—*Hedges v. Wilmington, etc., R. Co.*, 73 N. C. 558.

Minn.—*Morse v. Minneapolis, etc., R. Co.*, 30 Minn. 465.

Tenn.—*Nashville, etc., R. Co. v. Johnson*, 15 Lea (Tenn.), 677.

Tex.—*Taylor, etc., R. Co. v. Taylor*, 79 Tex. 104; *Missouri Pac. R. Co. v. Mitchell*, 75 Tex. 77, 12 S. W. 810.

Wis.—*Stewart v. Everts*, 76 Wis. 35.

13. *Southeastern R. Co. v. Southworth*, 135 Ill. 250; *Missouri Pac. R. Co. v. Collier*, 62 Tex. 318.

14. *Leonard v. Southern Pac. R. Co.*, 21 Or. 555.

15. *Byrne v. Brooklyn City, etc., R. Co.*, 6 Misc. Rep. (N. Y.) 260, 26 N. Y. Supp. 760, affd. 145 N. Y. 619; *Jacksonville, etc., R. Co. v. Southworth*, 135 Ill. 250; *Pennsylvania Co. v. Marion*, 104 Ind. 239. See also *Chicago, etc., R. Co. v. Lewis*, 48 Ill. App. 274.

16. *Schmidt v. Coney Island, etc., R. Co.*, 49 N. Y. Supp. 777.

reports of railroad officers and employes prior to the accident as to the condition of the track are admissible against the carrier to show the condition of the track at the time of the accident.¹⁷ Evidence of general rumor among the employes of the carrier as to the condition of any of the means of transportation is hearsay and irrelevant to prove its bad condition; but it is admissible to show negligence in the use of such means by the carrier after it should have known of its unsafe condition.¹⁸ Proof of a custom on the part of the carrier to keep its track in general good repair is not admissible to show the good condition of the track.¹⁹

§ 3. Evidence of other and similar accidents.—Evidence of other and similar accidents, if any have occurred by reason of the method of construction of or defects in any of the means of transportation, is admissible, to show the dangerous condition of such means of transportation,²⁰ and to show notice to and knowledge by the carrier of such condition,²¹ but it is not admissible to prove an independent act of negligence.²² Evidence as to former experience of the carrier in operating its trains under similar conditions is inadmissible to disprove negligence,²³ unless the conditions and circumstances are shown to have continued the same up to the time of the accident.²⁴ Evidence as to the result of subsequent experiments made at the same place and under the same circumstances and conditions as those existing at the time of the accident is admissible.²⁵

17. Vicksburg, etc., R. Co. v. Putnam, 118 U. S. 545; Texas, etc., R. Co. v. Lester, 75 Tex. 56.

18. Wormsdorf v. Detroit City R. Co., 75 Mich. 472.

19. Fort Worth, etc., R. Co. v. Thompson, 2 Tex. Civ. App. 170.

20. Gabriel v. Long Island R. Co., 54 App. Div. (N. Y.) 41, 66 N. Y. Supp. 301; Hanrahan v. Manhattan R. Co., 53 Hun (N. Y.), 420, 6 N. Y. Supp. 395, affd. 130 N. Y. 658, 29 N. E. 2033; Central, etc., Co. v. Smith, 80 Ga. 526; Bullard v. Boston, etc., R. Co., 64 N. H. 27; Missouri Pac. R. Co. v. Neiswanger, 41 Kan. 621; Cleveland, etc., R. Co. v. Newell, 104 Ind. 264; Morse v. Minneapolis, etc.,

R. Co., 30 Minn. 465; Mobile, etc., R. Co. v. Ashcraft, 48 Ala. 15, 49 Ala. 305. *Contra:* Davis v. Oregon, etc., R. Co., 8 Or. 172.

21. Hanrahan v. Manhattan R. Co., *supra*; Johnson v. Manhattan R. Co., 52 Hun (N. Y.), 111; Central R. Co., etc., Co. v. Smith, 80 Ga. 526.

22. Hipsley v. Kansas City, etc., R. Co., 88 Mo. 348; Gulf, etc., R. Co. v. Rowland, 82 Tex. 166; Missouri Pac. R. Co. v. Mitchell, 75 Tex. 77.

23. Joliet St. R. Co. v. Call, 42 Ill. App. 41.

24. Meloy v. Chicago, etc., R. Co. (Iowa), 37 N. W. 335.

25. Gilbert v. Third Ave. R. Co., 54 N. Y. Super. Ct. 470; Chicago,

§ 4. Subsequent repairs and precautions.—Evidence of repairs, or alterations, or precautions, made or taken by the carrier after an accident, is not admissible as proof of prior negligence.²⁶ The ground of this rule is that it would be unjust that the carrier could not, after an unexpected accident, and as a measure of extreme caution, adopt additional safeguards, without being liable to have such acts construed as an admission of prior negligence. To so construe such an act would be an unfair interpretation of human conduct and virtually an inducement for continued negligence.²⁷ But such evidence has been held admissible in some jurisdictions.²⁸

§ 5. Custom or habit of carrier or passenger.—Where the direct testimony as to the alleged negligent act is conflicting, evidence as to what was the usual stopping place of a train or car,²⁹ or what was the usual or customary time for trains or cars to stop,³⁰ or as to the habit of the injured person in alighting from a moving train or car, in despite of warning,³¹ or as to the practice of

etc., R. Co. v. Champion (Ind.), 32 N. E. 874.

26. N. Y.—Dale v. Delaware, etc., R. Co., 73 N. Y. 468; Dougan v. Champlain Transp. Co., 56 N. Y. 1; Reed v. New York Cent. R. Co., 45 N. Y. 574; Timpson v. Manhattan R. Co., 1 N. Y. Supp. 673; Schmitt v. Dry Dock, etc., R. Co., 3 St. Rep. (N. Y.) 257; Delaney v. Hilton, 50 N. Y. Super. Ct. 341.

Minn.—Morse v. Minneapolis, etc., R. Co., 30 Minn. 465. But see Kelly v. Southern Minnesota R. Co., 28 Minn. 98; Phelps v. Mankato, 23 Minn. 276; O'Leary v. Mankato, 21 Minn. 65.

Mo.—Hipsley v. Kansas City, etc., R. Co., 88 Mo. 348; Ely v. St. Louis, etc., R. Co., 77 Mo. 34.

Or.—Skottowe v. Oregon Short Line, etc., R. Co., 22 Or. 430, but such evidence is admissible to show the authority of the carrier over the place in which the repairs were made.

27. Payne v. Troy, etc., R. Co., 9

Hun (N. Y.), 526; Morse v. Minneapolis, etc., R. Co., 30 Minn. 465.

28. Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315; Augusta, etc., R. Co. v. Renz, 55 Ga. 126, evidence competent for the consideration of the jury, subject to being explained by the defendant; Fordyce v. Withers, 1 Tex. Civ. App. 540, for the purpose of showing the actual condition of the track; Fordyce v. Chancey, 2 Tex. Civ. App. 24, inadmissible to prove prior negligence, but admissible to rebut defendant's testimony as to track being in safe condition; Kansas Pac. R. Co. v. Miller, 2 Colo. 442, admissible to show that prior construction was defective.

29. Alexandria, etc., R. Co. v. Herndon, 87 Va. 193.

30. Fuller v. Naugatuck R. Co., 21 Conn. 557.

31. Craven v. Central. Pac. R. Co., 72 Cal. 345; Louisville, etc., R. Co. v. Berry, 88 Ky. 222, but such evidence

the carrier in regard to the approaches to its trains,³² or the general use of the same by the public,³³ is admissible. Evidence as to the custom or habit of passengers in alighting from or boarding trains and of the carrier's slowing trains but not coming to a full stop for this purpose, is admissible as bearing upon the carrier's duty to take proper precautions for the safety of its passengers.³⁴ But the occasional act of a passenger without the knowledge or consent of the carrier would not affect the rights and duties of the carrier.³⁵ Evidence as to the usual rate of speed is admissible on the question as to whether the rate of speed was negligent.³⁶ Evidence of the carrier's departure from its usual practice may be admissible to show negligence.³⁷ Evidence of the habit of passengers on the road of a street car company to give signal for stopping and starting cars is inadmissible in an action for an injury to a passenger caused by the sudden starting of the car while she was alighting in response to a signal by one of the passengers.³⁸

§ 6. Tickets as evidence of contract for transportation.—Tickets for passage over a carrier's road are not, in themselves, written evidence of the contract by which the transportation was engaged, and the passenger is not precluded from contradicting, varying, or explaining them by parol testimony as to the actual contract with the carrier. They are rather in the nature of vouchers or receipts for the passage money and their office is to serve as tokens to enable the persons having charge of the vessels and carriages of the carrier to recognize the bearers as parties who are entitled to be received on board and to passage as thereon indicated. They are quite consistent with a more special bargain. They do not come within the rule which excludes parol testimony respecting a contract which has been reduced to writing.³⁹ The fact that a

is not admissible when the proofs show that the injury was due to a defective platform.

32. Wentworth v. Eastern R. Co., 143 Mass. 248.

33. McDonald v. Chicago, etc., R. Co., 29 Iowa, 170.

34. Phillips v. Rensselaer, etc., R. Co., 57 Barb. (N. Y.) 644, 49 N. Y. 177.

35. Drake v. Pennsylvania R. Co., 137 Pa. St. 352.

36. Cleveland, etc., R. Co. v. Newell, 75 Ind. 542.

37. Chicago, etc., R. Co. v. Fisher, 31 Ill. App. 36.

38. Nichols v. Lynn & B. R. Co., 168 Mass. 528, 47 N. E. 427.

39. Elmore v. Sands, 54 N. Y. 515, 13 Am. Rep. 617; Van Buskirk v. Roberts, 31 N. Y. 663; Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; New York, etc., R. Co. v. Winter, 143 U. S. 60; Gordon v. Man-

passenger bought a ticket over several lines of road with coupons attached may be shown by parol, the contents of the ticket not being involved.⁴⁰ There is no such necessity of the sleeping car service, or such sufficient reason, for giving the berth check issued to passengers on a sleeping car upon the surrender of their tickets conclusive force as evidence of the contract between the passenger and the sleeping car company, as to exclude parol evidence of the agreement made between the conductor and the passenger.⁴¹

§ 7. Declarations and admissions of injured passengers.—The *res gestae*, speaking generally, is the accident, and declarations of the injured person as to the circumstances of the occurrence, which are no part of it, which were not made at the same time, or so nearly contemporaneous with it as to characterize it, or to throw any light on it, are not admissible in evidence as a part of the *res gestae*. They are purely narrative, giving an account of a transaction not partly past, but wholly past and completed.⁴² The statements of an injured person as to how or why an accident occurred, or as to the cause of his injuries, or the manner in which they were inflicted, unless made at the time of the accident, or while the transaction was in progress so as to constitute a part of the occurrence itself, are generally held to be inadmissible.⁴³ Such statements have been held to be admissible in certain cases, however, even though made a few moments after the accident, where

chester, etc., R. Co., 52 N. H. 596; Johnson v. Concord R. Corp., 46 N. H. 213. But see Memphis, etc., R. Co. v. Benson, 85 Tenn. 627.

40. Central R. Co. v. Wolff, 74 Ga. 664.

41. Mann Boudoir Car Co. v. Dupre, 57 Fed. 646, 47 Alb. L. J. 446.

42. Waldele v. New York Cent., etc., R. Co., 95 N. Y. 274, 47 Am. Rep. 41; Martin v. New York, etc., R. Co., 103 N. Y. 626; Downs v. New York Cent., etc., R. Co., 47 N. Y. 83; Savannah, etc., R. Co. v. Holland, 82 Ga. 257; Augusta, etc., R. Co. v. Randall, 79 Ga. 304; Chicago, etc., R. Co. v. Johnson, 36 Ill. App. 564; Sullivan v. Oregon R. etc., Co., 12 Or. 392.

43. Hall v. Cedar Rapids, etc., R. Co., 115 Iowa 8, 87 N. W. 739; Edwards v. Foote (Mich.), 88 N. W. 404, 8 Det. L. N. 880; Perlmutter v. Highland St. Ry. Co., 121 Mass. 497; Leahey v. Cass Ave., etc., R. Co., 97 Mo. 165, 10 Am. St. Rep. 300; Chicago W. D. Ry. Co. v. Becker, 128 Ill. 545, 21 N. E. 524; Webber v. St. Paul City R. Co., 67 Minn. 155, 69 N. W. 716; Citizens St. R. Co. v. Stoddard (Ind. App.), 37 N. E. 723. See also Nellis St. Rd. Acct. Law, p. 565; Illinois Cent. R. Co. v. Sutton, 42 Ill. 438; Fordyce v. McCants, 51 Ark. 509, declarations to attending physician.

the courts have regarded the declarations as verbal acts or facts illustrating, explaining, interpreting, or growing out of the transaction, and a part of the *res gestae*, or receiving support from the transaction itself.⁴⁴ Declarations of an injured person, indicative of existing pain or suffering, made at the time of the injury or afterwards, are competent evidence in an action to recover for personal injuries, although a narrative of how the injuries were received is not.⁴⁵ The fact that parties are now permitted to be witnesses in their own behalf has been held in New York not to have changed the rule of evidence which made it competent, in actions for personal injuries, for the plaintiff to prove screaming or other exclamations tending to show suffering, uttered at the time of the injury or immediately after the accident.⁴⁶ But, in

44. O'Keefe v. Eighlith Ave. R. Co., a party a competent witness does not 33 App. Div. (N. Y.) 324, 53 N. Y. Supp. 940; Louisville, etc., R. Co. v. Buck, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520; Pennsylvania R. Co. v. Lyons, 129 Pa. St. 113, 18 Atl. 759, 15 Am. St. Rep. 701; International, etc., R. Co. v. Smith (Tex.), 44 Am. & Eng. R. Cas. 324; Washington, etc., R. Co. v. McLane, 11 App. D. C. 220, 25 Wash. L. Rep. 485; Houston, etc., R. Co. v. Loefler (Tex.), 51 S. W. 536.

Rebuttal.—Where evidence is given tending to impeach the testimony of the injured person and show it to be an after-thought and a fabrication of recent invention, the witness may properly be permitted to show, in answer thereto, that he told the same story at the time of the accident. Baber v. Broadway, etc., R. Co., 9 Misc. Rep. (N. Y.) 20, 29 N. Y. Supp. 40.

45. Montgomery St. Ry. Co. v. Shanks, 3 St. Ry. Rep. 12, 139 Ala. 489, 37 So. 166; Beddle v. City Elec. R. Co., 112 Mich. 547, 70 N. W. 1096; Harris v. Detroit City R. Co., 76 Mich. 227, 42 N. W. 1111; Winter v. Central I. R. Co., 74 Iowa, 448, 38 N. W. 154, and the statute making

abridge his right to have such declarations introduced in evidence; Hancock v. Leggett, 115 Ind. 544, 18 N. E. 53; Bridge v. Oshkosh, 71 Wis. 363, 37 N. W. 409; Block v. Milwaukee St. R. Co., 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365; Birmingham Union Ry. Co. v. Hale, 90 Ala. 8, 8 So. 142; Laughlin v. Grand Rapids St. R. Co., 80 Mich. 154; Mott v. Detroit, etc., R. Co., 120 Mich. 127, 79 N. W. 3; Beath v. Rapid R. Co., 119 Mich. 512, 78 N. W. 537; Brown v. Hannibal, etc., R. Co., 66 Mo. 588; Texas, etc., R. Co. v. Barron, 78 Tex. 421.

46. Hagenlocher v. Coney Island, etc., R. Co., 99 N. Y. 136, 1 N. E. 536; Nichols v. Brooklyn City R. Co., 30 Hun (N. Y.), 437, affd. 100 N. Y. 635; Murphy v. New York Cent. R. Co., 66 Barb. (N. Y.) 125; DeLong v. Delaware, etc., R. Co., 37 Hun (N. Y.), 282; Lewke v. Dry Dock, etc., R. Co., 46 Hun (N. Y.), 283; Uransky v. Dry Dock, etc., R. Co., 44 Hun (N. Y.), 119; Geiler v. Manhattan R. Co., 11 Misc. Rep. (N. Y.) 413, 65 St. Rep. (N. Y.) 437, 32 N. Y. Supp. 254. See Griffith v. Utica, etc., R. Co., 63 Hun (N. Y.),

that State, declarations made by the injured person some time after the injury, to persons other than the physician in attendance upon the person injured, simply that he or she is then suffering pain, are held to be not a part of the *res gestae*, and, therefore, incompetent, although such evidence was admissible prior to the statute allowing parties to be witnesses.⁴⁷ It is also held that statements expressive of present condition are allowed in evidence only when made to a physician for the purpose of treatment by him.⁴⁸ In other States it has been held that expressions or complaints showing bodily suffering made at the time of the injury or soon thereafter, are competent evidence as part of the *res gestae*, and may be testified to and described by any person in whose presence they were uttered, if they were made at the time of the suffering.⁴⁹ Even dying declarations are not received in civil actions unless part of the *res gestae*, and come within the rule already stated.⁵⁰ Admissions of the passenger that the injuries

626, 17 N. Y. Supp. 692, affd. 137 N. Y. 566, may prove by physician her appearance when she reached home and he first examined her.

47. Kennedy v. Rochester, etc., R. Co., 130 N. Y. 654, 41 St. Rep. (N. Y.) 329; Roche v. Brooklyn, etc., R. Co., 105 N. Y.⁴ 294; Donohue v. Brooklyn, etc., R. Co., 53 App. Div. (N. Y.) 348, 65 N. Y. Supp. 634; otherwise, before the Code: Matteson v. N. Y. Cent. R. Co., 35 N. Y. 487; Caldwell v. Murphy, 11 N. Y. 416; Brown v. N. Y. Cent. R. Co., 32 N. Y. 597; Fuller v. Jamestown St. R. Co., 75 Hun (N. Y.), 273, such testimony is, however, admissible in rebuttal.

48. Kennedy v. Rochester, etc., R. Co., *supra*; Davidson v. Cornell, 132 N. Y. 228, 30 N. E. 573. See *contra*, Matteson v. N. Y. Cent. R. Co., *supra*, holding that such expressions of pain, made to a physician examining the injured person with a view of giving evidence, are admissible; Schuler v. Third Ave. R. Co., 1 Misc. Rep. (N. Y.) 35, 48 St. Rep. (N. Y.) 663, 20 N. Y. Supp. 683.

49. Williams v. Great Northern R. Co., 68 Minn. 55, 70 N. W. 860; Brush v. St. Paul City R. Co., 52 Minn. 572, 55 N. W. 57; Omaha St. R. Co. v. Emminger, 57 Neb. 240, 77 N. W. 675, 12 Am. & Eng. R. Cas. N. S. 188; Missouri, etc., R. Co. v. Sanders, 12 Tex. Civ. App. 5, 33 S. W. 245; Weiser v. Broadway, etc., R. Co., 10 Ohio C. C. 14, 2 Ohio Dec. 463; Heckle v. Southern Pac. Co., 123 Cal. 441, 5 Am. Neg. Rep. 298, 56 Pac. 56; Springfield Consol. R. Co. v. Hoeffner, 175 Ill. 634, 51 N. E. 884. But see West Chicago St. R. Co. v. Kennelly, 170 Ill. 508, 48 N. E. 996, 9 Am. & Eng. R. Cas. N. S. 359, affg. 66 Ill. App. 244; West Chicago St. R. Co. v. Carr, 170 Ill. 478, 48 N. E. 992.

50. Waldele v. New York Cent., etc., R. Co., 95 N. Y. 274; Daily v. New York, etc., R. Co., 32 Conn. 356; East Tennessee, etc., R. Co. v. Maloy, 77 Ga. 237; Marshall v. Chicago, etc., R. Co., 48 Ill. 475; Brownell v. Pacific R. Co., 47 Mo. 239, admissible as *res gestae* when made almost instantly after the accident.

received by him were caused by his own negligence are admissible in evidence against him,⁵¹ but are not conclusive and are subject to explanation.⁵²

§ 8. Declarations and admissions of employes.—When the acts of employes or servants will bind the carrier the declarations or admissions of such employes or servants will also bind the carrier, if it affirmatively appear that they were made at the time of the injury to the plaintiff and constituted a part of the *res gestae*.⁵³ But declarations or admissions made subsequently to the

51. *Gulzoni v. Tyler*, 64 Cal. 334; *De Mahy v. Morgan's Louisiana, etc., R. Co.*, 45 La. Ann. 1329; *Kellor v. Sioux City, etc., R. Co.*, 27 Minn. 178, but the silence of a wife when a husband is making such admission is not evidence against her.

52. *Zemp v. Wilmington, etc., R. Co.*, 9 Rich. L. (S. C.) 84.

53. *N. Y.—Koetter v. Manhattan El. R. Co.*, 59 Hun (N. Y.), 623, 13 N. Y. Supp. 458, affd. 129 N. Y. 668, 30 N. E. 65; *Butler v. Manhattan R. Co.*, 4 Misc. Rep. (N. Y.) 401, 3 Misc. Rep. (N. Y.) 453; *Matteson v. New York Cent. R. Co.*, 62 Barb. (N. Y.) 364.

U. S.—*New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637; *Vicksburg, etc., R. Co. v. O'Brien*, 119 U. S. 99, 30 L. Ed. 299, 7 S. Ct. 118; *Union Insurance Co. v. Smith*, 124 U. S. 424; *Pierce v. Van Dusen*, 78 Fed. 706.

Ala.—*Cheunning v. Ensley R. Co.*, 100 Ala. 493; *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45.

Iowa.—*Marion v. Chicago, etc., R. Co.*, 64 Iowa, 568.

Ky.—*McLeod v. Ginther*, 80 Ky. 399.

Ill.—*Springfield Consol. R. Co. v. Welsh*, 155 Ill. 511, 40 N. E. 1034.

Kan.—*Cherokee, etc., Coal Co. v. Dixon*, 55 Kan. 70, 39 Pac. 694.

Colo.—*Denver, etc., R. Co. v.*

Dwyer, 20 Colo. 132, 36 Pac. 1106; *Emerson v. Burnett*, 11 Colo. App. 88, 52 Pac. 753.

Dak.—*First National Bank v. North*, 6 Dak. 141, 41 N. W. 738.

Mass.—*Geary v. Stephenson*, 169 Mass. 31, 47 N. E. 509.

Mich.—*Joslin v. Grand Rapids, etc., R. Co.*, 53 Mich. 322, 19 N. W. 17; *Ensley v. Detroit United Ry. Co.*, 1 St. Ry. Rep. 380 (Mich.), 96 N. W. 34; *Hall v. Murdock*, 119 Mich. 392, 78 N. W. 330.

Minn.—*Beardsley v. Minneapolis St. R. Co.*, 54 Minn. 504, 56 N. W. 176.

Mo.—*Shaefer v. Missouri Pac. R. Co.*, 98 Mo. App. 154, 72 S. W. 154; *Bergeman v. Indiana, etc., Ry.*, 104 Mo. 86, 15 S. W. 994.

Neb.—*Omaha, etc., R. Co. v. Chollette*, 41 Neb. 578.

N. Dak.—*Short v. Northern Pac. R. Co.*, 1 N. Dak. 164, 45 N. W. 707.

Pa.—*Coll v. Easton Trans. Co.*, 180 Pa. St. 618, 37 Atl. 89; *Bayles v. Diamond St. Omnibus Co.*, 173 Pa. St. 378.

Tex.—*Gulf, etc., R. Co. v. Pierce*, 7 Tex. Civ. App. 597.

Wis.—*Robinson v. Superior R. T. Ry. Co.*, 94 Wis. 345, 68 N. W. 961, 59 Am. St. Rep. 897; *Bass v. Chicago, etc., R. Co.*, 42 Wis. 654, 24 Am. Rep. 437.

W. Va.—*Sample v. Consol. L. &*

time of the injury are not part of the *res gestae*, and are not admissible in evidence against the carrier.⁵⁴ Declarations made before the accident are not a part of the *res gestae* and are inadmissible.⁵⁵ Declarations made by an employe who was not directly connected with the occurrence are inadmissible.⁵⁶ Evidence of a declaration is incompetent where the declaration is not a statement of a fact, but of the opinion or conjecture of the declarant, as the statement of a guard, "You must be injured," made immediately after the fall, to a passenger whom he helped up.⁵⁷ Reports by employes to their superior officers of the circumstances connected with an accident, made after the event and in accordance with rules or special orders of the carrier, are not admissible as *res gestae*.⁵⁸ The declaration of the driver of a street car to the officer arresting him, on a trip subsequent to that on which it was claimed he ran into plaintiff's wagon, that he was the man

Ry. Co., 50 W. Va. 472, 40 S. E. 597, 24 Am. & Eng. R. Cas. N. S. 389. See also Nellis St. Rd. Acct. Law, p. 558.

54. N. Y.—Whittaker v. Eighth Ave. R. Co., 51 N. Y. 295; Hendricks v. Sixth Ave. R. Co., 44 N. Y. Super. Ct. 8.

U. S.—Vicksburg, etc., R. Co. v. O'Brien, 119 U. S. 99.

Ala.—Alabama G. S. R. Co. v. Hawk, 72 Ala. 112.

Cal.—Boone v. Oakland Trans. Co., 1 St. Ry. Rep. 14 (Cal.), 73 Pac. 243.

Ill.—Mobile, etc., R. Co. v. Klein, 43 Ill. App. 63; Chicago, etc., R. Co. v. Fillmore, 57 Ill. 265; Springfield Consol. Ry. Co. v. Puntenney, 101 Ill. App. 95, affd. 65 N. E. 442.

Ky.—Chesapeake, etc., R. Co. v. Reeves (Ky.), 11 S. W. 464; Louisville, etc., R. Co. v. Ellis, 97 Ky. 330.

Mass.—Williamson v. Cambridge R. Co., 144 Mass. 148, 10 N. E. 790.

Mich.—Patterson v. Wabash, etc., R. Co., 54 Mich. 91; Gardner v. Detroit St. R. Co., 99 Mich. 182, 58 N. W. 49.

Minn.—Reem v. St. Paul City R. Co. (Minn.), 80 N. W. 638.

Miss.—Forsee v. Alabama G. S. R. Co., 63 Miss. 66; Moore v. Chicago, etc., R. Co., 59 Miss. 243.

Mo.—Ruschenberg v. Southern El. Ry. Co., 161 Mo. 70, 61 S. W. 626.

N. J.—Blackman v. West Jersey & S. R. Co. (N. J.) 52 Atl. 370.

Tex.—Missouri Pac. R. Co. v. Ivy, 71 Tex. 409, 10 Am. St. Rep. 758.

Wis.—Milwaukee, etc., R. Co. v. Finney, 10 Wis. 388.

55. Louisville, etc., R. Co. v. Stewart, 56 Fed. 808; Mobile, etc., R. Co. v. Ashcraft, 48 Ala. 15; San Antonio, etc., R. Co. v. Robinson, 73 Tex. 277.

56. Metropolitan R. Co. v. Collins, 1 App. Cas. (D. C.) 383, 21 Wash. L. Rep. 811.

57. De Soucey v. Manhattan R. Co., 15 N. Y. Supp. 108.

58. Carroll v. East Tennessee, etc., R. Co., 82 Ga. 452; Wormsdorf v. Detroit City R. Co., 75 Mich. 472; North Hudson County R. Co. v. May, 48 N. J. L. 401; Nashville, etc., R. Co. v. Messino, 1 Snead (Tenn.), 221. But see Keyser v. Chicago, etc., R. Co., 66 Mich. 390.

he was looking for, from which it could be inferred that he deemed himself at fault, and was seeking to make a voluntary surrender, is inadmissible.⁵⁹ Where the plaintiff was struck by a street car, and about fifteen minutes was occupied in extricating and caring for him at the place of the accident, when the motorman stated that he saw plaintiff, but thought he would get off the track, the statement was no part of the *res gestae*.⁶⁰

§ 9. Declarations and conduct of other persons.—Evidence of the actions of other passengers and their exclamations at the time of the accident, and of the confusion among the passengers as a result thereof, is competent as a part of the *res gestae*, and also as evidence of what was deemed prudent by those in the same situation as the injured person, having an interest to take the least and avoid the greater hazard.⁶¹ Evidence of the outcries of bystanders on the occasion has also been held admissible.⁶² But statements made after the accident as to the circumstances are inadmissible.⁶³

59. Seipp v. Dry Dock, etc., R. Co., 45 App. Div. (N. Y.) 489, 61 N. Y. Supp. 409; Luby v. Hudson R. R. Co., 17 N. Y. 131; Maisels v. Dry Dock, etc., R. Co., 16 App. Div. (N. Y.) 391; Anderson v. Rome, etc., R. Co., 54 N. Y. 334; Little Rock Tract. & E. Co. v. Nelson, 66 Ark. 494, 52 S. W. 7.

60. Citizens St. R. Co. v. Howard, 102 Tenn. 474, 52 S. W. 863; Williamson v. Cambridge R. Co., 144 Mass. 148, 10 N. E. 790; Adams v. Hannibal, etc., R. Co., 74 Mo. 553; Tannis v. Interstate, etc., R. Co., 45 Kan. 503, 25 Pac. 876; Railroad Co. v. Stein (Ind.), 31 N. E. 180.

61. Hallahan v. New York, etc., R. Co., 102 N. Y. 194, 26 Am. & Eng. R. Cas. 169; Twomley v. Central Park, etc., R. Co., 69 N. Y. 158, 25 Am. Rep. 162; Mitchell v. Southern Pac. R. Co., 87 Cal. 62; Mobile, etc., R. Co. v. Ashcraft, 48 Ala. 15; Galena, etc., R. Co. v. Fay, 16 Ill. 558, 63 Am. Dec. 323; Hemmingway v.

Chicago, etc., R. Co., 72 Wis. 42, 7 Am. St. Rep. 823.

62. Kleiber v. Peoples R. Co., 107 Mo. 240; Shirley v. Billings, 8 Bush (Ky.), 147.

63. Metropolitan R. Co. v. Collins, 1 App. Cas. (D. C.) 383; Keller v. Sioux City, etc., R. Co., 27 Minn. 178; Missouri Pac. R. Co. v. Ivy, 71 Tex. 409; Macon, etc., R. Co. v. Johnson, 38 Ga. 409.

64. Levy v. Campbell (Tex.), 19 S. W. 438.

Declaration of bystander as evidence.—In an action by a person who was injured while riding a bicycle along the defendant's tracks, by a collision with one of the defendant's street cars, remarks made by a person who witnessed the accident, to the motorman after he had stopped the car, are inadmissible. Indianapolis St. Ry. Co. v. Taylor, 3 St. Ry. Rep. 151 (Ind.), 72 N. E. 1045. In an action to recover damages for an alleged unwarranted ejection from

Evidence of the injuries to other passengers or that they were uninjured is not admissible on the question as to the extent of the plaintiff's injury.⁶⁴

a street car, statements made by persons who saw the affair to the defendant's agent employed to investigate accidents were held inadmissible. *Foster v. Atlanta Rapid Transit Co.*, 2 St. Ry. Rep. 75, 119 Ga.

675, 46 S. E. 840; statement of passenger, *Boone v. Oakland Transit Co.* (Cal.), 1 St. Ry. Rep. 14, 73 Pac. 243. See also notes on Declarations as to cause of accident, 3 St. Ry. Rep. pp. 153 to 160.

CHAPTER XXV.

CONTRIBUTORY NEGLIGENCE.

- SECTION** 1. Contributory negligence must be proximate cause of injury.
2. Acts in disregard of warning or disobedience of carrier's rules.
3. Acts by permission or direction of carrier's employes.
4. Sudden peril.—Acts in emergencies.
5. Contributory negligence of children.
6. Contributory negligence of aged or infirm persons.
7. Contributory negligence of parents, guardians, or custodians.
8. Intoxication as evidence of contributory negligence.
9. Contributory negligence as a question of law or fact.
10. Traveling in violation of statute not contributory negligence.
11. Entering conveyance.
12. Boarding train or car in motion.
13. Place of entering cars or trains.
14. Leaving conveyance.
15. Alighting at improper place or in improper manner.
16. Alighting from train or cars in motion.
17. Riding in dangerous position.
18. Riding on platform, steps, or running board.
19. Standing up in car.
20. Passing from one car to another.
21. Riding with part of person projecting from window.
22. Awaiting and seeking transportation.
23. Standing near or between tracks and crossing intervening tracks.

§ 1. Contributory negligence must be proximate cause of injury.—The contributory negligence of a plaintiff, in order to defeat a recovery by him, must have contributed proximately to the injury.¹ Thus a passenger may recover for injuries sustained by

1. *Van Ostran v. New York Cent., etc., R. Co.*, 35 Hun (N. Y.), 590. 104 N. Y. 683; *Hofnagle v. New York Cent., etc., R. Co.*, 55 N. Y. 608; *Troy v. Vermont, etc., R. Co.*, 24 U. S. 487, 58 Am. Dec. 191; *Lane v. Atlantic Works*, 111 Mass. 136; *Hill v. Windsor*, 118 Mass. 251; *Crain v. Petrie*, 6 Hill (N. Y.), 522; *Culhane v. New York Cent., etc., R. Co.*, 60 N. Y. 133; *Lowery v. Western Union Tel. Co.*, 60 N. Y. 198; *McQuilken v. Central Pac. R. Co.*, 64 Cal. 463, 16 Am. & Eng. R. Cas. 353; *Hanson v. Mansfield R., etc., Co.*, 38 La. Ann. 111, 58 Am. Rep. 162; *Central R. Co. v. Van Horn*, 38 N. J. L. 133; *Thirteenth, etc., St. Pass. R. Co.*, 92 Pa. St. 475, 37 Am. Rep. 707, 2 Am. & Eng. R. Cas. 30; *Conroy v.*

reason of defendant's negligence just after alighting from the car, although plaintiff was negligent in leaving the car while in motion;² the passenger's negligence in going to the platform of a car while it is still moving, does not affect his right to recover for an injury suffered in properly alighting from the train after it has stopped;³ or when he has left the train and is standing on the ground when he is injured;⁴ nor the fact that plaintiff was acting at the time in disobedience of a proper order to secure his safety, if it does not appear that the injury was caused by such disobedience.⁵ So, the carrier will become liable, if, after becoming aware of plaintiff's danger through his own negligence, it could have prevented the injury by the use of ordinary skill, care, and caution, and failed to do so, or, if the injury would not have occurred but for an affirmative act of negligence on the part of the carrier.⁶ But if the negligence of a passenger amounting to absence of ordinary care, concurrently with the negligence of the carrier, proximately contributed to the injury, it is a good defense, whether the carrier could or could not, with ordinary or even extraordinary care, have guarded against it.⁷

§ 2. Acts in disregard of warning or disobedience of carrier's rules.—A warning to the passenger by the carrier through its servants or otherwise not to do a certain act or occupy a certain position which exposes him to danger, and his disregard thereof, will, in the absence of a good reason for it, prevent his recovery from the carrier for an injury growing out of it, although the carrier may also be negligent.⁸ So, if a passen-

Pennsylvania R. Co., 1 Pittsb. (Pa.) 440; Moakler v. Willamette Valley R. Co., 18 Or. 189, 17 Am. St. Rep. 717.

2. Van Ostran v. New York Cent., etc., R. Co., 35 Hun (N. Y.), 590, 104 N. Y. 683; Central R. Co. v. Smith, 74 Md. 212.

3. Wood v. Lake Shore, etc., R. Co., 49 Mich. 370, 8 Am. & Eng. R. Cas. 478; Lackawanna, etc., R. Co. v. Chenewith, 52 Pa. St. 382, 91 Am. Dec. 168.

4. Gadsden, etc., R. Co. v. Causler, 97 Ala. 235, 58 Am. & Eng. R. Cas. 258.

5. Lawrenceburgh, etc., R. Co. v. Montgomery, 7 Ind. 474.

6. Pennsylvania R. Co. v. Reed, 60 Fed. 694; Montgomery, etc., R. Co. v. Stewart, 91 Ala. 421; Kentucky Cent. R. Co. v. Dills, 4 Bush (Ky.), 593; Straus v. Kansas City, etc., R. Co., 72 Mo. 414; Price v. St. Louis, etc., R. Co., 75 Mo. 414; Whalen v. St. Louis, etc., R. Co., 60 Mo. 323.

7. Tobin v. Omnibus Cable Co. (Cal.), 34 Pac. 124, 58 Am. & Eng. R. Cas. 223.

8. Campbell v. Los Angeles R. Co., 135 Cal. 137, 67 Pac. 50; Dodge v. Boston, etc., Steamship Co., 148 Mass.

ger is injured by reason of his disobedience of the reasonable rules and regulations of the carrier, he cannot hold the carrier liable for an injury attributable in part to the carrier's negligence, since there is an implied agreement in the contract of carriage that the passenger will obey the reasonable rules of the carrier.⁹ But a passenger is not guilty of contributory negligence who, in ignorance of a rule of a carrier, acts in violation of it.¹⁰ Where the regulation of the carrier is known to the passenger, or the circumstances are such as to imply notice or to be equivalent to actual notice, the violation thereof, although by the permission, knowledge, or connivance of the carrier's servants, constitutes contributory negligence.¹¹ But where the regulation is unknown to the pas-

207, 37 Am. & Eng. R. Cas. 67; Ohio, etc., R. Co. v. Schieber, 44 Ill. 460; Blake v. Burlington, etc., R. Co., 78 Iowa, 57, 39 Am. & Eng. R. Cas. 405; Fulks v. St. Louis, etc., R. Co., 111 Mo. 335, 52 Am. & Eng. R. Cas. 280; State v. Tom, 8 Or. 177; Pennsylvania R. Co. v. Aspell, 23 Pa. St. 147, 62 Am. Dec. 323; Jewett v. Chicago, etc., R. Co., 54 Wis. 610, 41 Am. Rep. 63, 6 Am. & Eng. R. Cas. 379; Central of Ga. R. Co. v. McKinney, 118 Ga. 535, 45 S. E. 430; Rolette v. Great Northern R. Co. (Minn.), 97 N. W. 431.

9. Ala.—Alabama, etc., R. Co. v. Hawk, 72 Ala. 112, 47 Am. Rep. 403.

Cal.—Mitchell v. Southern Pac. R. Co., 87 Cal. 62.

Ill.—Chicago, etc., R. Co. v. Rielly, 40 Ill. App. 416.

Iowa.—McDonald v. Chicago, etc., R. Co., 26 Iowa, 124, 96 Am. Dec. 114.

Ohio.—Cincinnati, etc., R. Co. v. Lohe (Ohio), 67 N. E. 161.

Md.—Baltimore, etc., Turnpike Road Co. v. Leonhardt, 66 Md. 70; Western Maryland R. Co. v. Herold, 74 Md. 510.

Mo.—Whitehead v. St. Louis, etc., R. Co., 22 Mo. App. 60.

Pa.—Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21, 37 Am. Rep. 651.

Va.—Virginia Midland R. Co. v. Roach, 83 Va. 375.

W. Va.—Downey v. Chesapeake, etc., R. Co., 28 W. Va. 732.

Tex.—Houston, etc., R. Co. v. Moore, 49 Tex. 31, 30 Am. Rep. 98.

10. New York, etc., R. Co. v. Ball, 53 N. J. L. 283, 21 Atl. 1052; Hanson v. Mansfield, etc., R. Co., 38 La. Ann. 111, 58 Am. Rep. 162; McDonald v. Chicago, etc., R. Co., 26 Iowa, 124, 96 Am. Dec. 114; Western Maryland R. Co. v. Herold, 74 Md. 510.

11. Eaton v. Delaware, etc., R. Co., 57 N. Y. 382, 15 Am. Rep. 313; Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21, 37 Am. Rep. 651; Florida Southern R. Co. v. Hirst, 30 Fla. 32, 32 Am. St. Rep. 17; Files v. Boston, etc., R. Co., 149 Mass. 204, 14 Am. St. Rep. 411.

Knowledge will be presumed from previous employment by the carrier: Pennsylvania, etc., R. Co. v. Langdon, *supra*; Houston, etc., R. Co. v. Clemons, 55 Tex. 88, 40 Am. Rep. 799; Virginia Midland R. Co. v. Roach, 83 Va. 375.

senger and he acts in violation thereof, under the direction or with the knowledge, consent or permission of the carrier's servant, he is not guilty of contributory negligence, which will preclude a recovery.¹² So, if the carrier fails to enforce the rule and permits it to be generally disregarded.¹³ But the customary violation of a rule cannot avail a passenger who was requested by the carrier's employes to obey it.¹⁴

3. Acts by permission or direction of carrier's employes.—Where a passenger acts by permission or consent, or by the advice, direction, request, or command of a conductor or person in charge of a train or car, or other employe or agent of the carrier, acting within the scope of his authority, and such action on his part will not lead him into or expose him to any known or apparent or obvious danger, such as an ordinarily prudent person would not assume, he will not be chargeable with contributory negligence, although his action may result in causing injury to himself.¹⁵ Where

12. *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125, 18 Am. Rep. 360; *Dunn v. Grand Trunk R. Co.*, 58 Me. 187, 4 Am. Rep. 267; *Jones v. Chicago, etc., R. Co.*, 43 Minn. 279; *Hanson v. Mansfield R., etc., Co.*, 38 La. Ann. 111, 58 Am. Rep. 162; *New York, etc., R. Co. v. Ball*, 53 N. J. L. 286.

13. *Chicago, etc., R. Co. v. Lowell*, 151 U. S. 209, 38 L. Ed. 131, 14 Sup. Ct. 281; *Jones v. Chicago, etc., R. Co.*, 43 Minn. 279; *New York, etc., R. Co. v. Ball*, 53 N. J. L. 286.

14. *Houston, etc., R. Co. v. Bryant (Tex. Civ. App.)*, 72 S. W. 885.

15. N. Y.—*Lent v. New York Cent., R. Co.*, 120 N. Y. 467; *Carroll v. New York, etc., R. Co.*, 1 Duer (N. Y.) 584; *Schurr v. Houston*, 10 St. Rep. (N. Y.) 262.

Ala.—*Southern R. Co. v. Roebuck (Ala.)*, 31 So. 611; *Highland Ave., etc., R. Co. v. Winn*, 93 Ala. 309; *Montgomery, etc., R. Co. v. Stewart*, 91 Ala. 421; *South, etc., Alabama R. Co. v. Schaufler*, 75 Ala. 142.

Ark.—*St. Louis, etc., R. Co. v. Person*, 49 Ark. 182; *Little Rock, etc., R. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10; *St. Louis, etc., R. Co. v. Cantrell*, 37 Ark. 519, 40 Am. Rep. 105.

Ill.—*Hannibal, etc., R. Co. v. Martin*, 111 Ill. 219.

Ind.—*Louisville, etc., R. Co. v. Bisch*, 120 Ind. 549, 41 Am. & Eng. R. Cas. 589; *Louisville, etc., R. Co. v. Kelly*, 92 Ind. 371.

Iowa.—*Pence v. Wabash R. Co.*, 116 Iowa, 279, 90 N. W. 59.

Mich.—*McCaslin v. Lake Shore, etc., R. Co.*, 93 Mich. 553; *Clinton v. Root*, 58 Mich. 182, 55 Am. Rep. 671.

Miss.—*Davis v. Louisville, etc., R. Co.*, 69 Miss. 136.

Ohio.—*Pittsburgh, etc., R. Co. v. Krouse*, 30 Ohio St. 222.

Pa.—*Hartzig v. Lehigh Valley R. Co.*, 155 Pa. St. 364.

Tenn.—*Washburn v. Nashville, etc., R. Co.*, 3 Head (Tenn.) 638, 75 Am. Dec. 784.

for example, a passenger, under the direction of the conductor, gets off a slowly moving train;¹⁶ or passes from the platform of one car to another.¹⁷ But, while if the conditions which led the passenger into danger were of the carrier's own creation, both common sense and justice forbid that it should be allowed to withhold compensation, if, on the other hand, the danger, notwithstanding the permission, direction or solicitation of the carrier's servant, was so manifest that in the exercise of ordinary prudence the passenger should have observed it, or, if observing it, he voluntarily attempted an act obviously dangerous, he should be held guilty of contributory negligence and should suffer the consequences of an injury brought on by himself.¹⁸

§ 4. Sudden peril—acts in emergencies.—There is no rule of law which imposes it as a duty upon one, over whom danger impends by the negligence of another, to incur greater danger by delaying his efforts to avoid it until its exact nature and measure are ascertained. The instinctive effort of a passenger, or his impulsive or unguarded act, resulting in injury, while trying to avoid danger, in a reasonable and well grounded fear that a collision was about to take place, or an accident occur, which would result in serious injury, due to the mismanagement of the carrier, or the fact that he did not exercise the best judgment in the emergency, does not relieve the carrier from responsibility; but is to be deemed a consequence of such mismanagement for which the carrier is responsible, and a presumption of negligence on the part of the carrier arises because of the injuries received.¹⁹ The general

Tex.—Gulf, etc., R. Co. v. Shelton (Tex. Civ. App.), 69 S. W. 653, 70 S. W. 359.

16. Southern Ry. Co. v. Bandy, 120 Ga. 463, 47 S. E. 923.

17. Lent v. New York Cent., etc., R. Co., 120 N. Y. 467.

18. Hunter v. Cooperstown, etc., R. Co., 112 N. Y. 371, 8 Am. St. Rep. 752; Myers v. New York Cent. R. Co., 88 Hun (N. Y.) 619; Distler v. Long Island R. Co., 78 Hun (N. Y.) 252, 28 N. Y. Supp. 865; Whitlock v. Comer, 57 Fed. 565; Pittsburgh, etc., R. Co. v. Gray, 28 Ind. App.

588, 64 N. E. 39; East Tennessee, etc., R. Co. v. Hughes, 92 Ga. 388; Jeffersonville R. Co. v. Swift, 26 Ind. 459; Files v. Boston, etc., R. Co., 149 Mass. 204, 14 Am. St. Rep. 411; Bardwell v. Mobile, etc., R. Co., 63 Miss. 574, 56 Am. Rep. 842; New York, etc., R. Co. v. Ball, 53 N. J. L. 283; Kansas, etc., R. Co. v. Dorough, 72 Tex. 108; Worthington v. Central Vermont R. Co. (Vt.), 23 Atl. 590.

19. Voak v. Northern Cent. R. Co., 75 N. Y. 320; Coulter v. American, etc., Express Co., 56 N. Y. 585; Heath v. Glens Falls, etc., St. Ry.

rule is that a person placed by the reckless or careless acts of the servants or agents of another, in such a position as to be compelled to chose upon the instant and in the face of a great and impending peril between two hazards, such as a dangerous leap from the moving car, or to remain in the car at an apparently certain peril, is not precluded from recovery against the carrier for injuries thereby sustained, because of the fact that the car passed in safety and the peril was averted, where the action of the passenger was such as would have been taken by any one of ordinary prudence, placed in the same situation, and was not the result of unreasonable alarm and the injury was the result of such enforced action, and the proximate cause of the injury the misconduct of the person in charge of the car. The peril of remaining in the car is to be judged by the circumstances as they then appeared to the passenger, and not by the result, and the passenger has the right to act upon the probabilities as they appeared at the time. It is for the jury to say whether any one of ordinary prudence placed in the same situation would have acted in the same manner, and the outcries of the passengers in the same peril are competent upon the question as to whether the alarm of the person injured was unreasonable.²⁰ Ordinarily, a passenger who jumps from a train,

Co., 90 Hun (N. Y.) 560, 71 St. Rep. (N. Y.) 29, 36 N. Y. Supp. 22; Buel v. New York Cent. R. Co., 31 N. Y. 314; Chicago, etc., R. Co. v. Becker, 76 Ill. 25; Palmer v. Warren St. Ry. Co., 206 Pa. St. 574, 56 Atl. 49; Gannon v. New York, etc., R. Co., 173 Mass. 50, 52 N. E. 1075, 43 L. R. A. 833, 5 Am. Neg. Rep. 613; Floutroup v. Boston & M. R. Co., 163 Mass. 152, 39 N. E. 797; Dallas Consol. Tract. Ry. Co. v. Randolph (Tex. Civ. App.), 27 S. W. 925, 5 Am. Electl. Cas. 379; Adams v. Hannibal, etc., R. Co., 71 Mo. 553; Pennsylvania R. Co. v. Stageneier, 118 Ind. 305, 20 N. E. 843; Chicago, etc., R. Co. v. Clough, 134 Ill. 586, 25 N. E. 664; Knowlton v. Milwaukee City Ry. Co., 59 Wis. 278; Holzab v. New Orleans, etc., R. Co., 38 La. Ann. 185; Duiney v. Wheeling, etc., R. Co., 28 Wis. 32;

South Covington, etc., Ry. Co. v. Ware, 84 Ky. 267, 1 S. W. 493.

20. *N. Y.*—Twomley v. Central Park, etc., R. Co., 69 N. Y. 158, 25 Am. Rep. 162; Dyer v. Erie R. Co., 71 N. Y. 236; Cuyler v. Decker, 20 Hun (N. Y.) 175; Buel v. New York Cent. R. Co., 31 N. Y. 314, 88 Am. Dec. 271.

U. S.—Ladd v. Foster, 12 Sawy. (U. S.) 547; Saltonstall v. Stockton, Taney (U. S.) 11; Hastings v. Northern Pac. R. Co., 53 Fed. 224.

Ala.—Selma St., etc., R. Co. v. Owen, 132 Ala. 420, 31 So. 598; Central R., etc., Co. v. Miles, 88 Ala. 256.

Ark.—St. Louis, etc., R. Co. v. Maddry, 57 Ark. 306, 58 Am. & Eng. R. Cas. 327; St. Louis, etc., R. Co. v. Murray, 55 Ark. 248, 29 Am. St. Rep. 32, 52 Am. & Eng. R. Cas. 373.

though in rapid motion, to avoid a threatened forcible ejection by the conductor, is not guilty of contributory negligence.²¹

In the use of electrical appliances, the carrier is bound to use the very highest degree of care to see that those in use on the car do not get out of order and so endanger the safety of passengers.²² Where, by reason of the electric current being suddenly reversed to prevent a collision, the circuit breaker blew out, causing a loud explosion and a flash of light in the car, which was

Cal.—*Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62.

Colo.—*Denver, etc., R. Co. v. Pickard*, 8 Colo. 163.

Ga.—*South Western R. Co. v. Paulk*, 24 Ga. 366.

Ill.—*West Chicago St. R. Co. v. Lyons*, 57 Ill. App. 536; *Galena, etc., R. Co. v. Yarwood*, 17 Ill. 509, 65 Am. Dec. 682; *Frink v. Potter*, 17 Ill. 406.

Ind.—*Grand Rapids, etc., R. Co. v. Ellison*, 117 Ind. 234, 39 Am. & Eng. R. Cas. 480; *Indiana Ry. Co. v. Maurer* (Ind.), 66 N. E. 156.

La.—*Odom v. St. Louis, etc., R. Co.*, 45 La. Ann. 1201, 14 So. 734, 23 L. R. A. 152; *Carruth v. Texas, etc., R. Co.*, 45 La. Ann. 1228, 14 So. 736; *Reary v. Louisville, etc., R. Co.*, 40 La. Ann. 32.

Md.—*Western Maryland R. Co. v. State*, 95 Md. 637, 53 Atl. 969; *Western Maryland R. Co. v. Herold*, 74 Md. 510.

Mass.—*Ingalls v. Bills*, 9 Metc. (Mass.) 1, 43 Am. Dec. 346.

Mich.—*Lacas v. Detroit City R. Co.*, 92 Mich. 412, 52 N. W. 745.

Minn.—*Wilson v. Northern Pac. R. Co.*, 26 Minn. 278.

Mo.—*Dimmitt v. Hannibal, etc., R. Co.*, 40 Mo. App. 654; *Siegrist v. Arnot*, 86 Mo. 200, 56 Am. Rep. 425.

Ohio.—*Iron R. Co. v. Mowery*, 36 Ohio St. 418, 38 Am. Rep. 597.

Pa.—*Dunlay v. Traction Co.*, 18

Pa. Super. Ct. 206; *Pennsylvania R. Co. v. Lyons*, 129 Pa. St. 120, 15 Am. St. Rep. 701; *Pennsylvania R. Co. v. Peters*, 116 Pa. St. 206; *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147, 62 Am. Dec. 323. If the passenger leaps from the car without reasonable apprehension of danger he is guilty of contributory negligence, but whether the circumstances were such as to afford reasonable grounds to apprehend danger has been held to be a question for the jury. See cases cited above in this note.

W. Va.—*Mannon v. Camden Interstate Ry. Co.*, 3 St. Ry. Rep. 928, 56 W. Va. 554, 49 S. E. 450. See also notes on Acts in Emergencies and cases cited 3 St. Ry. Rep. 928-932.

21. *Kline v. Central Pac. R. Co.*, 37 Cal. 400, 99 Am. Dec. 282; *Highland Ave., etc., R. Co. v. Winn*, 93 Ala. 309; *International, etc., R. Co. v. Hassell*; 62 Tex. 256; *Boggess v. Chesapeake, etc., R. Co.*, 37 W. Va. 297. But he must have reasonable grounds for believing that he would suffer bodily harm by remaining on the train. *St. Louis, etc., R. Co. v. Rosenberry*, 45 Ark. 256, affd. (Ark.) 11 S. W. 212.

22. *Leonard v. Brooklyn H. R. Co.*, 7 Am. Electl. Cas. 583, 57 App. Div. (N. Y.) 125, 67 N. Y. Supp. 985, an action for injuries received by a woman in jumping from an electric car, where it appeared by the evidence

followed by the crash of breaking glass from the collision, the fact that the plaintiff, a nervous woman, was injured by jumping from the car, while the other passengers remained in the car and were uninjured, did not preclude her from the right to recover for her injuries.²³ So, a passenger, attempting to board a street car which starts after she has her foot upon the step and her hand upon the railing, is not necessarily negligent in continuing her hold upon the car after it starts, since, being placed in sudden peril by the negligence of the carrier, she is not held to strict accountability for her mode of action.²⁴ But there must be a reasonable apprehension of danger, and the carrier is not liable for an injury to a passenger occasioned by her jumping from the car under an apprehension of danger where there was no real danger and the apparent danger was not caused by the negligence of the carrier.²⁵ An act of the passenger to avoid great inconvenience, as shutting a car door to shut out smoke and cinders, although attended with slight danger, is not an act of contributory negli-

that the entire car was enveloped in flames caused by defective insulation of the cables underneath. It was also held that the question whether the accident was caused by defective insulation, and whether the company used due care in its inspection, was for the jury. Poulson v. Nassau Elect. R. Co., 7 Am. Electl. Cas. 675, 18 App. Div. (N. Y.) 221, 45 N. Y. Supp. 941, where plaintiff's ten-year-old daughter jumped from an electric car because of a blaze of fire coming from alongside of the motorman, which blaze was so great that it was noticed 50 or 60 feet away, it was sufficient to authorize the jury to infer negligence on the part of the company. Poulson v. Nassau Elec. R. Co., 7 Am. Electl. Cas. 677, 30 App. Div. (N. Y.) 246, 51 N. Y. Supp. 933, and the fact that other passengers remained in the car would not operate conclusively to establish contributory negligence on plaintiff's part in jumping. Buckbee v. Third Ave. R. Co., 7 Am. Electl. Cas. 692, 64 App.

Div. (N. Y.) 360, 72 N. Y. Supp. 217, where plaintiff, a woman, in escaping from a car stepped on the door sill and claimed to have received an electric shock, flames having broken from the controller box and extended beneath the car for its entire length, being preceded by a loud report, the evidence was held sufficient to go to the jury on the question as to whether plaintiff's injury arose from a shock of electricity.

23. Wanzer v. Chippewa Val. El. R. Co., 108 Wis. 329, 84 N. W. 423. And see Texarkana St. R. Co. v. Hart (Tex. Civ. App.), 26 S. W. 435. So, a passenger on a stalled electric car is not negligent, as a matter of law, in attempting to jump from a car on suddenly noticing that there is danger of another car colliding with it. Quinn v. Shamokin & M. C. Elec. R. Co., 7 Pa. Super. Ct. 19; Shankenbury v. Metropolitan St. R. Co., 46 Fed. 177.

24. Joliet St. Ry. Co. v. Duggan, 45 Ill. App. 450. And see Washing-

gence;²⁶ but it has been held to the contrary where the act was attended with obviously great danger.²⁷

§ 5. Contributory negligence of children.—It is a rule of law now almost universally held that the degree of care, prudence and discretion required from children, who are *sui juris*, is not the same as is required of adults, but is only such as ought reasonably to be expected of persons of their age, intelligence, capacity and experience.²⁸ The courts have held, as a general rule, that children under five years of age are *non sui juris*, and cannot be guilty of contributory negligence, as a matter of law.²⁹ It

ton & G. R. Co. v. Hickey (D. C.),
23 Wash. L. Rep. 177.

25. Kleiber v. Peoples R. Co., 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613. And see Getman v. Delaware, etc., R. Co., 162 N. Y. 21; Chicago, etc., R. Co. v. Felton, 125 Ill. 458.

26. Western Maryland R. Co. v. Stanley, 61 Md. 266, 48 Am. Rep. 96.

27. Adams v. Lancashire, etc., R. Co., L. R. 4 C. P. 739; Gee v. Metropolitan R. Co., L. R. 8 Q. B. 161.

28. Swift v. Staten Island R. Co., 123 N. Y. 650; McCarragher v. Rogers, 120 N. Y. 535; Connolly v. Knickerbocker Ice Co., 114 N. Y. 107; Kuebler v. New York, etc., R. Co., 15 N. Y. Supp. 187; Byrne v. New York Cent., etc., R. Co., 83 N. Y. 620; Haycroft v. Lake Shore, etc., R. Co., 2 Hun (N. Y.) 491, 64 N. Y. 636; Casey v. New York Cent., etc., R. Co., 78 N. Y. 518; McGovern v. New York Cent., etc., R. Co., 67 N. Y. 417; Fallon v. Central Park, etc., R. Co., 64 N. Y. 13; Thurber v. Harlem, etc., R. Co., 60 N. Y. 336; Reynolds v. New York Cent., etc., R. Co., 58 N. Y. 252; Mowrey v. Central City R. Co., 51 N. Y. 666; O'Mara v. Hudson River R. Co., 38 N. Y. 445; Sheridan v. Brooklyn, etc., R. Co., 36 N. Y. 42; Mallard v. Ninth Ave. R. Co., 27

St. Rep. (N. Y.) 801, 7 N. Y. Supp. 666; Block v. Harlem, etc., R. Co., 28 St. Rep. (N. Y.) 495, 9 N. Y. Supp. 164; Western, etc., R. Co. v. Young, 83 N. Y. 512; Hemingway v. Chicago, etc., R. Co., 72 Wis. 42, 7 Am. St. Rep. 823; Chicago, etc., R. Co. v. Wilcox, 44 Alb. L. J. 70; Wright v. Detroit, etc., R. Co., 77 Mich. 123; Citizens' St. R. Co. v. Hamer (Ind. App.), 62 N. E. 778; Philadelphia, etc., R. Co. v. Hassard, 75 Pa. St. 367; Coller v. Frankford, etc., R. Co. (Pa.), 9 W. N. C. 477; Ridenhour v. Kansas, etc., R. Co., 102 Mo. 270; Chicago City R. Co. v. Wilcox (Ill.), 24 N. E. 419; Erie City, etc., R. Co. v. Schuester, 113 Pa. St. 413; Louisville R. Co. v. Phillips, 22 Ky. Law. Rep. 842, 58 S. W. 995.

29. Ihl v. Forty-Second St., etc., R. Co., 47 N. Y. 317, 7 Am. Rep. 450; Neun v. Rochester Ry. Co., 165 N. Y. 146, 58 N. E. 876; Prendergast v. New York Cent., etc., R. Co., 58 N. Y. 652; Frick v. St. Louis, etc., R. Co., 23 Wis. 186; Wright v. Malden, etc., R. Co., 4 Allen (Mass.) 283; Toledo, etc., R. Co. v. Grable, 88 Ill. 441; Farris v. Cass Ave., etc., R. Co., 80 Mo. 325; Baltimore City P. R. Co. v. McDonnell, 43 Md. 534; Giraldo v. Coney Island, etc., R. Co., 16 N. Y.

has been quite generally held also that infants over twelve years of age are presumed, as a matter of law, to be *sui juris* as to their responsibility for contributory negligence, and to have sufficient capacity to apprehend, and sufficient prudence and foresight to avoid danger, and this presumption prevails in the absence of any evidence showing the lack of such capacity.³⁰ As to children under those ages, the courts have usually held the question whether the child was *sui juris* to be one of fact for the jury to determine, and not a question of law, unless the child was unusually intelligent, or the situation was such that a child of ordinary intelligence must of necessity realize his danger.³¹ The rule adopted by the New York courts in the earlier cases holding an infant to the same degree of care as an adult was subsequently repudiated by the court of appeals of that state, which adopted the rule now generally held as above stated.³² In entering, riding upon, and leaving trains or street cars, children who are *sui juris* are bound to exercise prudence equal to their capacity, knowledge, and experience, and to that extent are held responsible in law for acts or omis-

Supp. 774; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455, 36 Barb. (N. Y.) 130; *Pittsburgh, etc., R. Co. v. Caldwell*, 74 Pa. St. 421; *Westerfield v. Lewis*, 43 La. Ann. 63, 9 So. Rep. 52; *Government St. R. Co. v. Hanlon*, 53 Ala. 570.

30. *Tucker v. New York Cent., etc., R. Co.*, 124 N. Y. 308, 26 N. E. 916; *Manahan v. Steinway, etc., R. Co.*, 125 N. Y. 760; *St. Clair St. Ry. Co. v. Eadie*, 43 Ohio St. 91, 54 Am. Rep. 144; *Nagle v. Alleghany Val. R. Co.*, 88 Pa. St. 35; *Hogan v. Central Park*, etc., R. Co., 124 N. Y. 647.

31. *Stone v. Dry Dock, etc., R. Co.*, 115 N. Y. 104, 23 N. Y. St. Rep. 551, revg. 46 Hun (N. Y.) 184; *Gumby v. Metropolitan St. Ry. Co.*, 171 N. Y. 635, 65 App. Div. (N. Y.) 38, 72 N. Y. Supp. 551; *Weitzman v. Nassau Electric R. Co.*, 33 App. Div. (N. Y.) 585, 53 N. Y. Supp. 905; *Sullivan v. Union Ry. Co.*, 81 App. Div. (N. Y.) 596, 81 N. Y. Supp. 449; *McDermott v. Boston Elev. Ry. Co.*, 1 St.

Ry. Rep. 325, (Mass.) 68 N. E. 34; *Costello v. Third Ave. R. Co.*, 161 N. Y. 317, 55 N. E. 897; *Dowling v. New York Cent., etc., R. Co.*, 90 N. Y. 671; *Moebus v. Herrman*, 108 N. Y. 353; *Tucker v. New York Cent., etc., R. Co.*, 124 N. Y. 308, 36 N. Y. St. Rep. 273; *Zwack v. New York Cent., etc., R. Co.*, 160 N. Y. 362, 54 N. E. 785.

32. *Thurber v. Harlem, etc., R. Co.*, 60 N. Y. 326, repudiating former rule laid down in *Honegsberger v. Second Ave. R. Co.*, 2 Abb. Ct. App. Dec. 378, 1 Keyes (N. Y.) 574; *Burke v. Seventh Ave., etc., R. Co.*, 49 Barb. (N. Y.) 529; *Solomon v. Central Park*, etc., R. Co., 1 Sweeny (N. Y.) 298; and *Squire v. Central Park*, etc., R. Co., 36 N. Y. Super. Ct. 432; *Swift v. Staten Island R. T. Co.*, 123 N. Y. 645, 33 St. Rep. 604. See also *Phillips v. Duquesne Tract. Co.*, 8 Pa. Super. Ct. 210, 42 W. N. C. 528, 29 Pittsb. L. J. N. S. 60.

sions contributory to their own injury.³³ A boy fourteen years old is not, as matter of law, free from contributory negligence in trying to board an electric car followed by a trailer moving at the rate of from three to seven miles an hour.³⁴ If a boy ten years old fall from the platform or car steps because of his own imprudence, the carrier is not liable merely because the conductor called him to the platform when about to reach his destination and while giving the signal to stop.³⁵ Nor is the carrier liable for the death of a seven year old boy caused by his falling from a car in which he was riding without permission while voluntarily attempting to alight while the car was moving.³⁶ But where a young girl is boarding a street car and has hold of the hand rail when it starts, it is not contributory negligence for her to hold on to the rail, even though it causes her to be dragged half a block.³⁷ Where a boy sixteen years of age, a passenger on defendant's street car, the rear platform being too crowded to allow him to get on, got on the front platform, which was also crowded, standing with one foot on the platform and the other on the step, holding to the dashboard rail; the conductor ran forward to get on the front platform and at the first attempt failed, and on the second attempt, calling out for the passenger to make room for him, hit against plaintiff, and he and the conductor were immediately forced off, and he was run over; the question of negligence and contributory negligence were held to be properly submitted to the jury.³⁸ So, whether it was contributory negligence for a boy thirteen years of age, to sit on the platform of an electric car, resting his feet on the lower step, was held to be a question

33. Little Rock Tract. & E. Co. v. Nelson, 66 Ark. 494, 52 S. W. 7; Baltimore City Pass. R. Co. v. McDonnell, 43 Md. 534; Phila. City Pass. Ry. Co. v. Hassard, 75 Pa. St. 367.

34. Sly v. Union Depot R. Co., 134 Mo. 681, 36 S. W. 235; Chicago City Ry. Co. v. Wilcox (Ill.), 24 N. E. 419, 8 L. R. A. 494; Erie City Pass. Ry. Co. v. Schuester, 113 Pa. St. 412, 6 Atl. 269; Mowrey v. Central City Ry. Co., 66 Barb. (N. Y.) 43; Swift v. Staten Island R. T. Co., 123 N. Y. 645, 25 N. E. 378.

35. Cronan v. Crescent City R. Co., 49 La. Ann. 65, 21 So. 163.

36. Brightman v. Union St. R. Co., 167 Mass. 113, 44 N. E. 1091.

37. Schoenfelt v. Metropolitan St. Ry. Co., 40 Misc. Rep. (N. Y.) 201, 81 N. Y. Supp. 644.

38. Gray v. Metropolitan St. Ry. Co., 39 App. Div. (N. Y.) 536, 57 N. Y. Supp. (91 St. Rep.) 587; Garoni v. Compagnie Nationale de Navigation, 131 N. Y. 614, affg. 39 St. Rep. (N. Y.) 63, 14 N. Y. Supp. 797.

for the jury, since, the defendant not attempting to prevent passengers riding upon the steps and having accepted the plaintiff as a passenger while occupying the position he did, the question of negligence was at least one concerning which reasonable minds might differ.³⁹ A railroad company owes the duty of preventing children of such tender years that negligence cannot be imputed to them from being on the platform of a moving car, and, if such a child gets there without permission, failure to remove it from its position of danger as soon as it is discovered, is negligence.⁴⁰

Parents are not guilty of contributory negligence *per se* in permitting a boy of ten years, bright and healthy, to go upon an errand two miles away and return by a train which he knew would be signaled to stop near his home, and would stop when signaled, which will prevent a recovery by them for injuries sustained by the boy in jumping off the train upon the conductor's refusal to stop.⁴¹ How much experience and what degree of intelligence a child must evince before negligence can be imputed to him can never be determined as a matter of law. The age, the person, the circumstances surrounding the accident must all be taken into consideration and the jury determines the question as a matter of fact.⁴²

§ 6. Contributory negligence of aged or infirm persons.—A carrier does not owe to every passenger precisely the same care without respect to age, or bodily infirmity.⁴³ If a passenger be

39. Seller v. Market St. Ry. Co., 1 St. Ry. Rep. 9, 139 Cal. 268, 72 Pac. 1006.

40. Levin v. Second Ave. Tract. Co., 201 Pa. 58, 50 Atl. 225; Barre v. Railway Co., 155 Pa. 170, 26 Atl. 99.

41. Avery v. Galveston, etc., R. Co., 81 Tex. 243, 26 Am. St. Rep. 809, 16 S. W. 1015.

42. Barksdull v. New Orleans & C. R. Co., 23 La. Ann. 180; McMahon v. Northern Cent. Ry. Co., 39 Md. 438; Hestonville Pass. Ry. Co., v. Connell, 88 Pa. St. 520; Oldfield v. New York & H. R. Co., 14 N. Y.

310, affg. 3 E. D. Smith, 103; Washington & G. Ry. Co. v. Gladmon, 15 Wall. (U. S.) 401; Brown v. European, etc., R. Co., 58 Me. 384; Nagle v. Allegheny V. R. Co., 88 Pa. St. 35; St. Claire St. Ry. Co. v. Eadie, 43 Ohio St. 91, 54 Am. Rep. 144; Westerfield v. Lewis, 43 La. Ann. 63, 9 So. 52; Government St. R. Co. v. Hanlon, 53 Ala. 70; Farris v. Cass Ave., etc., R. Co., 80 Mo. 325. See other cases cited elsewhere as to contributory negligence of children and their parents, guardians or custodians.

43. St. Louis, etc., R. Co. v. Fin-

evidently crippled, or infirm, or very young, the duty of the carrier toward him while boarding the car or alighting, or while remaining in the car, must be performed with due regard to such apparent condition.⁴⁴ A passenger has a right to rely on the carrier's exercising proper care and furnishing a reasonably safe place to board and alight, and the fact that he is old, crippled, deaf, or blind, or very young, and is traveling alone, without an attendant, does not as a matter of law, constitute contributory negligence.⁴⁵ But where a passenger is laboring under such a disability, he will be guilty of negligence if he does not make known his infirmity to the carrier's servants; and where a passenger alighting from a car did not ask for assistance, though having an opportunity, nor inform the servants in charge of his disability, nor look to see whether the place to alight was safe, he was negligent precluding recovery for an injury received.⁴⁶ Knowledge communicated to one employe upon a car that a passenger is feeble and will need assistance in getting off is notice to the carrier; and it is not necessary to notify the conductor or the one in charge of the car,⁴⁷ and a conversation which plaintiff had with

lay, 79 Tex. 85, 15 S. W. 266; Schiller v. Dry Dock, etc., R. Co., 26 Misc. Rep. (N. Y.) 392, 56 N. Y. Supp. 184.

44. Ridenhour v. Kansas City Cable R. Co., 102 Mo. 283, 14 S. W. 760; Sheridan v. Brooklyn & N. R. Co., 36 N. Y. 39, 34 How. Pr. (N. Y.) 217; McCann v. Newark & So. R. Co., 58 N. J. L. (29 Vroom.) 642, 34 Atl. 1052, 4 Am. & Eng. R. Cas. 382, 33 L. R. A. 127; Indianapolis, etc., R. Co. v. Pitzer, 109 Ind. 179; East Line & R. Co. v. Rushing, 69 Tex. 306, 6 S. W. 834; Shenandoah Val. R. Co. v. Moose, 83 Va. 827, 3 S. E. 796; Lake Shore, etc., R. Co. v. Salzman, 52 Ohio St. 558, 31 L. R. A. 261; Atchison, etc., R. Co. v. Weber, 33 Kan. 543; Louisville, etc., R. Co. v. Fleming, 14 Lea. (Tenn.) 128; Columbus, etc., R. Co. v. Powell, 40 Ind. 37.

45. Texas & P. Ry. Co. v. Reid (Tex. Civ. App.), 74 S. W. 99; St.

Louis S. W. Ry. Co. v. Ferguson (Tex. Civ. App.), 64 S. W. 797. See also Sheridan v. Brooklyn City, etc., R. Co., 36 N. Y. 39, 93 Am. Dec. 490; St. Louis, etc., R. Co. v. Maddry, 57 Ark. 306. But see New Orleans, etc., R. Co. v. Statham, 42 Miss. 607, 92 Am. Dec. 478, holding it a duty for such person to have an attendant.

46. Young v. Missouri Pac. R. Co., 93 Mo. App. 267; Willetts v. Buffalo, etc., R. Co., 14 Barb. (N. Y.) 585; New Orleans, etc., R. Co. v. Statham, *supra*; McGinney v. Canadian Pac. R. Co., 7 Manitoba L. Rep. 151.

47. Foss v. Boston & M. R. Co. (N. H.), 21 Atl. 222, 11 L. R. A. 367, 47 Am. & Eng. R. Cas. 566; Croom v. Chicago, etc., R. Co., 52 Minn. 296, 38 Am. St. Rep. 557, 53 N. W. 1128, 18 L. R. A. 602, 7 Am. Ry. & Corp. Rep. 468. The carrier is not liable for the death by heart disease of a pas-

the conductor on entering the car is competent to show that he knew that the plaintiff was a cripple.⁴⁸ Where a elderly man requested a street car driver to stop and permit him to alight, and was rudely answered, he cannot recover if he be injured in attempting to jump from the car while in slow motion without any notice to the driver of his intention, although his injury was occasioned by a sudden jerk of the car as the team drawing it were struck by a whip just as he was alighting.⁴⁹ The carrier is not chargeable with notice that a passenger more than fifty years of age has ridden on a cable car only once or twice and does not understand the manner of receiving and discharging passengers.⁵⁰ But appearance alone is no excuse for a mistake on the part of the carrier's servant; thus, if he forcibly remove from the street car one suffering from St. Vitus dance, or one being in a weak condition from the administration of anaesthetics by a physician, under the mistaken notion that he is intoxicated, a rule of the company requiring conductors not to allow intoxicated persons on the car affords no protection.⁵¹ Whether one is negligent, however crippled or otherwise disabled, in attempting to board a moving car is generally a question for the jury under the circumstances of the case.⁵² A person who is laboring under the infirmities incident to old age, or who is crippled or otherwise physically disabled, is bound to exercise only such a degree of care and diligence to avoid danger as his physical and mental capacity enable him to exercise.⁵³ No one, whether sick, lame, imbecile, or vigorous and youthful is bound to exercise all the skill and all

senger, who was rudely and roughly removed from the car by the driver under the mistaken impression that he was drunk, and placed on the sidewalk, where soon after he died, there being nothing to show that it was not the disease that killed him, or that the driver's wrongful acts in any manner produced or hastened his death. *Briggs v. Minneapolis*, 52 Minn. 36, 53 N. W. 1019.

48. *Louisville, etc., R. Co. v. Bowlds*, 23 Ky. L. Rep. 1212, 64 S. W. 957.

49. *Outen v. North & S. St. R. Co.*, 94 Ga. 662, 21 S. E. 710.

50. *Jackson v. Grand Ave. R. Co.*, 118 Mo. 199, 24 S. W. 192.

51. *Regner v. Glens Falls, etc., R. Co.*, 74 Hun (N. Y.) 202, 56 St. Rep. (N. Y.) 300, 26 N. Y. Supp. 625; *Watson v. Oswego St. Ry. Co.*, 7 Misc. Rep. (N. Y.) 356, 28 N. Y. Supp. 84.

52. *Cincinnati, etc., R. Co. v. Nolan*, 8 Ohio C. C. 347; *Shaughnessy v. Consol. Tract. Co.*, 17 Pa. Super. Ct. 588; *Baltimore Tract Co. v. State, Ringgold*, 78 Md. 409, 58 Am. & Eng. R. Cas. 200, 28 Atl. 397.

53. *Mowrey v. Central City R. Co.*, 51 N. Y. 666; *Chicago West D. Ry.*

the care that the most capable and ready-witted person could command. Ordinary capacity and ordinary care and attention in protecting themselves is all the law requires. This each is bound to give whatever his age or condition ; and if he fails, he cannot call upon others to supply his deficiencies, or to compensate him for losses arising from its absence.⁵⁴

§ 7. Contributory negligence of parents, guardians, or custodians.—The rule that the negligent conduct of a parent, guardian, or custodian in allowing a child *non sui juris* to be exposed to danger, which negligence is the proximate cause of injury, is contributory negligence which must be imputed to the child and will bar the plaintiff from recovery in an action brought for personal injuries has been applied in the case of an action for injuries to a passenger who was an infant, and where plaintiff's father took her under his arm, and stepped from a moving train after it had passed the platform at a station, fell, and she was injured, the plaintiff was held, as matter of law, chargeable with contributory negligence.⁵⁵ But it has been held not negligence *per se* for a mother to permit a child four years of age to ride on a street car in charge of another child twelve and one-half years old;⁵⁶ nor to permit a child of five to ride upon a street car in company with another child of eleven.⁵⁷

§ 8. Intoxication as evidence of contributory negligence.—One who voluntarily disables himself by reason of intoxication is held to the same degree of care and prudence for his safety as is required of a sober person.⁵⁸ If intoxication contributes to an injury in any degree as a proximate cause thereof, it is a complete bar to any action for any damages sustained in consequence of it.⁵⁹

Co. v. Haviland, 12 Ill. App. 561; Jacksonville St. Ry. Co. v. Chappell, 21 Fla. 175; Walter v. Chicago, etc., R. Co., 39 Iowa 33; Bridges v. North London R. Co., L. R. 7 H. L. 213.

54. Sheridan v. Brooklyn City, etc., R. Co., 36 N. Y. 39, 93 Am. Dec. 490; Farrar v. New Orleans, etc., R. Co., 52 La. Ann. 417, 26 So. 995.

55. Morrison v. Erie R. Co., 56 N. Y. 304.

56. East Saginaw City R. Co. v. Bohn, 27 Mich. 503.

57. Pittsburgh, etc., R. Co. v. Caldwell, 74 Pa. St. 421.

58. Smith v. Norfolk & S. R. Co., 114 N. C. 728, 19 S. E. 863, 923; Chicago City Ry. Co. v. Lewis, 5 Ill. App. 242.

59. Fisher v. West Virginia & P. R. Co., 19 S. E. (W. Va.) 578, 23 L. R. A. 758, 58 Am. & Eng. R. Cas.

It is not itself, as matter of law, such negligence as will bar a recovery however, unless such intoxication was in some way the cause of, or contributed to, the accident or injury.⁶⁰ The mere fact that a passenger at the time he was injured was intoxicated is not in itself evidence of contributory negligence, but it is a circumstance to be considered, and it is for the jury to determine whether it in fact contributed to his injury.⁶¹ But the carrier is liable, notwithstanding such contributory negligence on the part of the plaintiff, when the conduct of the carrier was willful or its negligence occurred subsequent to that of the injured person.⁶² The knowledge of the condition of one who has become helpless by intoxication, and is known to be in a position of danger, imposes upon the carrier the duty of exercising special care and diligence.⁶³

§ 9. Contributory negligence as a question of law or fact.—When the facts of a case are undisputed, the question of contributory negligence may become one of law, as the other questions which arise upon a trial and are submitted to the decision of the court on a motion for a nonsuit. Where the facts as to which there is and can be no dispute are of such character and weight that the

337; Holland v. West End. St. R. Co., 29 N. E. (Mass.) 622; Butler v. Steinway R. Co., 87 Hun (N. Y.) 10, 67 N. Y. St. Rep. 498, 33 N. Y. Supp. 845; Monk v. Town of New Utrecht, 104 N. Y. 552; Welty v. Indianapolis, etc., R. Co., 105 Ind. 55; the testimony of a witness characterizing the acts of the plaintiff as those of an intoxicated person is competent evidence, Donoho v. Metropolitan St. Ry. Co., 30 Misc. Rep. (N. Y.) 433, 62 N. Y. Supp. 523.

60. Denver Tramway Co. v. Reid, 35 Pac. (Colo. App.) 269; Ward v. Chicago, etc., R. Co., 55 N. W. (Wis.) 771; Maguire v. Middlesex R. Co., 115 Mass. 239; Holmes v. Oregon, etc., R. Co., 6 Sawy. (U. S.) 262.

61. Trumbull v. Erickson, 97 Fed. (Colo.) 891, 38 C. C. A. 536; what is ,

sufficient evidence of the plaintiff's intoxication to go to the jury on the question of his own negligence as the cause of the accident, Bradley v. Second Ave. R. Co., 8 Daly (N. Y.) 289. See also Milliman v. New York Cent., etc., R. Co., 6 T. & C. (N. Y.) 585; Strand v. Chicago, etc., R. Co., 67 Mich. 380; Whalen v. St. Louis, etc., R. Co., 60 Mo. 323.

62. A common carrier owes a duty to a drunken passenger not to jerk its train while he is getting off at a station where it has stopped. Milliman v. New York Cent., etc., R. Co., 66 N. Y. 642.

63. Kean v. Baltimore, etc., R. Co., 61 Md. 154; Seymour v. Town of Lake, 66 Wis. 651; Kramer v. New Orleans City & L. R. Co., 51 La. Ann. 1689, 26 So. 411.

court can determine that there is no room for doubt or query, but that there was a complete absence of that care and prudence, without which, in the direction of conduct, there is negligence, the court should determine the question, as a matter of law, without calling in the aid of a jury.⁶⁴ But where the testimony is conflicting and any of the material facts of the case are disputed the question of contributory negligence is one for the jury,⁶⁵ as, for example, where there is a conflict of evidence as to whether or not a car or train was in motion while the passenger was in the act of boarding or alighting,⁶⁶ or as to whether or not the passenger jumped from a moving train.⁶⁷ So, where the facts are not disputed, but the circumstances and the conduct of the injured party are such that various inferences may be drawn therefrom, it is proper to submit the question of contributory negligence to the jury.⁶⁸

§ 10. Traveling in violation of statute not contributory negligence.—The duty imposed by law upon the carrier of passengers to carry safely so far as human skill and foresight can go, the persons it undertakes to carry, exists independently of contract, and although there is no contract in a legal sense between the parties. The law raises the duty out of regard for human life, and for the purpose of securing the utmost vigilance by carriers in protecting those who have entrusted themselves to their hands. A

64. Morrison v. Erie R. Co., 56 N. Y. 302; Burrows v. Erie R. Co., 63 N. Y. 560; Phillips v. Rensselaer, etc., R. Co., 49 N. Y. 177; Filer v. New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Nichols v. Sixth Ave. R. Co., 38 N. Y. 131, 97 Am. Dec. 780; Lucas v. New Bedford, etc., R. Co., 6 Gray (Mass.) 64, 66 Am. Dec. 406; Mayo v. Boston, etc., R. Co., 104 Mass. 142; Nagle v. California Southern R. Co., 88 Cal. 86; Jackson v. Crilly, 16 Colo. 103; Raben v. Central Iowa R. Co., 74 Iowa, 735; Baltimore, etc., Turnpike Road Co. v. Leonhardt, 66 Md. 72.

65. Jones v. Brooklyn, etc., R. Co., 21 St. Rep. (N. Y.) 169, 3 N. Y. Supp. 253; Armstrong v. New York

Cent., etc., R. Co., 66 Barb. (N. Y.) 437; Kelly v. Hannibal, etc., R. Co., 70 Mo. 604; Enches v. New York, etc., R. Co., 135 Pa. St. 194; Washington, etc., R. Co. v. Harmon, 147 U. S. 571.

66. See cases cited in last preceding note.

67. Leggett v. Western New York, etc., R. Co., 143 Pa. St. 51.

68. Hastings v. Northern Pac. R. Co., 53 Fed. 224; McQuilken v. Central Pac. R. Co., 64 Cal. 463; Central, etc., R. Co. v. Miles, 88 Ala. 261; Shannon v. Boston, etc., R. Co., 78 Me. 60; Chaffee v. Boston, etc., R. Corp., 104 Mass. 115; Gaynor v. Old Colony, etc., R. Co., 100 Mass. 212.

breach of this duty is a breach of the law, and whether there is a contract to carry, or the service undertaken is gratuitous, an action lies against the carrier for this breach resulting in the negligent injury of a passenger. The liability of the carrier is the same, whether the action is brought upon contract or upon the duty, and the evidence requisite to sustain the action in either form is substantially the same, and when there is an actual contract to carry, it is properly said that the liability in an action founded upon the public duty is co-extensive with the liability on the contract. Such a case, therefore, is not within the principle which forbids a recovery upon a contract made in respect to a matter prohibited by law, or for a cause of action which requires the proof of an illegal contract to support it, because the injured person happens to be unlawfully traveling on Sunday. The relation of carrier and passenger being established, the courts have refused to deny relief on the ground that to allow it would contravene the general policy of the statute prohibiting Sunday travel, or that the duty which the law in general imposes upon carriers to carry safely does not exist in respect to wrongdoers who are traveling in violation of the statute. It is now almost invariably held that the plaintiff's violation of the collateral statutory duty cannot be regarded in law as an efficient or proximate cause of the injury, and hence is not such contributory negligence as will bar his right to recover and is no defense to the action.⁶⁹ The courts of Massachusetts, Maine and Vermont, and perhaps of some other States, have in their earlier decisions taken a different view,⁷⁰ but the former States have since provided

69. Carroll v. Staten Island R. Co., 58 N. Y. 125, 134, 17 Am. Rep. 221; Platz v. City of Cohoes, 89 N. Y. 219, 42 Am. Rep. 286; Delaware, etc., R. Co. v. Trautwein, 52 N. J. L. 169, 19 Am. St. Rep. 442, 19 Atl. 178, 1 Am. Ry. & Corp. Rep. 688; Schmidt v. Humphrey, 48 Iowa, 652, 30 Am. Rep. 414; Opsahl v. Judd, 30 Minn. 129; Philadelphia, etc., R. Co. v. Lehman, 56 Md. 209, 40 Am. Rep. 415; Norris v. Litchfield, 35 N. H. 271; Covey v. Bath, 35 N. H. 530; Baldwin v. Barney, 12 R. I. 392, 34 Am. Rep. 670; Sutton v. Wauwau-tosa, 29 Wis. 21, 9 Am. Rep. 534;

Swisher v. Williams, Wright (Ohio), 754; Knowlton v. Milwaukee City Ry. Co., 59 Mo. 278; Eagan v. Maguire, 21 R. I. 189, 193, 42 Atl. 506; Taylor v. Star Coal Co. (Iowa), 81 N. W. 249; City of Kansas City v. Orr (Kan.), 61 Pac. 397; The Ferryboat S. S. Gregory, 2 Ben. (U. S.) 226.

70. Feital v. Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720; Smith v. Boston & M. R. Co., 120 Mass. 490, 21 Am. Rep. 538; Doyle v. Lynn & B. R. Co., 118 Mass. 195, 19 Am. Rep. 431; Day v. Highland St. Ry. Co., 135 Mass. 113, 40 Am. Rep. 447; Bucher v. Fitchburg R. Co., 131

by statute that such a defence shall not be available in actions for personal injuries, and the later decisions in other States now conform to the principles of the rule above stated.⁷¹ Where a railroad company, during the Rebellion, received a company of Confederate soldiers upon its cars, the company was held not liable for negligence in their transportation; the rule *in pari delicto* being applied.⁷² So, where an officer of the Confederate army, while absent from service, took passage on a railroad train for the purpose of reporting to his general commanding, the railroad company was held not liable for personal injuries due to its negligence, the act of the officer being illegal.⁷³

§ 11. Entering conveyance.—It is the duty of a carrier to provide reasonably safe means of ingress and egress to and from its trains, cars, or other vehicles employed for the transportation of passengers, and passengers must use the ways and means of going to and from such trains, cars, or vehicles provided for that purpose with such degree of care as ordinarily prudent and careful persons would exercise in like situations.⁷⁴ One who voluntarily and un-

Mass. 156, 41 Am. Rep. 216; Cratty v. City of Bangor, 57 Me. 423, 2 Am. Rep. 56; Davidson v. City of Portland, 69 Me. 116, 31 Am. Rep. 253; Johnson v. Town of Irasburgh, 47 Vt. 28, 19 Am. Rep. 111; Holcomb v. Town of Danby, 51 Vt. 428; Beacham v. Portsmouth Bridge (N. H.), 40 Atl. 1066. And see Bucher v. Cheshire R. Co., 125 U. S. 555, holding that such adjudications established a local State law which would be followed in the federal courts in actions arising therein.

71. Maine Laws 1895, Chap. 129; Mass. Stat. 1884, Chap. 37; McDonough v. Metropolitan R. Co., 137 Mass. 210; Cleveland v. Bangor, 87 Me. 259, 5 Am. Electl. Cas. 346; Jordan v. New York, etc., R. Co., 165 Mass. 346, 32 L. R. A. 101, 43 N. E. 111; Boyden v. Fitchburg R. Co., 70 Vt. 125, 10 Am. & Eng. R. Cas. N. S. 523, 39 Atl. 771. A railroad company is not relieved from liability

for negligently killing a person at a railroad crossing because he was traveling on Sunday in violation of the Vermont statute, where his act did not contribute to the injury; Hoadley v. International Paper Co., 72 Vt. 79, 47 Atl. 169.

72. Reed v. Muscogee R. Co., 48 Ga. 102.

73. Turner v. North Carolina R. Co., 63 N. C. 522.

74. Clark v. Metropolitan St. R. Co., 68 App. Div. (N. Y.) 49, 74 N. Y. Supp. 267; Cleveland, etc., R. Co. v. Wade, 18 Ind. App. 346, 48 N. E. 12; Bancroft v. Boston, etc., R. Corp., 97 Mass. 275; Little Rock, etc., R. Co. v. Cavenesse, 48 Ark. 106; Central R., etc., Co. v. Perry, 58 Ga. 461; West Chicago St. R. Co. v. Manning, 170 Ill. 417, 48 N. E. 958, 9 Am. & Eng. R. Cas. N. S. 364; Keller v. Hestonville, etc., Pass. R. Co., 149 Pa. St. 65; Galveston, etc., R. Co. v. Cooper, 2 Tex. Civ. App. 42; Michi-

necessarily exposes himself to a known danger, by attempting to climb on board a moving car, assumes all risks of injury therefrom; and the railroad company is not chargeable with negligence, causing his injury, which results from his falling from the car because of the manner in which its station or platform is constructed.⁷⁵ But, unless there is obvious danger in doing so, a passenger about to embark upon a car or boat, is justified in assuming that he can safely follow the directions of the employes in charge in getting on, and is not guilty of contributory negligence in so doing.⁷⁶ A person is not guilty of contributory negligence in attempting, after the signal to start has been given, to get on a train which is at rest when he begins his attempt;⁷⁷ or in resuming his place without direction from the trainmen where the cars have

gan Cent. R. Co. v. Coleman, 28 Mich. 440, passenger entering car from the wrong side guilty of contributory negligence; Pitcher v. Lake Shore, etc., R. Co., 137 N. Y. 568, affg. 16 N. Y. Supp. 62, but drover entering through a side door of a car containing horses in his charge not guilty of contributory negligence, where it is shown that the end door was used only in case of emergency; Missouri Pac. R. Co. v. Watson, 72 Tex. 631, and a pregnant woman stepping from ground to car step three feet high not guilty of contributory negligence, where no other means of entering the car were furnished her; Atlantic, etc., R. Co. v. Anderson, 118 Ga. 288, 45 S. E. 271, not contributory negligence to attempt to mount the steps at a point beyond the platform, where no notice of a peculiar method of receiving passengers at a baggage car door had been given. See also Peterson v. Delaware, etc., R. Co., 9 Kulp. (Pa.) 552; Plant Investment Co. v. Cook, 85 Fed. 611, 52 U. S. App. 566, 29 C. C. A. 377; Fitchburg R. Co. v. Nichols, 85 Fed. 945, 50 U. S. App.

297, 29 C. C. A. 500; Chicago, etc., R. Co. v. Elliott, 55 Fed. 949, 12 U. S. App. 381, 5 C. C. A. 347, 20 L. R. A. 582; Savannah, etc., R. Co. v. Flaherty, 110 Ga. 335, 35 S. E. 677. See also Redington v. Harrisburg Tract. Co., 210 Pa. St. 648, 60 Atl. 305, and note, Duty to Passenger boarding car, 3 St. Ry. Rep. 762.

75. Lauterer v. Manhattan R. Co., 128 Fed. 540, 63 C. C. A. 38; Southern R. Co. v. Williams (Miss.), 36 So. 394; Walther v. Chicago, etc., R. Co., 72 Ill. App. 354.

76. Pence v. Wabash R. Co., 116 Iowa, 279, 90 N. W. 59; Illinois Cent. R. Co. v. Cheek, 152 Ind. 663, 53 N. E. 641; Missouri Pac. R. Co. v. Foreman (Tex. Civ. App.), 46 S. W. 834; Clinton v. Root, 58 Mich. 182, 55 Am. Rep. 671; Detroit, etc., R. Co. v. Curtis, 23 Wis. 152, 99 Am. Dec. 141; Irish v. Northern Pac. R. Co., 4 Wash. 48, 31 Am. St. Rep. 899. See Allenger v. Chicago, etc., R. Co., 43 Iowa, 276.

77. Dawson v. Boston, etc., R. Co., 156 Mass. 127, 30 N. E. 466. See also Houston, etc., R. Co. v. Schmidt, 61 Tex. 282.

stopped for dinner and he has alighted for that purpose;⁷⁸ or for attempting to board a boat in the evening, instead of waiting until morning, where it was the custom to receive passengers on the boat the night before.⁷⁹ But he is chargeable with contributory negligence in attempting to board a train before the proper time and get a seat in the dark before the usual time to light the car.⁸⁰ Where a railroad company had for many years run a certain train on the southerly of two tracks, and passengers, in taking said train had been accustomed to pass over the northerly track, lying between it and the station, to reach such train, and a passenger, on such train being announced, left the station to board it, and while passing over the north track to take the train, as he thought, on the south track, as usual, was killed by the train passing on the north track, he was not guilty of contributory negligence in not looking to see which track the train was on.⁸¹ Where, in accordance with a railroad's custom, passengers were allowed to board a freight train at a station before the coach had been drawn up to the depot after the switching had been done, a passenger attempting to enter the coach when it was standing still and injured by the engine backing into the car, as he did so, was not guilty of contributory negligence.⁸² A person was not guilty of contributory negligence where injured by a sudden jerk of the car and there was no evidence to show that a reasonable time was allowed him to reach a place of safety after boarding the car before the same was started;⁸³ where he attempted to board a street car which was not carrying passengers but was proceeding to a shed for the night, unless he knew, or by ordinary care should have known, that the car was not carrying passengers;⁸⁴ where he was injured while passing along the inside footboard to a seat, by being struck by a car approaching on a parallel track from the opposite direction, and he had no knowledge that the tracks were so close as to render his act dan-

78. Larkin v. Oregon Pac. R. Co., 15 Or. 220, 34 Am. & Eng. R. Cas. 500.

R. Co., 46 App. Div. (N. Y.) 470, 61 N. Y. Supp. 721. See Moore v. Railroad Co., 119 Mich. 613; Atlantic City R. Co. v. Goodin, 62 N. J. L. 394.

79. Skottowe v. Oregon, etc., R. Co., 22 Or. 430.

80. Hodges v. New Hanover Transit Co., 107 N. C. 576.

83. Stoddard v. St. Louis, etc., R. Co. (Mo. App.), 80 S. W. 33.

81. Beecher v. Long Island R. Co., 161 N. Y. 222, 55 N. E. 899.

84. Leu v. St. Louis Transit Co. (Mo. App.), 80 S. W. 273.

82. Jones v. New York Cent., etc.,

gerous, although he failed to look around before going onto such footboard;⁸⁵ where, wishing to board a street car, he signalled for the motorman to stop, and the car slowed down almost to a standstill, and while he was in the act of stepping on, the motorman called to him to take the next car, and immediately quickened the speed of the car, throwing him off;⁸⁶ where he enters an elevator which is apparently at rest and with the door open, and which the passenger has no reason to suppose can be started until the door is closed, though the elevator is moving, which would have been determined by a momentary observation of the car and machinery.⁸⁷ But a person was guilty of contributory negligence precluding a recovery where he, intending to take passage on a car and knowing that it had not stopped, seized the hand rail and walked along sideways to get on the car, and, while not looking where he was going, fell into an open manhole near the track, in use by workmen;⁸⁸ where he, seeking to board a train and walking between the tracks of a double track railway beside a moving train, upon discovering the approach of a train upon the other track, fails to exercise ordinary care to prevent injury to himself, and go to a place of safety, where there is a reasonable opportunity;⁸⁹ where he attempts to board a car moving from four to six miles per hour, and which did not slow up for passengers, in the absence of an invitation by signals or otherwise from the conductor or motorman;⁹⁰ where he signals an electric car to stop at a crossing, and the signal is heeded, and the car is slackening its speed, and he attempts to get on while it is running three miles an hour;⁹¹ where he approached a street car from the rear and did not reach it until after the signal to go ahead had been given and the car had started, and then seized the handrail and attempted to board, though others

85. Kreimelmann v. Jourdan (Mo. App.), 80 S. W. 323.

86. Schmidt v. North Jersey St. R. Co. (N. J.), 58 Atl. 72.

87. Blackwell v. O'Gorman Co., 22 R. I. 638, 49 Atl. 28. But see Bremer v. Pleiss, 121 Wis. 61, 98 N. W. 945.

88. Sellers v. Union Tract. Co., 21 Pa. Super. Ct. 5.

89. Lake Shore, etc., R. Co. v Hotchkiss, 24 Ohio Cir. Ct. Rep. 431.

90. Fremont v. Metropolitan St. R. Co., 83 App. Div. (N. Y.) 414, 82 N. Y. Supp. 307.

91. Hunterson v. Union Tract. Co., 205 Pa. 568, 55 Atl. 543. See also Monroe v. Metropolitan St. R. Co., 79 App. Div. (N. Y.) 587, 80 N. Y. Supp. 177, the slowing up of the car as it approached the street crossing was not an invitation to the person signalling it to board it before it stopped.

appreciated his danger and sought to warn him;⁹² where he attempts to board a railroad train, although it is not possible for want of time allowed for him to board it in safety.⁹³

§ 12. Boarding train or car in motion.—It is the general rule of law, established by the decisions in New York and other States, that the boarding of or attempt to board a moving train is presumably and generally a negligent act *per se*, and that in order to rebut this presumption and justify a recovery for an injury sustained in getting on a moving train, it must appear that the passenger was, by the act of the carrier, put to an election between alternate dangers, or that something was done or said, or that some direction was given to the passenger by those in charge of the train, or some situation created, which interfered to some extent with his free agency, and was calculated to divert his attention from the danger, and create a confidence that the attempt could be made in safety.⁹⁴ It has been held that it is not negligi-

92. Foster v. Seattle Electric Co.,
35 Wash. 177, 76 Pac. 995.

93. Houston, etc., R. Co. v. Stewart, 14 Tex. Civ. App. 703, 37 S. W. 770.

94. N. Y.—Hunter v. Cooperstown, etc., R. Co., 126 N. Y. 23, 112 N. Y. 371; Solomon v. Manhattan R. Co., 103 N. Y. 437, 57 Am. Rep. 760, 27 Am. & Eng. R. Cas. 155; Paulitsch v. New York Cent., etc., R. Co., 102 N. Y. 280; Connaughton v. Brooklyn, etc., R. Co., 13 Misc. Rep. (N. Y.) 403, 34 N. Y. Supp. 243; Fahr v. Manhattan R. Co., 9 Misc. Rep. (N. Y.) 57, 29 N. Y. Supp. 1; Robinson v. Manhattan R. Co., 5 Misc. Rep. (N. Y.) 209, 25 N. Y. Supp. 91; Philips v. Rensselaer, etc., R. Co., 49 N. Y. 177.

Ala.—Montgomery, etc., R. Co. v. Stewart, 91 Ala. 421.

Colo.—Denver, etc., R. Co. v. Pickard, 8 Colo. 163.

U. S.—Missouri Pac. R. Co. v. Texas, etc., R. Co., 36 Fed. 879.

Ga.—Ricks v. Georgia, etc., R. Co., 118 Ga. 259, 45 S. E. 268.

Ill.—Walthers v. Chicago, etc., R. Co., 72 Ill. App. 354; Ohio, etc., R. Co. v. Allender, 47 Ill. App. 484; Spannagle v. Chicago, etc., R. Co., 31 Ill. App. 460; Chicago, etc., R. Co. v. Koehler, 47 Ill. App. 147.

La.—Knight v. Pontchartrain R. Co., 23 La. Ann. 462.

Mass.—Harvey v. Eastern R. Co., 116 Mass. 269.

Mich.—Cousins v. Lake Shore, etc., R. Co., 96 Mich. 386.

Mo.—Fulks v. St. Louis, etc., R. Co., 111 Mo. 335, 52 Am. & Eng. R. Cas. 280, attempting to board when warned to the contrary.

N. C.—Browne v. Raleigh, etc., R. Co., 108 N. C. 34, 47 Am. & Eng. R. Cas. 544.

Pa.—Bacon v. Delaware, etc., R. Co., 143 Pa. St. 14; Johnson v. West Chester, etc., R. Co., 70 Pa. St. 357.

R. I.—Chaffee v. Old Colony R. Co., 17 R. I. 658, 52 Am. & Eng. R. Cas. 366.

gence *per se* to step upon a train moving at two or three miles an hour;⁹⁵ to attempt to get on a train at a station after it has started or from a station platform which it is slowly passing,⁹⁶ that whether the train stopped long enough for passengers to get on, and other circumstances, may affect the question, and if the evidence is conflicting the question is for the jury.⁹⁷ But attempting to board a train slowly passing or moving out of a station which resulted in the person being injured by falling from the train or being struck by some passing object has been held to be contributory negligence.⁹⁸ On the other hand, it cannot be said, as matter of law, that it is always negligent for a person to get upon a street car while it is in motion, irrespective of the rate of speed and other circumstances, though presumptively negligent while the car is moving at ordinary or accelerated speed, especially if the attempt is made between cars or at the front end of the car.⁹⁹ Ordinarily it is perfectly safe to get upon a street car

Tex.—Galveston, etc., R. Co. v. Le Gierse, 51 Tex. 189. *Contra:* Mills v. Missouri, etc., R. Co. (Tex.), 59 S. W. 874, 57 S. W. 291. Proof that some one on the train had called out the station, others were also getting on the train, and plaintiff himself and others had previously got on and off at this station when trains were in motion, and it was the custom to slacken the speed of the trains at such station affords no justification, Phillips v. Rensselaer, etc., R. Co., 49 N. Y. 177; Denver, etc., R. Co. v. Pickard, 8 Colo. 170.

95. Distler v. Long Island R. Co., 151 N. Y. 424, 45 N. E. 937.

96. Houston, etc., R. Co. v. Stewart, 14 Tex. Civ. App. 703, 37 S. W. 770; Fulks v. St. Louis, etc., R. Co., 111 Mo. 335, 19 S. W. 818; Baltimore, etc., R. Co. v. Kane, 69 Md. 11. See also Warren v. Southern Kansas R. Co., 37 Kan. 408, 31 Am. & Eng. R. Cas. 10.

97. Swigert v. Hannibal, etc., R. Co., 75 Mo. 475, 9 Am. & Eng. R. Cas. 322.

98. Phillips v. Rensselaer, etc., R. Co., 49 N. Y. 177; McMurtry v. Louisville, etc., R. Co., 67 Miss. 601; Chicago, etc., R. Co. v. Scates, 90 Ill. 586; Carroll v. Interstate Rap. T. Co., 107 Mo. 653; Halden v. Great Western R. Co., 30 U. C. C. P. 89.

99. Sahlgaard v. St. Paul City Co., 48 Minn. 232, 51 N. W. 111; Mettlestadt v. Ninth Ave. R. Co., 4 Robt. (N. Y.) 377. Trying to board a car in rapid motion is negligence, Chicago City Ry. Co. v. Delcourt, 35 Ill. App. 430.

Where plaintiff signaled a street car approaching the crossing on which he was standing to stop, and it slowed down, but did not stop completely, whereupon he attempted to board it while in motion, and after it had passed the crossing, and in doing so was injured and it did not appear that the slowing down of the car was in response to plaintiff's signal, the plaintiff was guilty of contributory negligence. Reidy v. Metropolitan St. R. Co., 27 Misc. Rep. (N. Y.) 527, 58 N. Y. Supp. 326.

moving slowly, and thousands of people do it every day with perfect safety. But there may be exceptional cases, when the car is moving rapidly, or when the person is infirm or clumsy, or is encumbered with children, packages, or other hindrances, or where there are other unfavorable conditions, when it would be reckless to do so, and a court might, upon undisputed evidence, hold as a matter of law that there was negligence in doing so. But in most cases it must be a question for the jury, to be determined by them under all the circumstances of the case.¹ The Pennsylvania courts hold that to step on or off a moving car is *per se* negligence, and the burden is upon the plaintiff to clearly demonstrate to the court why his case should go to the jury as a rare exception to this rule.²

Where one stepped aboard a car when it had almost stopped, and was injured by its sudden starting, it cannot be said, as a matter of law, he was guilty of contributory negligence. *Mulligan v. Metropolitan St. R. Co.*, 89 App. Div. (N. Y.) 207, 58 N. Y. Supp. 791.

1. *Eppendorf v. Brooklyn City, etc., R. Co.*, 69 N. Y. 195, 25 Am. Rep. 171; *Omaha St. Ry. Co. v. Martin*, 6 Am. Electl. Cas. 417, 48 Neb. 65; *Corlin v. West End St. Ry. Co.*, 4 Am. Electl. Cas. 406, 154 Mass. 197, 27 N. E. 1000; *Hansberger v. Sedalia El. Ry. & L. Co.*, 82 Mo. App. 566; *North Chicago St. R. Co. v. Kaspers*, 186 Ill. 246, 57 N. E. 849; *Brown v. Washington & G. R. Co.*, 25 Wash. L. Rep. 404, 11 App. D. C. 37; *North Chicago St. R. Co. v. Wiswell*, 168 Ill. 613, 48 N. E. 407, 9 Am. & Eng. R. Cas. (N. S.) 377; *Moyland v. Second Ave. R. Co.*, 128 N. Y. 583, 37 St. Rep. (N. Y.) 871, 27 N. E. 977; *Central Pass. R. Co. v. Rose*, 15 Ky. L. Rep. 209, 22 S. W. 745; *Picard v. Ridge Ave. Pass. R. Co.*, 147 Pa. St. 195, 1 Pa. Adv. Rep. 218, 23 Atl. 566; *McDonough v. Metropolitan R. Co.*, 137 Mass. 210; *Stager v. Ridge Ave. Pass. R. Co.*, 119 Pa.

St. 70; *North Birmingham Ry. Co. v. Liddicoat*, 99 Ala. 545; *Railway Co v. Atkins*, 46 Ark. 423; *Railway Co v. Williams*, 140 Ill. 275; *Railway Co. v. Spaher*, 7 Ind. App. 23; *Railroad Co. v. McCandless*, 33 Kan. 366; *Ober v. Crescent City R. Co.*, 44 La Ann. 1059, 11 So. 818, 52 Am. & Eng R. Cas. 576; *Baltimore & O. R. Co v. Kane* (Md.), 13 Atl. 387, 9 Am. St Rep. 387; *New York, etc., R. Co. v Coulbown* (Md.), 16 Atl. 207; *Wyatt v. Railway Co.*, 55 Mo. 485; *Schepers v. Union Depot R. Co.*, 12 Mo. 665; *Sexton v. Metropolitan St R. Co.*, 57 N. Y. Supp. 577, 26 Misc Rep. (N. Y.) 432; *Munroe v. Third Ave. R. Co.*, 18 J. & S. (N. Y.) 114; *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28; *Citizens St. Ry. Co. v. Jolly* 1 St. Ry. Rep. 157 (Ind.), 67 N. E 935; *South Chicago City R. Co. v Dufresne*, 102 Ill. App. 493, affd. 20 Ill. 456, 65 N. E. 1057; *Berry v Utica Belt Line St. R. Co.*, 76 App Div. (N. Y.) 490, 78 N. Y. Supp 542.

2. *Hunterson v. Union Tract Co.* 1 St. Ry. Rep. 697 (Pa.), 55 Atl 543, holding that no recovery can be permitted where it appears that the plaintiff signals an approaching

The authorities of other States quite generally sustain the opposite view.³ An attempt to board a stationary car by the front platform is not negligence *per se*.⁴ If the passenger be in good physical condition and unincumbered, he may, without negligence, attempt to board a slowly moving car under all ordinary circumstances, and it will be even a question for the jury if in boarding he was negligent in not holding fast to the handrail provided for the purpose of aiding him to board.⁵ But it has been held to be negligent, as a matter of law, for a person, even in good physical condition and unincumbered, to attempt to get on the front platform of a car moving at an ordinary rate of speed of seven or eight miles an hour.⁶ Where, however, provision is made to get on or off the front or rear platform, it may not be negligence to board

train to stop, whose signal is heeded, but who, before it stops, and while running at a speed of three or four miles an hour, attempts to get on a car; Powelson v. Union Tract. Co., 204 Pa. St. 474; Stager v. Ridge Ave. Pass. Ry. Co., 119 Pa. St. 70; Walton v. Philadelphia Tract. Co., 161 Pa. St. 36; Jagger v. Peoples Pass. Ry. Co., 180 Pa. St. 436.

3. Cicero & P. St. R. Co. v. Meixner, 160 Ill. 320, 31 L. R. A. 331, 43 N. E. 823. The court in this case said: "The doctrine is established in nearly all of the States where the question has arisen that it is not negligence *per se* for a passenger to board or alight from a street car operated by horse power, and the question of contributory negligence is one for the jury. It would be impossible for a court to lay down a rule as to what particular rate of speed would be sufficient notice to a passenger that, if he attempted to get on or off, he would be held guilty of contributory negligence. It would also be a great hardship and unjust to lay down a general rule that a passenger attempting to board a street car while in motion at all should be held guilty of contributory negligence."

The court also considered the question whether the rule as to persons boarding or alighting from horse cars should apply to electric cars, and concludes as follows: "While in electric cars the possibilities of speed are greater than in the case of horse cars, yet the general operation and management of such cars so nearly approach those of horse cars that it must be held that the same rule of law which in the cases cited and a long line of other cases holds that it is not negligence *per se* to board or depart from such cars while in motion is also applicable to electric cars." See also cases cited in note to § 6, chap. 19.

4. Pfeffer v. Buffalo Ry. Co., 4 Misc. Rep. (N. Y.) 465, 24 N. Y. Supp. 490, 54 St. Rep. (N. Y.) 342, affd. 144 N. Y. 636, 64 St. Rep. (N. Y.) 868, 4 Am. Electl. Cas. 444.

5. Martin v. Second Ave. R. Co., 3 App. Div. (N. Y.) 448, 38 N. Y. Supp. 220, 73 St. Rep. (N. Y.) 714; Morrison v. Broadway, etc., R. Co., 130 N. Y. 166, 41 St. Rep. (N. Y.) 248, 29 N. E. 105.

6. Woo Dan v. Seattle El. R. & P. Co., 5 Wash. 466, 32 Pac. 103, 58 Am. & Eng. R. Cas. 195.

by the front platform.⁷ A person attempting to board a trolley car in motion by way of the front platform is bound to exercise more care than he would had he waited to board by the rear step or for the car to stop. The fact that there was a jerk or sudden movement of the car when plaintiff jumped on the step did not necessarily establish negligence of the motorman. It might have been the natural result of applying the brake to stop the car.⁸ It is not *per se* negligence for a person with an umbrella in one hand and a handkerchief in the other, to board or attempt to board an electric car while it is in the act of stopping to receive passengers and before it has come to a full stop.⁹ A passenger is not as matter of law guilty of negligence in entering a street car by the front platform at the invitation of the driver, and proceeding to her seat with her back to the horses, which will preclude her recovery for injuries from being thrown to the floor by the starting of the car, although the rear platform is the usual place for entering the car, and she did not use the straps placed in the car for passengers to take hold of.¹⁰ Nor is one, as matter of law, guilty of contributory negligence in attempting to board the front platform of a street car while it is in motion, where he has given a signal and the driver has slackened the speed of his horses.¹¹ But a boy,

7. Peterson v. Delaware, etc., R. Co. (Pa.), 9 Kulp. 552. A boy seven years of age, injured in attempting to get upon the front platform of a street railroad car while starting, where no notice was given to the employees in charge of the car and they had no knowledge of his intention and attempt to become a passenger, cannot recover against the company. Although there was no conductor on the car, the driver is not bound to look for passengers while engaged in attending to his horses. Pitcher v. Peoples St. R. Co., 154 Pa. St. 560, 32 W. N. C. 243, 26 Atl. 559.

8. Paulson v. Brooklyn City R. Co., 13 Misc. Rep. (N. Y.) 387, 5 Am. Electl. Cas. 419.

9. White v. Atlantic Consol. R. Co., 92 Ga. 494, 17 S. E. 672. The rule is otherwise, however, if the in-

tending passenger carried a package on his shoulder which obstructed his line of vision so that he fell into an excavation while attempting to reach a slowly moving car. Hanson v. Third Ave. R. Co., 27 Misc. Rep. (N. Y.) 524, 58 N. Y. Supp. 282. And see Readington v. Philadelphia Tract. Co., 132 Pa. St. 154. It is negligence *per se* for a person weighing 200 lbs., and of low stature, to attempt to board a street car moving at the rate of six miles per hour, while both his hands are encumbered by packages. Baltimore Tract. Co. v. State, Ringgold, 28 Atl. 397, 78 Md. 409, 58 Am. & Eng. R. Cas. 290.

10. Holmes v. Alleghany Tract. Co., 153 Pa. 152, 25 Atl. 640.

11. Finkeldey v. Omnibus Cable Co., 114 Cal. 28, 45 Pac. 996, 5 Am. & Eng. R. Cas. N. S. 393.

fourteen year old, is not, as matter of law, free from contributory negligence in trying to board an electric car followed by a trailer moving at the rate of from three to seven miles an hour. He is required to exercise such care and caution as might reasonably be expected from one of his age, experience, and intelligence.¹² And where a young man, able-bodied and unincumbered, having motioned for an open car to stop upon a crosswalk, when it had nearly stopped put his foot on the step on the side of and near the middle of the car and took hold of the stanchion, and after the car had moved six or seven feet, he was struck by the wheel of a truck which was standing in the street, it was held that it was plaintiff's duty to see before getting on the car, that there was no obstacle outside the car which would make it dangerous for him to attempt to get on board; and that if the injury was attributable to any negligence, it was, in part at least, that of the plaintiff.¹³ It is not necessarily negligent for a passenger to board a street car knowing that the track is being repaired, and that there are iron poles in close proximity to the track on the side of the car on which he is about to enter.¹⁴ But where the plaintiff testified that he signaled the company's motorman to stop; that the car was stopped, and as he stepped on the running board the car was suddenly started, and he was carried about fifteen feet, and struck by a pillar of an elevated road. He was facing in the direction in which the car moved. Several witnesses testified that the plaintiff jumped on the car while in motion, and swung himself along the running board, and that the conductor warned him when he boarded the car to look out for the pillar. It was held that the plaintiff was guilty of contributory negligence.¹⁵ The controversy being whether defendant's street railway, which ran over plaintiff's intestate as he attempted to board it, was moving slowly, as testified by plaintiff's witnesses, or rapidly, as testified by defendant's witnesses, plaintiff cannot show that it was defendant's custom to stop its cars near the point of the accident to take on passengers; this not being competent to corroborate plaintiff's evidence,

12. Sly v. Union Depot R. Co., 134 Mo. 681, 36 S. W. 235.

13. Moylan v. Second Ave. R. Co., 128 N. Y. 583, 37 St. Rep. (N. Y.) 871, 27 N. E. 977. But see San Antonio Tract. Co. v. Bryant (Tex.), 70 S. W. 1015.

14. Citizens St. Ry. Co. v. Merlin (Ind. App.), 59 N. E. 491.

15. Cassio v. Brooklyn H. R. Co., 59 App. Div. (N. Y.) 617, 69 N. Y. Supp. 208.

and furnishing no excuse for attempting to mount a rapidly moving street car.¹⁶ Where plaintiff boarded one of defendant's street cars at the front platform, and stood there because, according to his testimony, he could not open the door, and when the car ran on a curve he was thrown off and injured, an instruction that it was the duty of the plaintiff to get on the car by the rear platform, and seat himself if he could by reasonable effort, and that his failure to do so was negligence, was erroneous; there being no notice forbidding entrance at the front platform, or apparent danger in so doing, though he apparently might have entered by the rear door.¹⁷

16. West Chicago St. Ry. Co. v. Torpe, 187 Ill. 610, 58 N. E. 607.

17. Townsend v. Binghamton R. Co., 57 App. Div. (N. Y.) 234, 68 N. Y. Supp. 121.

Passengers injured in boarding street cars.—Gleason v. Metropolitan St. Ry. Co., 3 St. Ry. Rep. 709, 99 App. Div. (N. Y.) 209, 90 N. Y. Supp. 1025; Ward v. Metropolitan St. Ry. Co., 3 St. Ry. Rep. 710, 99 App. Div. (N. Y.) 126, 90 N. Y. Supp. 897; Wagner v. Brooklyn H. R. Co., 3 St. Ry. Rep. 710, 95 App. Div. (N. Y.) 219, 88 N. Y. Supp. 791; Spencer v. St. Louis Transit Co., 3 St. Ry. Rep. 554, 111 Mo. App. 653, 86 S. W. 593; Lehner v. Metropolitan St. Ry. Co., 3 St. Ry. Rep. 555, 110 Mo. App. 215, 85 S. W. 110; Kaiser v. St. Louis Transit Co., 3 St. Ry. Rep. 555, 108 Mo. App. 708, 84 S. W. 199; McKee v. St. Louis Transit Co., 3 St. Ry. Rep. 555, 108 Mo. App. 470, 83 S. W. 1013; Shanahan v. St. Louis Transit Co., 3 St. Ry. Rep. 556, 109 Mo. App. 228, 83 S. W. 784; Maggioli v. St. Louis Transit Co., 3 St. Ry. Rep. 556, 108 Mo. App. 416, 83 S. W. 1026; Eikenberry v. St. Louis Transit Co., 3 St. Ry. Rep. 557, 103 Mo. App. 442, 80 S. W. 360; McNamara v. St. Louis Transit Co., 3 St. Ry. Rep. 558, 106

Mo. App. 349, 80 S. W. 303; Leu v. St. Louis Transit Co., 3 St. Ry. Rep. 558 (Mo. App.), 80 S. W. 273, 86 S. W. 137; Murphy v. North Jersey St. Ry. Co., 3 St. Ry. Rep. 652 (N. J. L.), 58 Atl. 1018; Schmidt v. North Jersey St. Ry. Co., 3 St. Ry. Rep. 652 (N. J. L.), 58 Atl. 72; Jacques v. Sioux City Tract. Co., 3 St. Ry. Rep. 249, 124 Iowa, 257, 99 N. W. 1069, as to contributory negligence of passenger in mounting car with an armful of packages. See also as to commencement of relationship of passenger and carrier, O'Mara v. St. Louis Transit Co. (Mo.), 2 St. Ry. Rep. 627, 76 S. W. 680; Citizens' St. Ry. Co. v. Jolly (Ind.), 1 St. Ry. Rep. 157, 67 N. E. 935; inference to be drawn by passenger from fact that motorman lessened speed of car, Mulligan v. Met. St. Ry. Co., 2 St. Ry. Rep. 787, 87 App. Div. (N. Y.) 320, 84 N. Y. Supp. 366; it is not contributory negligence as a matter of law to get upon a street car while in motion, Clinton v. Brooklyn Hts. R. Co., 2 St. Ry. Rep. 791, 91 App. Div. (N. Y.) 374, 86 N. Y. Supp. 932; injured in attempting to board a slowly moving car by sudden start of car, Maguire v. St. Louis Transit Co. (Mo.), 2 St. Ry. Rep. 629, 78 S. W. 838; injured while boarding car by,

§ 13. Place of entering cars or trains.—Ordinarily, the place to board a train, and the sole place, is that provided by the carrier for that purpose, and it is contributory negligence to enter a train at a place where the carrier is not accustomed to receive passengers.¹⁸ But it is not contributory negligence for a passenger to get on a train at a place where the carrier is in the habit of receiving passengers, although not the regular depot provided for that purpose.¹⁹ It is not negligence *per se* to board a passenger train at a point elsewhere than at a depot platform,²⁰ but if a railroad company designates and sets apart a platform as the place where it requires all passengers to enter the cars, and this is known to the passenger, and, in disregard of this regulation, the passenger seeks to enter the cars at another place, he is guilty of contributory negligence.²¹

§ 14. Leaving conveyance.—A passenger cannot recover from a carrier for personal injuries occasioned by his neglect to exercise proper care in alighting from the conveyance and to avail himself of the suitable place for landing and means of ingress to and egress from the cars or trains provided by the carrier.²² But it has been

sudden start, *Plum v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 792, 91 App. Div. (N. Y.) 420, 86 N. Y. Supp. 827; *Northington v. Norfolk Ry. & L. Co.*, 2 St. Ry. Rep. 932, 102 Va. 446, 46 S. E. 475; evidence as to rule requiring car to stop, *Nassau Elec. Ry. Co. v. Corliss*, 2 St. Ry. Rep. 999, 126 Fed. 355; safety of passengers embarking, *Leveret v. Shreveport Belt Line Co.* (La.), 1 St. Ry. Rep. 253, 34 So. 570; to step on or off a moving car is *per se* negligence, and the burden is upon the plaintiff to clearly demonstrate to the court why his case should go to the jury as a rare exception to this rule, *Hunerson v. Union Tract. Co. (Pa.)*, 1 St. Ry. Rep. 697, 55 Atl. 543.

18. Phillips v. Northern R. Co., 62 Hun (N. Y.), 233, 16 N. Y. Supp. 909; *Central R., etc., Co. v. Perry*, 58 Ga. 461; *Haase v. Oregon R.*,

etc., Co., 19 Or. 354, 44 Am. & Eng. R. Cas. 360.

19. Keating v. New York Cent., etc., R. Co., 3 Lans. (N. Y.) 469, affd. 49 N. Y. 673.

20. Stoner v. Pennsylvania Co., 98 Ind. 384, 49 Am. Rep. 764; *Curtis v. Detroit, etc., R. Co.*, 27 Wis. 158; *Louisville, etc., R. Co. v. Long*, 94 Ky. 410.

21. McDonald v. Chicago, etc., R. Co., 26 Iowa, 124, 96 Am. Dec. 114.

22. Drake v. Pennsylvania R. Co., 137 Pa. St. 352, 21 Am. St. Rep. 883; *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318, 37 Pa. St. 420; *Chicago, etc., R. Co. v. Dingman*, 1 Ill. App. 164; *Graham v. Pennsylvania R. Co.*, 39 Fed. 596, leaving ferryboat by gangway intended for teams; *Keokuk Packet Co. v. Henry*, 50 Ill. 264, jumping from steamboat because of want of proper time and facilities for

held that, under the circumstances of the case, a passenger was not under the imputation of negligence and could not be charged with contributory negligence, when alighting, for failure to retain hold of the railing, if it were practicable to do so, at the moment he was about to step from the car to the platform of the station;²³ nor for placing his hand on the brake wheel in leaving the train;²⁴ nor for getting off the train steps upon a connecting link between two cars when the train had halted at a station;²⁵ nor for passing over flat cars under the direction of a brakeman in order to reach a place for alighting,²⁶ nor for passing from a boat by a way upon a ferry bridge provided for animals and vehicles, upon invitation of the employes in charge of the bridge, where he received an injury from a cause not arising from or attendant upon his use of the bridge but from a cause *ab extra* that use.²⁷ A passenger has been held guilty of contributory negligence in leaving a train at a depot on the side opposite the platform provided for such purpose, where there was no paramount necessity for so doing and the platform was not unsafe,²⁸ in alighting on the track side at a place where there was no platform;²⁹ and in alighting from a rapidly moving cable car on the side next to a parallel track.³⁰ Other courts have held that it was not contributory negligence *per se* for a passenger to alight at a depot on the side of the train away from the depot and platform, but that the question as to whether the passenger's manner of alighting was negligent under the circumstances was one that should be submitted to the jury.³¹ Proof that the passenger violated the regulations of the carrier, in leaving a

landing; Dodge v. Boston, etc., Steamship Co., 148 Mass. 207, 12 Am. St. Rep. 541, 37 Am. & Eng. R. Cas. 67, leaving boat at place not intended for the use of passengers and in violation of notice; Scully v. New York, etc., R. Co., 80 Hun (N. Y.), 197, 30 N. Y. Supp. 61, jumping from train which the conductor had neglected to stop at the passenger's destination.

23. McDonald v. Long Island R. Co., 116 N. Y. 546, 15 Am. St. Rep. 437; Martin v. Second Ave. R. Co., 3 App. Div. (N. Y.) 448, 38 N. Y. Supp. 220. See also Delamatyr v. Milwaukee, etc., R. Co., 24 Wis. 578.

24. Cleveland, etc., R. Co. v. McHenry, 47 Ill. App. 301.

25. Johnson v. Winona, etc., R. Co., 11 Minn. 296, 88 Am. Dec. 83.

26. Hartzig v. Lehigh Valley R. Co., 154 Pa. St. 364.

27. Watson v. Camden, etc., R. Co., 55 N. J. L. 125.

28. Louisville, etc., R. Co. v. Rickerts, 93 Ky. 116.

29. Morgan v. Camden, etc., R. Co. (Pa.), 16 Atl. 353.

30. Weber v. Kansas City Cable R. Co., 100 Mo. 194, 18 Am. St. Rep. 541, 41 Am. & Eng. R. Cas. 117.

31. Goldberg v. New York Cent.,

car on the wrong side, even without the excuse of a cogent necessity, will not as a matter of law debar him from a recovery.³² It has been held that if a passenger is injured by alighting of his own accord from the rear end of a car at a place where there is no platform, when by passing forward, he could alight with safety on the platform, he is guilty of contributory negligence;³³ but not so when there was no light at that point,³⁴ or when the passenger, who was a lady, could alight on the platform only by going forward through the smoker.³⁵ The passenger is under no obligation to be on the lookout to avoid danger from defects in the carrier's appliances or means of ingress or egress, and is not negligent unless he fails to use ordinary care after knowledge of a defect or peril is thrust upon him.³⁶

§ 15. Alighting at improper place or in improper manner.—A passenger endeavoring to alight from a train is bound to use due care to ascertain whether the train has reached the place designed for passengers to alight, and has no right to assume it simply because the brakeman has announced the station, and the train has stopped; and he is guilty of contributory negligence if, by reason of a failure to use such care, he is injured by alighting at an improper place.³⁷ But where the appearances and circum-

etc., R. Co., 133 N. Y. 561, 30 N. E. 597, 54 St. Rep. (N. Y.) 90, 24 N. Y. Supp. 1143; Onderdonk v. New York, etc., R. Co., 74 Hun (N. Y.), 42, 26 N. Y. Supp. 310; Plopper v. New York Cent. R. Co., 13 Hun (N. Y.), 625; Dickens v. New York Cent. R. Co., 1 Abb. App. Dec. (N. Y.) 504; Robostelli v. New York, etc., R. Co., 33 Fed. 796; McQuilken v. Central Pac. R. Co., 64 Cal. 463, 16 Am. & Eng. R. Cas. 353; Boss v. Providence, etc., R. Co., 15 R. I. 149, 21 Am. & Eng. R. Cas. 364; Missouri Pac. R. Co. v. Long, 81 Tex. 253, 26 Am. St. Rep. 811.

32. Chicago, etc., R. Co. v. Lowell, 151 U. S. 209, 38 L. Ed. 131, 14 S. C. 281.

33. Eckerd v. Chicago, etc., R. Co.,

70 Iowa, 353. See also Chicago, etc., R. Co. v. Dingman, 1 Ill. App. 164.

34. McDonald v. Illinois Cent. R. Co., 88 Iowa, 345, 55 N. W. 102, 58 Am. & Eng. R. Cas. 263.

35. Cartwright v. Chicago, etc., R. Co., 52 Mich. 606, 50 Am. Rep. 274, 16 Am. & Eng. R. Cas. 321.

36. Ohio, etc., R. Co. v. Stansberry, 132 Ind. 533, defective platform; McDermott v. Chicago, etc., R. Co., 82 Wis. 246, movable bench which was not a reasonably safe appliance; Bethman v. Old Colony R. Co., 155 Mass. 352, passenger passing over a movable truck which obstructed the way to the station platform.

37. Chicago, etc., R. Co. v. Sattler (Neb.), 90 N. W. 649, 57 L. R. A.

stances are such as to reasonably indicate to the passenger that the train has stopped at the depot or for the purpose of discharging passengers, it is not negligent for the passenger to alight.³⁸ Persons alighting from railway trains upon the express or implied invitation of the officers in charge are justified in assuming that the officers have taken proper precautions to insure their safety.³⁹ And if the passenger is invited or requested by the conductor or other agent of the carrier to leave the car at an improper or dangerous place, he will not be chargeable with contributory negligence in alighting there unless the danger is obvious.⁴⁰ The announcement of the name of the station is not of itself an invita-

890; *Barry v. Boston, etc., R. Co.*, 172 Mass. 109, 51 N. E. 518, 12 Am. & Eng. R. Cas. N. S. 245; *Dunn v. Pennsylvania R. Co.*, 20 Phila. (Pa.) 258; *Nagle v. California Southern R. Co.*, 88 Cal. 86, train halting for a moment upon a trestle; *Brockway v. Lascala*, 1 Edm. Sel. Cas. (N. Y.) 135; *State v. Tom*, 8 Or. 177, stepping off boat before it had landed; Ohio, etc., *R. Co. v. Schiebe*, 44 Ill. 460, where a passenger train had run on a side track to allow a freight train to pass; *Illinois Cent. R. Co. v. Green*, 81 Ill. 19, 25 Am. Rep. 255, train stopping at bridge to take water; *Siner v. Great Western R. Co.*, L. R. 4 Exch. 117; *Georgia, etc., R. Co. v. Murray*, 113 Ga. 1021, 39 S. E. 427, momentary stopping of train to allow switch to be set.

A passenger negligently carried beyond his station and forced to get off at a place other than the station was not guilty of contributory negligence in returning by way of the track, when that was the most natural course. *New York, etc., R. Co. v. Doane*, 115 Ind. 435, 7 Am. St. Rep. 451. But if, after alighting under such circumstances, he attempts to do an act obviously dangerous, he is guilty of contributory negligence. *International, etc., R.*

Co. v. Folliard, 66 Tex. 603, 27 Am. & Eng. R. Cas. 280. So, where he was himself negligent in not getting off at the station and the train was stopped at his request and he alighted at another place, *Wilson v. New Orleans, etc., R. Co.*, 68 Miss. 9.

38. McAlan v. Trustees New York, etc., Bridge, 43 App. Div. (N. Y.) 374, 60 N. Y. Supp. 176; *St. Louis, etc., R. Co. v. Farr*, 70 Ark. 264, 68 S. W. 243.

39. Leveret v. Shreveport Belt Ry. Co. (La.), 34 So. 579. See also note on Acts constituting invitation to alight and cases cited, 3 St. Ry. Rep. 840.

40. Hulbert v. New York Cent., etc., R. Co., 40 N. Y. 145; *Bellman v. New York Cent., etc., R. Co.*, 42 Hun (N. Y.), 130, 122 N. Y. 671; *Hickey v. Railroad Co.*, 14 Allen (Mass.), 429; *Sweeny v. Railroad Co.*, 10 Allen (Mass.), 368; *Dlamatyr v. Milwaukee, etc., R. Co.*, 24 Wis. 578; *Gadsden, etc., R. Co. v. Causler*, 97 Ala. 235; *Baltimore, etc., R. Co. v. Leapley*, 65 Md. 571, where a pregnant woman was directed to jump from the train which had stopped at a point distant from the platform; *Georgia, etc., R. Co. v. Usry*, 82 Ga. 54, 14 Am. St. Rep. 140, whether a pregnant woman could avoid

tion to alight;⁴¹ but if the train soon thereafter is brought to a full stop, in the absence of notice that the train has not come to a final stop for the discharge of passengers, a passenger is justified in supposing that the train has arrived at the station announced and that he can safely alight, and is not guilty of contributory negligence in attempting to do so, in the absence of circumstances and conditions which would obviously show to a reasonably prudent and careful person that the train had not arrived at the station or proper landing place for passengers.⁴² The question as to whether the passenger was induced by the announcement to believe that his destination had been reached is usually one for the jury, and the fact that the act of alighting under such circumstances occurred on a dark night will be evidence tending to show such belief.⁴³

§ 16. Alighting from train or car in motion.—It is presumptively a negligent act for a passenger to attempt to alight from a moving train;⁴⁴ and it is not sufficient to rebut the presumption

the consequences to herself of such negligent act of the carrier by the use of ordinary care was a question for the jury.

41. *Gonzales v. New York, etc., R. Co.*, 33 N. Y. Super. Ct. 57; *East Tennessee, etc., R. Co. v. Holmes*, 97 Ala. 332, 58 Am. & Eng. R. Cas 252; *Memphis, etc., R. Co. v. Stringfellow*, 44 Ark. 322, 51 Am. Rep. 598; *East Tennessee, etc., R. Co. v. Connor*, 15 Lea (Tenn.), 254; *Bridges v. North London R. Co.*, L. R. 7 H. L. 213.

42. *Taber v. Delaware, etc., R. Co.*, 71 N. Y. 489; *Chicago, etc., R. Co. v. Arnold*, 144 Ill. 261; *McNulta v. Ensch*, 134 Ill. 46; *Central R. Co. v. Van Horn*, 38 N. J. L. 133; *Pennsylvania Co. v. Hoagland*, 78 Ind. 203, 3 Am. & Eng. R. Cas. 436; *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Richmond, etc., R. Co. v. Smith*, 92 Ala. 237; *Smith v. Georgia Pac. R. Co.*, 88 Ala. 538, 16 Am. St. Rep. 63; *Mitchell v.*

Chicago, etc., R. Co., 51 Mich. 236, 47 Am. Rep. 566; *McGee v. Missouri Pac. R. Co.*, 92 Mo. 208, 1 Am. St. Rep. 706; *Southern Kansas R. Co. v. Pavey*, 48 Kan. 452.

43. See cases cited in last preceding note.

44. *Soloman v. Manhattan R. Co.*, 103 N. Y. 437, 57 Am. Rep. 760, 27 Am. & Eng. R. Cas. 155; *Burrows v. Erie R. Co.*, 63 N. Y. 556; *Morrison v. Erie R. Co.*, 56 N. Y. 302; *Geogagn v. New York, etc., R. Co.*, 10 App. Div. (N. Y.) 454, 42 N. Y. Supp. 205; *Redmond v. Rome, etc., R. Co.*, 16 N. Y. Supp. 330.

Ga.—*Atlanta, etc., R. Co. v. Dickerson*, 89 Ga. 455; *Whelan v. Georgia, etc., R. Co.*, 84 Ga. 506.

Ind.—*Louisville, etc., R. Co. v. Crunk*, 119 Ind. 542, 12 Am. St. Rep. 443; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228.

Me.—*Shannon v. Boston, etc., R. Co.*, 78 Me. 52.

that the trainman acquiesced in the action of the passenger, or that the company violated its duty or contract in not stopping the train, or that to remain on the train would subject the passenger to trouble or inconvenience, but to excuse such an act and free the passenger from the charge of contributory negligence there must be a coercion of circumstances which did not leave the passenger in the free and untrammeled possession of his faculties and judgment.⁴⁵ In a number of cases it has been held that alighting voluntarily from a train in motion is negligence *per se*.⁴⁶ But many other authorities sustain the rule that alighting voluntarily from a train in motion is not contributory negligence *per se*. While, as a general proposition, it is conceded that it is imprudent and a want of ordinary care to alight from a train while it is in motion, whether it was so in a particular case must depend upon the circumstances under which the attempt was made, and, ordinarily, is a question for the jury.⁴⁷ Whether such an act was culpable

Mich.—Cousins v. Lake Shore, etc., R. Co., 96 Mich. 386.

Pa.—Pennsylvania R. Co. v. Lyons, 129 Pa. St. 113, 15 Am. St. Rep. 701; New York, etc., R. Co. v. Enches, 127 Pa. St. 316, 14 Am. St. Rep. 848; Pennsylvania R. Co. v. Aspell, 23 Pa. St. 147, 62 Am. Dec. 323; Clintock v. Pennsylvania R. Co., 21 W. N. C. (Pa.) 133.

Wis.—Brown v. Chicago, etc., R. Co., 80 Wis. 162; Hemmingway v. Chicago, etc., R. Co., 72 Wis. 42, 7 Am. St. Rep. 823.

Mass.—Gavett v. Manchester, etc., R. Co., 16 Gray (Mass.), 501, 77 Am. Dec. 422; Lucas v. New Bedford, etc., R. Co., 6 Gray (Mass.), 64, 66 Am. Dec. 406, in the absence of anything to create excitement or cause alarm; Brooks v. Boston, etc., R. Co., 135 Mass. 21, but not where plaintiff did not in fact know that the train was moving.

45. See New York cases cited in last preceding note.

46. Secor v. Toledo, etc., R. Co., 10 Fed. 15.

Ill.—It is negligence, which precludes a recovery to get off of a train of which the motive power is steam while it is still in motion. Illinois Cent. R. Co. v. Cunningham, 102 Ill. App. 206; Louisville, etc., R. Co. v. Johnson, 44 Ill. App. 56; Dougherty v. Chicago, etc., R. Co., 86 Ill. 467; Illinois Cent. R. Co. v. Lutz, 84 Ill. 598; Illinois Cent. R. Co. v. Slatton, 54 Ill. 135, 5 Am. Rep. 109; Ohio, etc., R. Co. v. Stratton, 78 Ill. 88. Compare Illinois Cent. R. Co. v. Able, 59 Ill. 131.

La.—Walker v. Vicksburg, etc., R. Co., 41 La. Ann. 795, 17 Am. St. Rep. 417; Damont v. New Orleans, etc., R. Co., 9 La. Ann. 441, 61 Am. Dec. 214.

N. C.—Morrow v. Atlanta, etc., Air Line R. Co. (N. C.), 46 S. E. 12.

Wis.—Walters v. Chicago, etc., R. Co. (Wis.), 89 N. W. 140, where plaintiff knowingly and unnecessarily steps from a train in motion.

47. *N. Y.*—Bucher v. New York Cent., etc., R. Co., 98 N. Y. 128.

Ala.—Central R., etc., Co. v. Miles, 88 Ala. 256.

or excusable has been held in many instances to depend upon all the facts and circumstances, such as the rapidity of motion of the train, the fact whether it was in the daytime or at night, the distance from the car to the ground or other surface upon which the passenger proposed to alight, the age and vigor of the party, and whether he took the risk by the command or encouragement of the carrier's agents in charge of the train, or to escape a greater peril.⁴⁸ It is not contributory negligence *per se*, or as a matter of law, for a passenger to alight from a very slowly moving train, but the question is one for the jury to decide from all the attendant circumstances.⁴⁹ But there are cases where the undisputed

Ark.—St. Louis, etc., R. Co. v. Person, 49 Ark. 182; Little Rock, etc., R. Co. v. Atkins, 46 Ark. 423.

Cal.—Carr v. Eel River, etc., Co., 98 Cal. 366.

Colo.—Posten v. Denver Consol. Tramway Co., 3 St. Ry. Rep. 37 (Colo. App.), 78 Pac. 1067.

Ga.—Covington v. Western, etc., R. Co., 81 Ga. 275; West End, etc., St. R. Co. v. Mozely, 79 Ga. 463.

Ind.—Pittsburgh, etc., R. Co. v. Gray (Ind. App.), 59 N. E. 1000; Louisville, etc., R. Co. v. Crunk, 119 Ind. 542, 12 Am. St. Rep. 443; Pennsylvania R. Co. v. Marion, 123 Ind. 415, 18 Am. St. Rep. 330.

Iowa.—Raben v. Central Iowa R. Co., 74 Iowa, 732.

Md.—Cumberland Valley R. Co. v. Maugans, 61 Md. 53, 48 Am. Rep. 88.

Mich.—Cousins v. Lake Shore, etc., R. Co., 96 Mich. 386.

Mo.—Madden v. Missouri, etc., R. Co., 50 Mo. App. 664.

Neb.—Chicago, etc., R. Co. v. Winfrey (Neb.), 93 N. W. 526; Chicago, etc., R. Co. v. Landauer, 36 Neb. 642.

Pa.—Pennsylvania R. Co. v. Peters, 116 Pa. St. 206; Pennsylvania R. Co. v. Kilgore, 32 Pa. St. 292, 72 Am. Dec. 787.

Tex.—International, etc., R. Co. v. Satterwhite, 15 Tex. Civ. App. 102,

38 S. W. 401; Galveston, etc., R. Co. v. Smith, 59 Tex. 406.

Wis.—Hemingway v. Chicago, etc., R. Co., 72 Wis. 42, 7 Am. St. Rep. 823.

Can.—Edgar v. Northern R. Co., 11 Ont. App. 452.

48. Bucher v. New York Cent., etc., R. Co., 98 N. Y. 128; Filer v. New York Cent. R. Co., 42 N. Y. 47, 10 Am. Rep. 327; Morrison v. Erie R. Co., 56 N. Y. 202; St. Louis, etc., R. Co. v. Cantrell, 37 Ark. 526; Little Rock, etc., R. Co. v. Atkins, 46 Ark. 423; Cumberland Valley R. Co. v. Maugans, 61 Md. 53, 48 Am. Rep. 88; Pennsylvania R. Co. v. Kilgore, 32 Pa. St. 292; Wyatt v. Citizens R. Co., 62 Mo. 408; Georgia Pac. R. Co. v. West, 66 Miss. 310; Hemmingway v. Chicago, etc., R. Co., 72 Wis. 42, 7 Am. St. Rep. 823; Brooks v. Boston, etc., R. Co., 135 Mass. 21; Leggett v. Western New York, etc., R. Co., 143 Pa. St. 39.

49. McAlan v. Trustees New York, etc., Bridge, 43 App. Div. (N. Y.) 374, 60 N. Y. Supp. 176; Distler v. Long Island R. Co., 151 N. Y. 424, 45 N. E. 937, 35 L. R. A. 762; Pennsylvania Co. v. Marion, 123 Ind. 415, 18 Am. St. Rep. 330, train moving at speed of two miles an hour; Central R. Co. v. Miles, 88 Ala. 256, at speed

facts have been such that the courts have held the question of contributory negligence not to be one of fact for the jury, or of fact and law to be given to the jury with instruction, but one of law for the decision of the court. For example, where the act of the passenger was obviously dangerous and without reasonable necessity, and done with a full consciousness of danger and foolish rashness, which showed complete absence of ordinary care and prudence,⁵⁰ as alighting from a rapidly moving train,⁵¹ or alighting when in an enfeebled and weak condition,⁵² or when encumbered with luggage

of three miles an hour; Louisville, etc., R. Co. v. Crunk, 119 Ind. 542, 12 Am. St. Rep. 443, at speed of four and a half miles an hour; New York, etc., R. Co. v. Coulbourn, 69 Md. 361, 9 Am. St. Rep. 430, at speed of five miles an hour; Lake Shore, etc., R. Co. v. Bangs, 47 Mich. 470, at speed of six miles an hour; Nance v. Carolina Cent. R. Co., 94 N. C. 619; Lambeth v. North Carolina R. Co., 66 N. C. 494, 8 Am. Rep. 508; Georgia Pac. R. Co. v. West, 66 Miss. 310; Shannon v. Boston, etc., R. Co., 78 Me. 52; Straus v. Kansas City, etc., R. Co., 75 Me. 185, 6 Am. & Eng. R. Cas. 384; Price v. St. Louis, etc., R. Co., 72 Mo. 414; Taylor v. Missouri Pac. R. Co., 26 Mo. App. 336; Kelly v. Hannibal, etc., R. Co., 70 Mo. 607; Lloyd v. Hannibal, etc., R. Co., 53 Mo. 509; Leslie v. Wabash, etc., R. Co. 88 Mo. 50; Richmond v. Quincy, etc., R. Co., 49 Mo. App. 104.

50. N. Y.—Morrison v. Erie R. Co., 56 N. Y. 302.

Ala.—East Tennessee, etc., R. Co. v. Holmes, 97 Ala. 332; Central, etc., R. Co. v. Miles, 88 Ala. 261; Ricketts v. Birmingham St. R. Co., 85 Ala. 600.

Ind.—Toledo, etc., R. Co. v. Win-gate (Ind.), 37 N. E. 274; Woolery v. Louisville, etc., R. Co., 107 Ind. 381, 57 Am. Rep. 114, 27 Am. & Eng. R. Cas. 210.

Ky.—Peak's Admtr. v. Louisville & N. R. Co., 23 Ky. L. Rep. 2157, 66 S. W. 995.

Me.—Shannon v. Boston, etc., R. Co., 78 Me. 52.

Mass.—La Pointe v. Boston & M. R. Co., 182 Mass. 227, 65 N. E. 44; England v. Boston, etc., R. Co., 153 Mass. 490.

Mo.—Tabler v. Hannibal, etc., R. Co., 93 Mo. 79; Clotworthy v. Hannibal, etc., R. Co., 80 Mo. 220; Nelson v. Atlantic, etc., R. Co., 68 Mo. 593; Wyatt v. Citizens R. Co., 62 Mo. 408; Doss v. Missouri, etc., R. Co., 59 Mo. 27, 21 Am. Rep. 371.

Tex.—Houston, etc., R. Co. v. Leslie, 57 Tex. 83.

51. Ga.—McLarin v. Atlanta, etc., R. Co., 85 Ga. 504; Watson v. Georgia Pac. R. Co., 81 Ga. 476; Jarrett v. Atlanta, etc., R. Co., 83 Ga. 347, train moving at twenty-five miles an hour.

Ind.—Woolery v. Louisville, etc., R. Co., 107 Ind. 381, 57 Am. Rep. 114, 27 Am. & Eng. R. Cas. 210, train moving at fifteen miles an hour.

Mo.—Leslie v. Wabash, etc., R. Co., 88 Mo. 50. And see cases cited under last preceding note.

Neb.—Chicago, etc., R. Co. v. Martelle (Neb.), 91 N. W. 364.

52. Louisville, etc., R. Co. v. Lee, 97 Ala. 325.

so as to be deprived of the ability to properly protect himself,⁵³ or alighting in the dark from a train known to be in motion.⁵⁴ But where the danger was so sudden and unexpected as to leave no time for the passenger to deliberate and he acted according to his best judgment under the circumstances, as where the injury occurred because the carrier did not give the passenger a reasonable opportunity to leave the train before it started, and the train started just as he was about to step from the car to the station platform, or had partly descended the steps for the purpose of alighting, the presumption of negligence is rebutted and the question of contributory negligence is for the jury.⁵⁵ Where a passenger is induced, permitted, or directed, by the advice, permission, or order of an authorized servant of the carrier to attempt to leave a train while in motion, and thus put to a choice, without any fault on his part, whether to obey the advice, suggestion or order of the carrier's servant, and risk the danger of alighting, or remain aboard and suffer the inconveniences of being carried on, it is not an act of negligence *per se*, if alighting under such circumstances would not be obviously dangerous, as where the train is moving slowly; but whether it is imprudent and careless to make the attempt depends upon the circumstances, and it is a proper question for the jury whether his act is one of ordinary care and prudence under the circumstances or a rash and reckless exposure to peril and hazard.⁵⁶ But if the cars are going at a rapid rate and the danger of being injured by jumping from them is obvious, the attempt to

53. Morrison v. Erie R. Co., 56 N. Y. 302; Ricketts v. Birmingham St.

R. Co., 85 Ala. 600; Toledo, etc., R. Co. v. Wingate (Ind.), 37 N. E. 274.

54. Morrison v. Erie R. Co., 56 N. Y. 302; England v. Boston, etc., R. Co., 153 Mass. 490; East Tennessee, etc., R. Co. v. Holmes, 97 Ala. 332; Central R., etc., Co. v. Latcher, 69 Ala. 106, 44 Am. Rep. 505; Richmond, etc., R. Co. v. Morris, 31 Gratt. (Va.) 200.

55. Murphy v. Rome, etc., R. Co., 32 St. Rep. (N. Y.) 381, 10 N. Y. Supp. 354; Nicholas v. Dubuque, etc., R. Co., 68 Iowa, 732; Loyd v. Hannibal, etc., R. Co., 53 Mo. 509;

Leggett v. Western New York, etc., R. Co., 143 Pa. St. 39.

56. Bucher v. New York Cent., etc., R. Co., 98 N. Y. 128; Filer v. New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327, 68 N. Y. 124; Schurr v. Houston, 10 St. Rep. (N. Y.) 262; Quin v. Manhattan R. Co., 7 St. Rep. (N. Y.) 252; South, etc., Alabama R. Co. v. Schaufler, 75 Ala. 142; Highland Ave., etc., R. Co. v. Winn, 93 Ala. 309; Georgia, etc., R. Co. v. McCurdy, 45 Ga. 288; St. Louis, etc., R. Co. v. Person, 49 Ark. 182; Gallaway v. Chicago, etc., R. Co., 87 Iowa, 458; Raben v. Central Iowa R. Co., 74 Iowa, 732; McCaslin

leave the cars under such circumstances, even at the instance of the carrier's servants, would be a negligent act, as matter of law, and no recovery could be had against the carrier.⁵⁷ A passenger who attempts to alight from a moving train, without necessity, in spite of warnings by the company's servants,⁵⁸ or by a fellow passenger,⁵⁹ or in direct violation of a regulation of the defendant brought to his knowledge before the occurrence,⁶⁰ is guilty of contributory negligence.

v. Lake Shore, etc., R. Co., 93 Mich. 553; Pittsburgh, etc., R. Co. v. Krouse, 30 Ohio St. 222; Western, etc., R. Co. v. Young, 51 Ga. 489; Pennsylvania R. Co. v. Kilgore, 32 Pa. St. 292; Delaware, etc., Canal Co. v. Webster (Pa.), 6 Atl. 841, 27 Am. & Eng. R. Cas. 160; England v. Boston, etc., R. Co., 153 Mass. 490; Louisville, etc., R. Co. v. Stacker, 86 Tenn. 343; Edger v. Northern R. Co., 11 Ont. App. 452.

57. Filer v. New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Whitlock v. Corner, 57 Fed. 565; East Tennessee, etc., R. Co. v. Hughes, 92 Ga. 388; Jeffersonville, etc., R. Co. v. Swift, 26 Ind. 459; Bardwell v. Mobile, etc., R. Co., 63 Miss. 574, 56 Am. Rep. 842; Pittsburgh, etc., R. Co. v. Krouse, 30 Ohio St. 222; Vilmont v. Chicago, etc., R. Co., 71 Iowa, 58, 28 Am. & Eng. R. Cas. 210; Masterson v. Macon City, etc., R. Co., 88 Ga. 436. But see Southwestern R. Co. v. Singleton, 66 Ga. 252; Jones v. Chicago, etc., R. Co., 42 Minn. 183; Wyatt v. Citizens R. Co., 55 Mo. 485.

58. New York, etc., R. Co. v. Enches, 127 Pa. St. 316; Pennsylvania R. Co. v. Aspell, 23 Pa. St. 147; Jewell v. Chicago, etc., R. Co., 54 Wis. 610, 41 Am. Rep. 63, 6 Am. & Eng. R. Cas. 379; Ohio, etc., R. Co. v. Schiebe, 44 Ill. 460.

59. Kilpatrick v. Pennsylvania R. Co., 140 Pa. St. 502.

60. Burrows v. Erie R. Co., 63 N. Y. 556.

Passengers injured while alighting from street cars.—As to alighting from car at a dangerous place, Fort Wayne Tract. Co. v. Morvilius (Ind.), 2 St. Ry. Rep. 221, 68 N. E. 304; as to failure to notify conductor of intention to alight, Spaulding v. Quincy & B. St. Ry. Co., 2 St. Ry. Rep. 441, 184 Mass. 470, 69 N. E. 217; as to injury while alighting by the sudden start of car, Meade v. Boston Elev. Ry. Co. (Mass.), 2 St. Ry. Rep. 456, 70 N. E. 197; as to burden of proof in an injury while alighting, Peck v. St. Louis Transit Co., 2 St. Ry. Rep. 508, 178 Mo. 617, 77 S. W. 736; as to amount of care to avoid injury to alighting passenger, Richmond Tract. Co. v. Williams, 2 St. Ry. Rep. 927, 102 Va. 253, 46 S. E. 292; as to contributory negligence upon the part of a passenger attempting to alight, Richmond Tract. Co. v. Williams, *supra*; a reasonable time is to be allowed to passenger for alighting from car, Hannom v. St. Louis Transit Co. (Mo.), 2 St. Ry. Rep. 624, 77 S. W. 158; as to injury caused by attempting to alight from car which had slowed down in response to plaintiff's signal, by sudden start of car, Dawson v. St. Louis Transit Co. (Mo.), 2 St. Ry. Rep. 625, 76 S. W. 689; as to being injured while attempting to alight

§ 17. Riding in dangerous position.—A passenger who, without any reasonable cause or excuse, assumes a dangerous position on the platform or steps or in the car of a railroad train while it

while car was still in motion by sudden acceleration of speed, *Duffy v. St. Louis Transit Co.* (Mo.), 2 St. Ry. Rep. 626, 78 S. W. 831; as to injury caused by attempting to alight while car was in motion, *Champane v. La Crosse City Ry. Co.* (Wis.), 2 St. Ry. Rep. 988, 99 N. W. 334; as to injury by sudden start of car while alighting, *Hastings v. Boland* (Mich.), 2 St. Ry. Rep. 503, 98 N. W. 1017; *Brazie v. St. Louis Transit Co.* (Mo.), 2 St. Ry. Rep. 624, 76 S. W. 708; *Scannell v. St. Louis Transit Co.* (Mo.), 2 St. Ry. Rep. 626, 76 S. W. 660; *Paganini v. North Jersey St. Ry. Co.* (N. J.), 2 St. Ry. Rep. 731, 57 Atl. 128; *San Antonio Tract. Co. v. Welter* (Tex.), 2 St. Ry. Rep. 900, 77 S. W. 414; as to injury to passenger alighting from car, *Boone v. Oakland Transit Co.* (Cal.), 1 St. Ry. Rep. 14, 73 Pac. 243; *Denver Consol. Tramway Co. v. Rush* (Col.), 1 St. Ry. Rep. 30, 73 Pac. 664; *Henning v. Louisville Ry. Co.*, 1 St. Ry. Rep. 238, 24 Ky. L. Rep. 2419, 74 S. W. 209; *Lee v. Elizabeth, P. & C. J. Ry. Co.* (N. J.), 1 St. Ry. Rep. 539, 55 Atl. 106; *Koues v. Metropolitan St. Ry. Co.*, 1 St. Ry. Rep. 602, 86 App. Div. (N. Y.) 611, 83 N. Y. Supp. 380; *Gillespie v. Yonkers R. Co.*, 1 St. Ry. Rep. 644, 87 App. Div. (N. Y.) 38, 83 N. Y. Supp. 1043; *Fuller v. Dennison & Sherman Ry. Co.* (Tex.), 1 St. Ry. Rep. 780, 74 S. W. 940. See also note, passengers injured while alighting, 2 St. Ry. Rep. 988, 3 St. Ry. Rep. 715; note, *Invitation to board car*, 3 St. Ry. Rep. 913.

Other recent cases in regard

to passengers injured while alighting from street cars are as follows: *Dambman v. Metropolitan St. R. Co.*, 3 St. Ry. Rep. 663, 180 N. Y. 384, 73 N. E. 59; *Murnahan v. Cincinnati, etc., R. Co.*, 3 St. Ry. Rep. 267 and notes (Ky. L. Rep.), 86 S. W. 688; *Macon Ry. & L. Co. v. Vining*, 3 St. Ry. Rep. 83, 120 Ga. 511, 48 S. E. 232; *Houghton v. Louisville Ry. Co.*, 3 St. Ry. Rep. 282, 26 Ky. L. Rep. 393, 81 S. W. 695; *Posten v. Denver Consol. Tramway Co.*, 1 St. Ry. Rep. 37 and notes (Colo. App.), 78 Pac. 1067; *Topp v. United Rys. & Elec. Co.*, 3 St. Ry. Rep. 332 and notes, 99 Md. 630, 59 Atl. 52; *Johnson v. Yonkers R. Co.*, 3 St. Ry. Rep. 715, 101 App. Div. (N. Y.) 65, 91 N. Y. Supp. 508; *Maloney v. Metropolitan St. R. Co.*, 3 St. Ry. Rep. 716, 95 App. Div. (N. Y.) 393, 88 N. Y. Supp. 638; *McDonough v. Third Ave. R. Co.*, 3 St. Ry. Rep. 716, 95 App. Div. (N. Y.) 311, 88 N. Y. Supp. 609. See also Notes on passenger alighting in unsafe place, 2 St. Ry. Rep. 221, 997; note on safe place for alighting, 1 St. Ry. Rep. 255; *Senf v. St. Louis & Sub. Ry. Co.*, 3 St. Ry. Rep. 559, 112 Mo. App. 74, 86 S. W. 887; *MacDonald v. St. Louis Transit Co.*, 3 St. Ry. Rep. 559, 108 Mo. App. 374, 83 S. W. 1001; *Kroner v. St. Louis Transit Co.*, 3 St. Ry. Rep. 560, 107 Mo. App. 41, 80 S. W. 915; *Pim v. St. Louis Transit Co.*, 3 St. Ry. Rep. 560, 108 Mo. App. 713, 84 S. W. 155; *Parker v. St. Louis Transit Co.*, 3 St. Ry. Rep. 561, 108 Mo. App. 465, 83 S. W. 1016; *McKinstry v. St. Louis Trans. Co.*, 3 St. Ry. Rep. 561, 108 Mo. App. 12, 82

is in motion, or in any place not designed for the carriage of passengers is guilty of contributory negligence which may bar his recovery of damages for an injury resulting from the concurring negligence of the carrier.⁶¹ But while he incurs the risks arising from his exposed situation, he does not assume those which are not inherent in or do not arise in consequence of the position he occupies, but result from the negligence of the carrier to which his negligence in no way contributed.⁶² A passenger who leaves his proper position in the car and takes a place on the engine without being assigned to such place by any authorized servant of the carrier,⁶³ or an employe unnecessarily riding on the pilot of the en-

S. W. 1108; *Cody v. Duluth St. Ry. Co.*, 3 St. Ry. Rep. 452 (Minn.), 102 N. W. 201.

61. *St. Louis, etc., R. Co. v. Leftwich*, 117 Fed. 127, 54 C. C. A. 1; *Kerr v. Chicago, etc., R. Co.*, 100 Ill. App. 148; *Myers v. Nashville, etc., R. Co.*, (Tenn.), 72 S. W. 114; *Little Rock, etc., R. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10, 13 Am. & Eng. R. Cas. 10, riding on top of a cattle car; *Jackson v. Crilly*, 16 Colo. 103, sitting on railing of open car; *Hickey v. Boston, etc., R. Co.*, 14 Allen (Mass.) 429; *Carroll v. Inter-State Rap. T. Co.*, 107 Mo. 653, 52 Am. & Eng. R. Cas. 273; *Ashbrook v. Frederick Ave. R. Co.*, 18 Mo. App. 290; *Tuley v. Chicago, etc., R. Co.*, 41 Mo. App. 432, riding on top of caboose of a freight train; *Higgins v. Cherokee R. Co.*, 73 Ga. 149, riding in open flat car; *Smith v. Richmond, etc., R. Co.*, 99 N. C. 241, 34 Am. & Eng. R. Cas. 557, sitting on arm of seat in car of a train used partly for freight; *Freeman v. Pere Marquette R. Co.*, 9 Det. L. N. 436, 91 N. W. 1021; *Norfolk, etc., R. Co. v. Ferguson*, 79 Va. 241, sitting in chair instead of stationery seat provided for passenger. See also *Beidler v. Branshaw*, 200 Ill. 425, 65 N. E. 1086, as to riding on an elevator; *Bard v. Pennsylvania Tract Co.*,

6 Am. Electl. Cas. 444, 76 Pa. St. 97, 34 Atl. 953. See also *Grieve v. New Jersey St. Ry. Co.*, 64 N. J. L. 409, 47 Atl. 427.

But it has been held not to be contributory negligence, under certain circumstances, to occupy a chair instead of a stationery seat, *Quackenbush v. Chicago, etc., R. Co.*, 73 Iowa 458; or to ride in an open flat car, *Wagner v. Missouri Pac. R. Co.*, 97 Mo. 512; or to ride on the running board of an excursion train, *Dickinson v. Port Huron, etc., R. Co.*, 53 Mich. 43; or in the carriage way of a ferry boat when crowded out of the passenger way, *Cleveland v. New Jersey Steam-boat Co.*, 68 N. Y. 306; *Hazman v. Hoboken Land, etc., Co.*, 2 Daly (N. Y.) 130; or to stand on the stairway of a ferry boat at the time of landing, *Bartlett v. New York, etc., Ferry, etc., Co.*, 57 N. Y. Super. Ct. 348, 130 N. Y. 659.

62. *Paquin v. St. Louis & S. Ry. Co.*, 90 Mo. App. 118; *New York, etc., R. Co. v. Ball*, 53 N. J. L. 283, 21 Atl. 1052; *Keith v. Pinkham*, 43 Me. 501, 69 Am. Dec. 80; *Hanson v. Mansfield R. etc., Co.*, 38 La. Ann. 111, 58 Am. Rep. 162; *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 166, 42 Am. Rep. 208.

63. *Radley v. Columbia Southern R. Co. (Or.)*, 75 Pac. 212; *Files v.*

gne or on the platform at the end of the tender, even with the knowledge of the conductor or trainmen,⁶⁴ and, by reason of being there is injured, is guilty of contributory negligence which will prevent his recovery, unless his injury is due to the wanton or intentional negligence or misconduct of the carrier or its servants, or such reckless misconduct as is the equivalent thereof.⁶⁵ If a passenger on a train, without the direction of or in violation of the rules of the carrier, leaves his seat in a passenger coach and goes into the baggage or express car, and is injured, it has been held that he is guilty of contributory negligence, particularly where he would not have been injured had he remained in another car.⁶⁶ But if his injury could not be traced to his presence in the baggage car, or it was no more dangerous a place than the passenger coach or was a safer place,⁶⁷ or he entered the baggage car for safety, in apprehension of a collision,⁶⁸ the question of contributory negligence may properly be submitted to the jury. If the passenger is riding in the baggage car by invitation or permission of the conductor and is injured in consequence of a collision, being lawfully there, he is not guilty of contributory negligence.⁶⁹

Boston, etc., R. Co., 149 Mass. 204, 14 Am. St. Rep. 411; Brown v. Scarboro, 97 Ala. 316; Virginia Midland R. Co. v. Roach, 83 Va. 375; Lake Shore, etc., R. Co. v. Brown, 123 Ill. 162, 5 Am. St. Rep. 510, a question of fact for the jury, where directed or invited by those in charge of the engine. See Hanson v. Mansfield R., etc., Co., 38 La. Ann. 111, 58 Am. Rep. 162, not negligent *per se* where invited by conductor.

64. Lehigh Valley R. Co. v. Greiner, 113 Pa. St. 600; Downey v. Chesapeake, etc., R. Co., 28 W. Va. 732; Shuler v. Chesapeake, etc., R. Co., 81 Va. 188.

65. Illinois Cent. R. Co. v. Brown, 77 Miss. 338, 28 So. 949; Grieve v. North Jersey St. Ry. Co. (N. J.), 47 Atl. 427.

66. Peoria, etc., R. Co. v. Lane, 83

Ill. 448; Pennsylvania R. Co. v. Langdon, 92 Pa. St. 28, 37 Am. Rep. 651; Kentucky Cent. R. Co. v. Thomas, 79 Ky. 165, 42 Am. Rep. 208; Houston, etc., R. Co. v. Clemons, 55 Tex. 88, 40 Am. Rep. 799; New York, etc., R. Co. v. Ball, 53 N. J. L. 283; Florida Southern R. Co. v. Hirst, 30 Fla. 1, 32 Am. St. Rep. 17; Jones v. Chicago, etc., R. Co., 20 Minn. 125, 18 Am. Rep. 360.

67. Webster v. Rome, etc., R. Co., 115 N. Y. 112.

68. Cody v. New York, etc., R. Co., 151 Mass. 462.

69. Carroll v. New York, etc., R. Co., 1 Duer (N. Y.) 584, 11 N. Y. Leg. Obs. 144; Washburn v. Nashville, etc., R. Co., 3 Head (Tenn.) 644, 75 Am. Dec. 784. See also Spooner v. Brooklyn City R. Co., 54 N. Y. 230.

§ 18. Riding on platform, running board or steps.—Riding on the platform or steps of a steam railroad car when the train is under full headway or moving rapidly is *prima facie* negligence on the part of a passenger and will bar his recovery for injuries sustained, in the absence of affirmative proof excusing such act.⁷⁰ A passenger who voluntarily and unnecessarily takes a position on the platform or steps of a steam railroad car while it is in motion, and is injured, is guilty of contributory negligence which will prevent his recovery for such injury;⁷¹ for example, where he has been requested or warned to enter the car,⁷² or is so riding in violation of the carrier's rules,⁷³ or when he knows that the train is about to be started,⁷⁴ or the cars to be switched,⁷⁵ or coupled,⁷⁶ or when there is room and unoccupied seats within the car.⁷⁷ But when there are no vacant seats within the car, the New York and Illinois courts have established the rule that the passenger is not guilty of contributory negligence, either under the statute or independently of statute, for riding on the platform, steps or running board of a car while the train or car is in motion.⁷⁸ But the

70. Hicks v. Georgia, etc., R. Co., 108 Ga. 304, 32 S. E. 880, 14 Am. & Eng. R. Cas. N. S. 279; Goodwin v. Boston, etc., R. Co., 84 Me. 203, 24 Atl. 816; Hickey v. Boston, etc., R. Co., 14 Allen (Mass.) 429; Worthington v. Central Vermont R. Co., 64 Vt. 107, 23 Atl. 590, 45 Alb. L. J. 299, 15 L. R. A. 326, 52 Am. & Eng. R. Cas. 384.

71. Blitch v. Central R. Co., 76 Ga. 333; Ohio, etc., R. Co. v. Allender, 47 Ill. App. 484; Lindsey v. Chicago, etc., R. Co., 64 Iowa, 407.

72. Graville v. Manhattan R. Co., 105 N. Y. 525, 59 Am. Rep. 516, 34 Am. & Eng. R. Cas. 375; Louisville, etc., R. Co. v. Bisch, 120 Ind. 549; Fisher v. West Virginia, etc., R. Co., 39 W. Va. 366, 58 Am. & Eng. R. Cas. 337.

73. Higgins v. New York, etc., R. Co., 2 Bosw. (N. Y.) 132; Mitchell v. Southern Pac. R. Co., 87 Cal. 62; Alabama G. S. R. Co. v. Hawk, 72 Ala. 112, 47 Am. Rep. 403, 18 Am. &

Eng. R. Cas. 194; Zemp v. Wilmington, etc., R. Co., 9 Rich. L. (S. C.) 84, 64 Am. Dec. 763.

74. Rockford, etc., R. Co. v. Coulertas, 67 Ill. 398; Torrey v. Boston, etc., R. Co., 147 Mass. 412; Malcom v. Richmond, etc. R. Co., 106 N.C. 63.

75. Smotherman v. St. Louis, etc., R. Co., 29 Mo. App. 265.

76. De Mahy v. Morgan's Louisiana R., etc., Co., 45 La. Ann. 1329, 58 Am. & Eng. R. Cas. 448.

77. Goodrich v. Pennsylvania, etc., Canal, etc., Co., 29 Hun (N. Y.) 50; Memphis, etc., R. Co. v. Salinger, 46 Ark. 528; Kentucky, etc., Bridge Co. v. Quinkert, 2 Ind. App. 244.

78. Werle v. Long Island R. Co., 98 N. Y. 650, 21 Am. & Eng. R. Cas. 429; Willis v. Long Island R. Co., 34 N. Y. 675; Morris v. Eighth Ave. R. Co., 68 Hun (N. Y.) 39, 22 N. Y. Supp. 666; Bruno v. Brooklyn City R. Co., 5 Misc. Rep. (N. Y.) 327, 25 N. Y. Supp. 507; North Chicago St. R. Co. v. Cotton, 140 Ill. 486, 52 Am.

courts of other States maintain the rule that the passenger is guilty of contributory negligence for so riding, where there are no unoccupied seats in the car, unless it is shown that there was no standing room in the car.⁷⁹ But standing or riding on the platform or steps of a steam railroad car is generally held not to be contributory negligence *per se*, but to be ordinarily a question for the jury under all the circumstances of the case.⁸⁰ The law of negligence governing the standing on a platform of an interurban electric car outside of a city is the same as in case of steam cars, and where a rule prohibits passengers from standing on the platform, and on request they refuse to enter the car, there being vacant seats, they remain on the platform at their own risk.⁸¹

It is not contributory negligence *per se* for a passenger on a street car to ride on the platform, running board, or steps of the car, in the absence of special circumstances, showing it to be such.⁸² The rule applicable to street railroad cars is different from

& Eng. R. Cas. 238. But it is the duty of the passenger to seek a seat when other passengers leave the train. Chicago, etc., R. Co. v. Fisher, 141 Ill. 614; Chicago, etc., R. Co. v. Carroll, 5 Ill. App. 201.

79. Rolette v. Great Northern R. Co. (Minn.), 97 N. W. 431; Goodwin v. Boston, etc., R. Co., 84 Me. 203; Oliver v. Louisville, etc., R. Co., 43 La. Ann. 804, 47 Am. & Eng. R. Cas. 576; Camden, etc., R. Co. v. Hoosey, 99 Pa. St. 492, 44 Am. Rep. 120, 6 Am. & Eng. R. Cas. 454; Worthington v. Central Vermont R. Co., 64 Vt. 107, 52 Am. & Eng. R. Cas. 384.

80. Werle v. Long Island R. Co., 98 N. Y. 650; Merwin v. Manhattan R. Co., 48 Hun (N. Y.) 608, 1 N. Y. Supp. 267; Augusta Southern R. Co. v. Snider, 118 Ga. 146, 44 S. E. 1005; Mitchell v. Southern Pac. R. Co., 87 Cal. 62; Chicago, etc., R. Co. v. Fisher, 141 Ill. 614; Gerstle v. Union Pac. R. Co., 23 Mo. App. 361; Zemp v. Wilmington, etc., R. Co. 9 Rich. L. (S. C.) 84, 64 Am. Dec. 763; Woods v. Southern Pac. R. Co., 9 Utah 146.

81. Cincinnati, etc., R. Co. v. Lohe (Ohio), 67 N. E. 161.

82. North Chicago St. Ry. Co. v. Baur, 179 Ill. 126, 53 N. E. 568, 45 L. R. A. 108; Brainard v. Nassau Elec. R. Co., 44 App. Div. (N. Y.) 613, 61 N. Y. Supp. 74; Scott v. Bergen Co. Tract. Co., 63 N. J. L. 407, 48 Atl. 113; West Chicago St. R. Co. v. Marks, 82 Ill. App. 185, affd. 182 Ill. 15, 55 N. E. 67; Pray v. Omaha St. Ry. Co., 5 Am. Electl. Cas. 407, 44 Nebr. 167, 62 N. W. 447, 11 Am. R. Corp. Rep. 522, 48 Am. St. Rep. 717; North Chicago St. Ry. Co. v. Williams 140 Ill. 275, 29 N. E. 672, affg. 40 Ill. App. 590; Watson v. Portland, etc., R. Co., 91 Me. 584, 40 Atl. 699, 44 L. R. A. 157; Upham v. Detroit Citizens R. Co., 85 Mich. 12, 12 L. R. A. 129, 48 N. W. 190; Sandford v. Hestonville, etc., R. Co., 136 Pa. St. 84, 26 N. W. C. 401, 20 Atl. 799; Harbinson v. Metropolitan R. Co., 24 Wash. L. Rep. 438, 9 App. D. C. 60; Doolittle v. Southern Ry. Co., 62 S. C. 130, 40 S. E. 133; Geitz v. Milwaukee City R. Co., 72 Wis. 307, 39 N.

that applied to a train drawn by steam power. It is well known that street railroad companies whose cars are propelled by elec-

W. 866; Willmott v. Corrigan Consol. St. R. Co., 106 Mo. 534, 17 S. W. 490; Townsend v. Binghamton R. Co., 57 App. Div. (N. Y.) 234, 58 N. Y. Supp. 121; McGrath v. Brooklyn, etc., R. Co., 5 Am. Electl. Cas. 422, 87 Hun (N. Y.) 310; Marion St. Ry. Co. v. Shaffer, 4 Am. Electl. Cas. 458, 9 Ind. App. 486, 36 N. E. 861; Bailey v. Tacoma Tract. Co., 16 Wash. 48, 47 Pac. 241; Adams v. Washington & G. R. Co., 9 App. D. C. 25, 24 Wash. L. Rep. 364; Dillon v. Forty-second St., etc., R. Co., 28 App. Div. (N. Y.) 404, 51 N. Y. Supp. 145; Cumming v. Worcester L. & S. St. Ry. Co., 166 Mass. 220, 44 N. E. 125; Hassen v. Nassau Elec. Ry. Co., 34 App. Div. (N. Y.) 71, 53 N. Y. Supp. 1069; Muldoon v. Seattle City R. Co., 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794; Augusta, etc., R. Co. v. Renz, 55 Ga. 126; Seigel v. Eisen, 41 Cal. 109; Meesel v. Lynn, etc., R. Co., 8 Allen (Mass.) 234; Nolan v. Brooklyn City, etc., R. Co., 87 N. Y. 63, 41 Am. Rep. 345; Maher v. Central Park, etc., R. Co., 39 N. Y. Super. Ct. 155; Zemp v. Wilmington, etc., R. Co., 9 Rich. (S. C.) 84, 64 Am. Dec. 763; Hastings v. Central Crosstown R. Co., 7 App. Div. N. Y. 312, 40 N. Y. Supp. 93; Archer v. Fort Wayne, etc., R. Co., 87 Mich. 101, 48 Am. & Eng. Cas. 50; Thirteenth, etc., St. Pass. R. Co. v. Boudrou, 92 Pa. St. 475, 2 Am. & Eng. R. Cas. 30, 37 Am. Rep. 707, where a passenger riding on the rear platform of a car, leaning back against the dasher, was struck and injured by the pole of a following car, he was allowed to recover. In such case, "his position was a condition, but not a cause of his injury. It neither lessened the speed of the car

he was on nor increased that of the other; his presence was not the cause of the broken chain and reckless driving of the rear car; his place was an incident of an overcrowded car, whose conductor had left the platform to give him standing room, and had not given him a seat or requested him to enter the car."

The rule is true even where there is plenty of room inside; Maguire v. Middlesex R. Co., 115 Mass. 239, where plaintiff was intoxicated; Burns v. Bellefontaine, etc., R. Co., 50 Burns v. Bellefontaine, etc., R. Co., 50 Mo. 139, where plaintiff was a free passenger; Nolan v. Brooklyn City, etc., R. Co., 87 N. Y. 63, 41 Am. Rep. 345, where plaintiff went out on platform to smoke; Matz v. St. Paul City R. Co. (Minn.) 53 N. W. 1071; Brusch v. St. Paul City R. Co. (Minn.) 55 N. W. 57. Compare Ashbrook v. Frederick Ave. R. Co., 18 Mo. App. 290; Downey v. Hendrick, 46 Mich. 498; Chicago W. D. Ry. Co. v Klauber, 9 Ill. App. 613.

In Missouri it was held that it was error to instruct the jury that if the plaintiff was riding on the foot-board of a grip car when it was running at its usual speed, he was guilty of contributory negligence, unless he was a passenger, since his status as a passenger cannot affect the question of his negligence. Raming v. Metropolitan St. Ry. Co., 157 Mo. 477, 57 S. W. 268. The passenger's negligence in riding on the platform will not prevent a recovery for his death, if the injuries could have been inflicted upon him in the same manner had he ridden elsewhere upon the car. Birmingham Ry. & E. Co. v. James, 121 Ala. 120, 25 So. 847.

tricity constantly expect and invite passengers to ride upon the platforms of their cars when there is no room inside, and that persons having occasion to use such cars are often glad for even a foothold upon the platform, step or footboard. Neither the carrier nor the public have regarded the street car platform as a known place of danger, and the courts have, therefore, held that a passenger who rides thereon is not guilty of such contributory negligence, as a matter of law, as will prevent his recovery for an injury sustained through the fault of an employe of the company. It is a circumstance, however, to be submitted to and determined by the jury.⁸³ The question of contributory negligence under the particular circumstances of a case is one to be submitted to the jury, whenever there is reasonable doubt.⁸⁴ It cannot be said to be negligence as a matter of law, under all circumstances, for the carrier of passengers to permit a passenger to stand upon the running board; but if no seat is furnished and the carrier permit a passenger to ride in that way, the carrier assumes the duty of exercising the care demanded by the circumstances.⁸⁵ It is not contributory negligence, as a matter of law, to stand on the step along the side of an open car if the car is crowded.⁸⁶ But a pas-

83. Watson v. Portland & C. E. Ry. Co., 91 Me. 584, 40 Atl. 699, 64 Am. St. Rep. 268, 44 L. R. A. 157; Seller v. Market St. Ry. Co., 1 St. Ry. Rep. 8, (Cal.) 72 Pac. 1006; Purington-Kimball Brick Co. v. Eckman, 102 Ill. App. 183.

84. Meesel v. Lynn & B. R. Co., 8 Allen (Mass.) 234; City R. Co. v. Lee, 50 N. J. L. 438, 34 Am. & Eng. R. Cas. 568; Topeka City R. Co. v. Higgs, 38 Kan. 389, 34 Am. & Eng. R. Cas. 544; Flick v. Union R. Co., 134 Mass. 481, 16 Am. & Eng. R. Cas. 372; Huelsenkamp v. Citizens' R. Co., 34 Mo. 45, 37 Mo. 537, 90 Am. Dec. 399; Burns v. Bellefontaine, etc., R. Co., 50 Mo. 139; Germantown Pass. R. Co. v. Walling, 97 Pa. St. 55, 2 Am. & Eng. R. Cas. 20, 37 Am. Rep. 796; Geitz v. Milwaukee City R. Co., 72 Wis. 307.

85. North Chicago St. Ry. Co. v. Polkey, 1 St. Ry. Rep. 94, 203 Ill.

225, 67 N. E. 793; North Chicago St. Ry. Co. v. Williams, 140 Ill. 275, 29 N. E. 672, affg. 40 Ill. App. 590.

86. Bruno v. Brooklyn City R. Co., 5 Misc. Rep. (N. Y.) 327, 25 N. Y. Supp. 507; Cummings v. Worcester, etc., St. R. Co., 166 Mass. 220, 44 N. E. 126; Wilde v. Lynn & B. R. Co., 163 Mass. 533, 40 N. E. 851, where plaintiff rode on the footboard of a crowded car without objection on the part of those having charge of the car, it was held proper to submit the question of his contributory negligence to the jury.

Where a boy of sixteen years was a passenger on a crowded train, whereby he was compelled to stand on the platform, and leaned out slightly, when his head came in contact with an iron post and he was killed, he was guilty of such contributory negligence as to prevent his recovery. Though a carrier of passengers must

senger occupying such a position must exercise reasonable care in looking out for and protecting himself against vehicles of travel met or overtaken by the car, and objects along the track, and he has a right to assume in taking such a position by the invitation or consent of the company, that the company will exercise some degree of care to avoid doing anything that might injure him, and it is the legal duty of the company so to do.⁸⁷ The seats in street cars are provided for passengers to occupy, and if there is room to be seated inside the car and no special reason exists why the passenger should not occupy it, he is negligent as a matter of law, in remaining on the platform, and, if without reasonable cause, he leaves the car or places himself on the outside of it while in motion, he assumes the hazard of so doing.⁸⁸ The cause which may justify a passenger, without the imputation of fault on his part, as against the carrier, in leaving his seat and going outside the car, and occupying temporarily or otherwise, a position there while

provide a safe place within its cars for its passengers to ride, yet, when such duty has been performed, a passenger has no right to extend his person beyond the line of the car or ride on the platform thereof. *Benedict v. Minneapolis & St. P. R. Co.*, 90 N. W. 360, 86 Minn. 224, 57 L. R. A. 639. A passenger standing on the side steps of an open street car, when there is room inside, assumes the risk, so that there can be no recovery for his being struck by a pole supporting the electric wires. *Woodroffe v. Roxborough, etc., Ry. Co.*, 201 Pa. 521, 51 Atl. 394.

87. *Seller v. Market St. Ry. Co.*, 1 St. Ry. Rep. 9, (Cal.) 72 Pac. 1006; *Bumbear v. United Tract. Co.*, 198 Pa. 198, 47 Atl. 961; *Moser v. South Covington & C. St. Ry. Co.*, 1 St. Ry. Rep. 240, 25 Ky. L. Rep. 154, 74 S. W. 1090; *Gelley v. New Orleans City & L. R. Co.*, 49 La. Ann. 588, 21 So. 851. See also *Padgett v. Moll*, 159 Mo. 143, 60 S. W. 121, case of newsboy boarding the car to sell papers.

88. *Thane v. Scranton Tract. Co.*,

191 Pa. 249, 43 Atl. 136, 6 Am. Neg. Rep. 185, 4 Chic. L. J. Wkly. 260; *Bradley v. Second Ave. R. Co.*, 90 Hun (N. Y.) 419, 70 St. Rep. (N. Y.) 622, 35 N. Y. Supp. 918; *Coleman v. Second Ave. R. Co.*, 114 N. Y. 612, 21 N. E. 1064; *Mann v. Philadelphia Tract. Co.*, 175 Pa. St. 122, 34 Atl. 572; *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135, 93 Am. Dec. 495; *Guina v. Second Ave. R. Co.*, 67 N. Y. 596; *Dixon v. Brooklyn City & N. R. Co.*, 100 N. Y. 171; *Todd v. Old Colony, etc., R. Co.*, 3 Allen (Mass.) 18, 80 Am. Dec. 49, 7 Allen (Mass.) 207, 83 Am. Dec. 679; *Hickey v. Boston, etc., R. Co.*, 14 Allen (Mass.) 429; *Torrey v. Boston, etc., R. Co.*, 147 Mass. 412; *Pittsburgh, etc., R. Co. v. McClurg*, 56 Pa. St. 294; *Indianapolis, etc., R. v. Rutherford*, 29 Ind. 82, 92 Am. Dec. 336; *Pittsburg, etc., R. Co. v. Andrews*, 39 Md. 329, 17 Am. Rep. 568; *Dun v. Seaboard, etc., R. Co.*, 78 Va. 645, 49 Am. Rep. 388; *Moody v. Springfield St. Ry. Co. (Mass.)*, 65 N. E. 29.

in motion, must be dependent upon the occasion and circumstances which induce or impel him to do so, as, for example, where it becomes necessary for his comfort because of the crowded condition of the car, to do so.⁸⁹ If a passenger is unnecessarily and voluntarily in a place of danger, his negligence is presumed, and puts the burden of proof upon the plaintiff to show that his riding in that position did not contribute to his injury.⁹⁰ It is the duty of a passenger to go inside the car or train, if there is standing room inside, although there are no vacant seats. The fact that the passenger has a well founded ground of complaint against the company for not providing adequate accommodations does not release him from the duty of leaving the platform and entering the car.⁹¹ If the car is so crowded that there is no room except upon the platform, and the conductor stops and allows the passenger to get on, the presumption of the passenger's negligence does not exist; the company must assume all risks where it requires its passengers to ride in such a place; nor can negligence be imputed to a passenger who boards a car under such circumstances.⁹²

89. Coleman case, *supra*; Wood v. Brooklyn City R. Co., 5 App. Div. (N. Y.) 492; Tanner v. Buffalo Ry. Co., 72 Hun (N. Y.) 465; Martin v. Second Ave. R. Co., 3 App. Div. (N. Y.) 448, 38 N. Y. Supp. 220.

90. Solomon v. Central Park, etc., R. Co., 31 N. Y. Super. Ct. 138; Bradley v. Second Ave. R. Co., 90 Hun (N. Y.) 419, 35 N. Y. Supp. 918; Ward v. Central Park, etc., R. Co., 11 Abb. Pr. N. S. (N. Y.) 411, 42 How. Pr. (N. Y.) 289; Willis v. Lynn, etc., R. Co., 129 Mass. 351, 2 Am. & Eng. R. Cas. 27, where a passenger was riding on the platform in spite of a rule of the company and the driver's warning; Downey v. Hendrie, 46 Mich. 468, 41 Am. Rep. 177, such riding bars recovery when there is room inside, even when it is done at the invitation of the driver; Archer v. Fort Wayne, etc., R. Co., 87 Mich. 101, 48 Am. & Eng. R. Cas. 50; McGuire v. Middlesex R. Co., 115 Mass. 239; Butler v. Pittsburgh, etc., R.

Co., 139 Pa. St. 195; Ashbrook v. Frederick Ave. R. Co., 18 Mo. App. 290.

91. Graville v. Manhattan R. Co., 105 N. Y. 525, 34 Am. & Eng. R. Cas. 375, 59 Am. Rep. 516, as to whether the brakeman or conductor might in such a case force the passenger to enter the car is a question which the courts have not as yet determined.

92. Sheridan v. Brooklyn, etc., R. Co., 36 N. Y. 39, 93 Am. Dec. 490; Werle v. Long Island R. Co., 98 N. Y. 650, 21 Am. & Eng. R. Cas 429; Willis v. Long Island R. Co., 34 N. Y. 670, affg. 32 Barb. (N. Y.) 398; Clark v. Eighth Ave. R. Co., 36 N. Y. 135, 93 Am. Dec. 495; Guina v. Second Ave. R. Co., 8 Hun (N. Y.) 494, affd. 67 N. Y. 596, passenger not negligent in failing to take hold of handrail; Thirteenth St., etc., Pass. R. Co. v. Boudrou, 92 Pa. St. 475, 2 Am. & Eng. R. Cas. 30, 37 Am. Dec. 707; West Phila. Pass. R. Co. v. Gallagher, 108 Pa. St. 524,

One riding on the platform of a street car, at the invitation of the conductor as a passenger without hire, and injured without fault on his part through the negligence of the driver in the course of his employment, may recover of the company.⁹³ Likewise one who is riding there without objection on the part of the conductor, there being no notice or warning prohibiting such riding.⁹⁴ A passenger may go out of the car as it approaches his destination, and he is not necessarily negligent in preparing to leave the car. He has no right to leave the car to jump from it while in motion, but he has a perfect and unquestionable right to prepare to leave after notice given, and particularly after he has received intimations from the company's servants that his notice is understood. There is no rule of law which requires him to keep his seat until the very moment that the car has actually stopped. He has a right to start to leave when he has notified the driver or conductor, and unless he is careless and negligent in so doing he is not guilty of contributory negligence, and does not lose his right to recover damages for an injury received through the negligence of the carrier.⁹⁵ But, if he thus voluntarily places himself upon the

27 Am & Eng. R. Cas. 201; Germantown Pass. R. Co. v. Walling, 97 Pa. St. 55, 2 Am. & Eng. R. Cas. 20, 39 Am. Rep. 796; Walling v. Railway Co., 12 Phila. (Pa.) 309; People's Pass. R. Co. v. Green, 56 Md. 84, 6 Am. & Eng. R. Cas. 168; Topeka City R. Co. v. Higgs, 38 Kans. 375, 34 Am. & Eng. R. Cas. 529, passenger riding on sideboard of the car; Geitz v. Milwaukee City R. Co., 72 Wis. 307; City R. Co. v. Lee, 50 N. J. L. 435, 34 Am. & Eng. R. Cas. 566, riding on running board; Lapointe v. Middlesex R. Co., 144 Mass. 18, 28 Am. & Eng. R. Cas. 198, woman injured while standing inside, there being no vacant seats. Gatens v. Metropolitan St. Ry. Co., 85 N. Y. Supp. 967, where a crowded car was driven around a curve without slackening speed, in violation of a rule of the company, the company was liable.

93. Wilton v. Middlesex R. Co., 107 Mass. 108; Philadelphia, etc., R.

Co. v. Derby, 14 How. (U. S.) 468. But one directed by the conductor to ride on the front platform, who is injured by being kicked by one of the horses after it had fallen and efforts were being made to release it, was held not entitled to recover, as the driver's negligence was not the proximate cause of the accident. Roedecker v. Metropolitan St. R. Co., 87 App. Div. (N. Y.) 227, 84 N. Y. Supp. 300.

94. Nolan v. Brooklyn City, etc., R. Co., 87 N. Y. 63, 41 Am. Rep. 345; Day v. Brooklyn City R. Co., 12 Hun (N. Y.) 435; East Saginaw City R. Co. v. Bohn, 27 Mich. 503, 33 Mich. 259; Brennan v. Fair Haven, etc., R. Co., 45 Conn. 284; Pittsburgh, etc., Pass. Co. v. Caldwell, 74 Pa. St. 421; Phila. City Pass R. Co. v. Hassard, 75 Pa. St. 367.

95. Nichols v. Sixth Ave. R. Co., 38 N. Y. 131, 97 Am. Dec. 780; Losee v. Watervliet Turnp., etc., R. Co., 63

platform or steps of the car while it is in motion and is thrown off by the increase of the speed of the car, which happens before he has indicated to any one of the agents of the company that he intends to alight, such an increase of speed, unaccompanied by any other fact, cannot be the foundation of a charge against the company of negligence.⁹⁶ A passenger is not necessarily negligent, if, under the direction of the conductor of the rear car, he attempts to go to the rear car just as the train starts, but he is not justified in attempting to pass from one footboard to another while the train is in motion;⁹⁷ and he is guilty of contributory negligence in riding upon the rear platform when there is ample standing room inside the car in which there are straps unto which he may cling while standing, if an injury result to him, which would not have occurred had he been inside the car.⁹⁸ But a woman's want of reasonable care in getting upon a crowded street car and attempting to ride upon the platform because she is unable to get inside the car, will not relieve the street car company from liability for injuries due to her being thrown from the platform, if, knowing her situation and consequent exposure to danger, it might, by the exercise of reasonable care, under the circumstances, have pre-

Hun (N. Y.) 404; Colwell v. Manhattan R. Co., 57 Hun (N. Y.) 542; Fleck v. Union R. Co., 134 Mass. 480, 16 Am. & Eng. R. Cas. 372; North Chicago St. R. Co. v. Baur, 179 Ill. 126, 53 N. E. 568, 45 L. R. A. 108, where passenger about to alight stood on the platform with his back against the dashboard, and by a sudden jerk of the car was thrown into the street; Conner v. Citizens St. Ry. Co., 105 Ind. 62, 55 Am. Rep. 177; Wylde v. Northern R. of N. J., 53 N. Y. 156; Poulin v. Broadway, etc., Ry. Co., 61 N. Y. 621; Morrison v. Erie Ry. Co., 56 N. Y. 310.

96. Sims v. Metropolitan St. R. Co., 65 App. Div. (N. Y.) 270, 72 N. Y. Supp. 835. A passenger on an electric street car, leaving his seat and stepping onto the running board of the car while in motion, assumes the

risk of his position. Bainbridge v. Union Tract. Co., 206 Pa. St. 71, 55 Atl. 836. Where plaintiff elected to ride on the step of a crowded street car and was thrown off by the oscillation or "greyhound motion" of the car as it was running at the usual rate of speed, and there was no evidence of any unusual or abnormal motion due to any unusual condition of the car, rails, roadbed, or management, plaintiff assumed the risk of an injury so occasioned. Moskowitz v. Brooklyn H. R. Co., 85 N. Y. 960.

97. Eickhof v. Chicago, N. S. R. Co., 74 Ill. App. 196.

98. Ward v. Central Park R. Co., 11 Abb. Pr. N. S. (N. Y.) 411; Aikin v. Frankford, etc., R. Co., 142 Pa. St. 47, 21 Atl. 781; Andrews v. Capital City, etc., R. Co., 2 Mackay (D. C.) 137.

vented injury to her.⁹⁹ Where it is customary for the passengers, with the consent of the carrier to use the running board of an open street car, not only as a means of ingress and egress, but also to pass from one part of the car to another, the question of negligence in case of accident cannot be properly answered without considering this circumstance. Standing upon the running board, the passenger must take reasonable care to avoid accident, and it can not certainly be said that the carrier is negligent in permitting the passenger to use the running board as a standing place; the question of the carrier's negligence and of the passenger's contributory negligence, are, therefore, for the jury.¹ The fact that a passenger on a cable car is standing on the running board where passengers are accustomed to ride does not, however, absolve the railroad company from its duty toward him as a passenger, although his position may be unsafe;² and a street railway company is not, as matter of law, free from negligence in permitting a passenger, without warning, to stand on the footboard at the side of a car while crossing a viaduct on which are posts so near as to strike one riding on such footboard, unless he inclines his body toward the car;³ or where the conductor of an open car did not stop it although he knew a passing truck on the street was dangerously close, and that the plaintiff, a passenger, was on the side step of the car.⁴ Courts will not draw distinctions between foot boards and seats upon a street car as places of relative danger and safety, in view of the general custom of street car carriers of persons.⁵ If a street railway be built along a causeway which

99. *Metropolitan St. R. Co. v. Shashall* (D. C. App.), 22 Wash. L. Rep. 377.

1. *Citizens St. R. Co. v. Hoffbauer*, 23 Ind. App. 614, 56 N. E. 54, citing *Cogswell v. West Side*, etc., R. Co., 5 Wash. 46, 31 Pac. 411; *Railway Co. v. Scott*, 86 Va. 902, 11 S. E. 404; *Railway Co. v. Rude*, 62 Ill. App. 550; *Railroad Co. v. Cook*, 145 Ill. 551, 33 N. E. 958; *Elliott v. Newport*, etc., R. Co., 18 R. I. 707, 28 Atl. 331, 31 Atl. 694, 23 L. R. A. 208; *Railway Co. v. McCleave* (Ky.), 38 S. W. 1055; *Topeka City R. Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667; *Spellman v. Lin-*

coln Transit Co., 36 Neb. 890, 55 N. W. 270, 22 L. R. A. 316; *McLean v. Burbank*, 11 Minn. 277; *Dahl v. Railway Co.*, 62 Wis. 655, 22 N. W. 755; *Watkins v. El. Co.* (Ala.), 24 So. 392, 43 L. R. A. 297.

2. *Sweeney v. Kansas City Cable Co.*, 150 Mo. 385, 51 S. W. 682.

3. *West Chicago St. R. Co. v. Marks*, 82 Ill. App. 185, affd. 182 Ill. 15, 55 N. E. 67.

4. *Faris v. Brooklyn City & N. F. Co.*, 46 App. Div. (N. Y.) 231, 61 N. Y. Supp. 670.

5. *West Chicago St. R. Co. v. Stiver*, 69 Ill. App. 625; *Lake v. Cir-*

necessitated placing trolley poles near the track, and the plaintiff who had knowledge of the situation, be riding on the footboard next to the trolley poles and refuses to step on the platform at the invitation of the conductor, but leans back to allow him to pass by, and thereby his head is brought in contact with a trolley pole, he is guilty of contributory negligence.⁶ A passenger upon a cable street railway is not guilty of negligence in taking a seat provided for passengers upon the outside of the grip car instead of on the inside of the trailer.⁷ The provisions of the New York Railroad Law that "in case any passenger on any railroad shall be injured while on the platform of a car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury; provided said company at the time furnished room inside its passenger cars sufficient for the proper accommodation of the passengers" do not apply to street railroad companies.⁸

cinnati Inc. P. R. Co., 13 Ohio C. C. 494; East Omaha St. R. Co. v. Godola, 50 Nebr. 906, 70 N. W. 491, 7 Am. & Eng. R. Cas. N. S. 300; Cleveland, etc., R. Co. v. Moneyhun, 146 Ind. 147, 34 L. R. A. 141, 44 N. E. 1106, 5 Am. & Eng. R. Cas. N. S. 632.

6. Nugent v. Fair Haven & W. St. Ry. Co., 73 Conn. 139, 46 Atl. 875. And see Caspers v. Dry Dock, etc., R. Co., 22 App. Div. (N. Y.) 156, 47 N. Y. Supp. 961; Vrooman v. Houston, etc., R. Co., 7 Misc. Rep. (N. Y.) 234, 58 St. Rep. (N. Y.) 23, 27 N. Y. Supp. 287; Tanner v. Buffalo R. Co., 72 Hun (N. Y.) 465, 54 St. Rep. (N. Y.) 776, 25 N. Y. Supp. 242; Littman v. Dry Dock, etc., R. Co., 6 Misc. Rep. (N. Y.) 34, 55 St. Rep. (N. Y.) 514, 25 N. Y. Supp. 1002; Pomaski v. Grant, 119 Mich. 657, 78 N. W. 891, 6 Det. Leg. N. 43; Malpass v. Hestonyville, etc., R. Co., 129 Pa. St. 599, 42 Atl. 291, 5 Am. Neg. Rep. 471.

7. Hawkins v. Front St. Cable R. Co., 3 Wash. 592, 28 Pac. 1021.

8. Vail v. Broadway R. Co., 147 N. Y. 377, 70 St. Rep. (N. Y.) 33, "In the very nature of things," said the court in its opinion, "a provision of this character, intended primarily to prevent accidents and injuries to passengers on trains operated by steam and running at a high rate of speed, is not applicable to a street railroad, the cars of which are drawn through city streets at the rate of a few miles per hour. The danger to passengers standing upon the platforms of steam cars when in motion is great and obvious, while that of passengers on the platforms of street cars is almost nothing, as is fully demonstrated by the practice of the general public and the companies themselves." (p. 381.) Lax v. Forty Second St., etc., R. Co., 46 N. Y. Super. Ct. 448; Hayes v. Forty-Second St., etc., R. Co., 97 N. Y. 259. .

§ 19. Standing up in car.—A contract requiring a railroad corporation to furnish a passenger a seat does not, as matter of law, oblige him to keep it from the time he first takes it until the train has come to a final stop at the place of his destination.⁹ It cannot therefore be held, as a matter of law, that a passenger in a crowded railroad car, by surrendering his seat to one less able to stand than himself,¹⁰ or who temporarily leaves his seat for a legitimate reason and is compelled to stand in the aisle because, when he returns, the seat is occupied,¹¹ is guilty of negligence which precludes his recovery for an injury received through the negligence of the carrier, although such injury would not have been received had he retained his seat. Nor a passenger who left his seat in the car to pick up a package belonging to him,¹² or the overcoat of a fellow passenger,¹³ and was thrown down and injured. But standing near an open side door of a car when the train is starting or in motion,¹⁴ or while the train is stopped, standing by the door of the car, the door shutter being open, with his hand resting on the door frame against which the shutter is closed,¹⁵ or standing up in a freight train where he could have known by the exercise of ordinary care, that the train had stopped to do switching, and that part of the train was likely to be backed against the part to which the caboose was attached, which would probably produce concussion in the caboose,¹⁶ has been held to be contributory negligence which would bar a passenger's recovery for injury. Where a passenger was standing at the rear door of a coach, viewing the scenery, his left hand resting on the water closet door to brace himself, and the conductor, approaching from behind opened the closet door and shut it quickly, catching and crushing the passenger's little finger, which had slipped into the

9. Barden v. Boston, etc., R. Co., 121 Mass. 426.

10. Trumbull v. Erickson, 97 Fed. 891, 38 C. C. A. 536.

11. Holland v. St. Louis, etc., R. Co., 105 Mo App 117, 79 S. W. 508.

12. Condy v. St. Louis, etc., R. Co., 13 Mo. App. 587, 85 Mo. 79.

13. Wallace v. Western North Carolina R. Co., 101 N. C. 454, 37 Am. & Eng. R. Cas. 159.

14. Thompson v. Duncan, 76 Ala. 334. See also Gee v. Metropolitan R.

Co., L. R. 8 Q. B. 161; Warburton v. Midland R. Co., 21 L. T. N. S. 835, holding it to be a question for the jury.

15. Texas, etc., R. Co. v. Overall, 82 Tex. 247; Richardson v. Metropolitan R. Co., 37 L. J. C. P. 300.

16. Harris v. Hannibal, etc., R. Co., 89 Mo. 233, 58 Am. Rep. 111, 27 Am. & Eng. R. Cas. 216; Koumm v. St. Louis, etc., R. Co. (Ark.), 76 S. W. 1075, passenger standing up to get a drink.

crevice without his knowledge; the passenger testified that the conductor said he saw him there, and ought to have spoken to him, and that he did not hear the conductor approaching, it was held that the questions of the defendant's negligence and the plaintiff's contributory negligence were for the jury.¹⁷ The New York courts hold that where a passenger leaves his seat with a view of leaving the car as soon as the train stops, as passengers usually do, he has a right to assume that the train will be stopped in the usual manner, and he is not chargeable with contributory negligence, if injured by a sudden jerk of the car, although it is probable that if he had retained his seat he would not have been injured.¹⁸ But in Pennsylvania such an act has been held to be contributory negligence,¹⁹ and also in Kentucky, where the passenger leaves his seat and stands by the door before the train stops, if injuries are sustained by a fall caused by the stopping of the train with no more jerk than incident to its stoppage in the exercise of the proper care.²⁰ In other cases it has been held that whether a passenger, in leaving his seat and making his way to the door of the car in order to get off at a station which a train is approaching, exercised due care and whether the carrier negligently and improperly managed its trains under the circumstances, should be submitted to the jury.²¹ It has been held that a passenger boarding a mixed train composed of freight and passenger cars, the starting of which involves jerking and jostling endangering the safety of unseated passengers, is bound to exercise ordinary care in obtaining a seat, and is guilty of contributory negligence in failing to do so.²² And so,

17. Romine v. Evansville, etc., R. Co. (Ind. App.), 56 N. E. 245, citing Thurber v. Harlem Bridge, etc., R. Co., 60 N. Y. 326; Wylde v. Northern R. Co., 53 N. Y. 156; Baker v. Manhattan R. Co., 118 N. Y. 533, 23 N. E. 885, and other cases. See also Briniger v. Louisville & N. R. Co., 24 Ky. L. Rep. 1973, 72 S. W. 783.

18. Bartholomew v. New York Cent., etc., R. Co., 102 N. Y. 716, 27 Am. & Eng. R. Cas. 154; Wylde v. Northern R. Co., 53 N. Y. 156; Nicholas v. Sixth Ave. R. Co., 38 N. Y. 131, 97 Am. Dec. 780; Willis v. Long Island R. Co., 34 N. Y. 670.

19. Dunn v. Pennsylvania R. Co., 20 Phila. (Pa.) 258.

20. Illinois Cent. R. Co. v. Jolly, 25 Ky. L. Rep. 1735, 78 S. W. 476.

21. Treat v. Boston, etc., R. Co., 131 Mass. 371, 3 Am. & Eng. R. Cas. 423; Barden v. Boston, etc., R. Co., 121 Mass. 426; Morgan v. Southern Pac. R. Co., 95 Cal. 501; New Jersey R. Co. v. Pollard, 22 Wall. (U. S.) 341.

22. Macon, etc., R. Co. v. Moore, 108 Ga. 84, 33 S. E. 889, 6 Am. Neg. Rep. 451, 15 Am. & Eng. R. Cas. N. S. 842.

where a passenger, entering a passenger train which has stopped a reasonable time for passengers to enter and be seated in the cars, fails to take a seat and is thrown down and injured by the starting of the train.²³ But where a passenger enters a car and finds no seat vacant and is injured while searching for a seat,²⁴ or while standing in the car, after having looked through several cars for a seat and abandoned the search,²⁵ he is not guilty of contributory negligence, although there were vacant seats in another part of the train. He is not guilty of negligence *per se* in not taking the first seat and in not looking to see whether other cars are backing towards a car which he has been invited to enter.²⁶ A man who surrenders his seat on a crowded street car to a woman, and stands on the running board of the car, is not, as a matter of law, negligent.²⁷ One who boarded an open, crowded electric car stopping for passengers, and was injured, while standing on the running board, facing the inside of the car, looking for a seat, as the car was passing a van, was not guilty of contributory negligence as a matter of law, since whether, when the car passed the van, reasonable care required that he should observe the side of the street, rather than to see if there was a vacant place within the car, was a question for the jury.²⁸

§ 20. Passing from one car to another.—It is not negligence *per se* for a passenger to attempt to pass from one car to another of a moving train, but he assumes the risks incident to such an undertaking from ordinary, natural causes, and is bound to exercise due care in doing so.²⁹ If it appears that the passenger incurs additional risk by leaving his seat, or if he selects a time for doing so when there is necessarily increased violence in the movement of the train, then he is under a duty to use such care for his safety as a prudent person would under the circumstances, and failure

23. International, etc., R. Co. v. Copeland, 60 Tex. 325.

24. Pollard v. New York, etc., R. Co., 7 Bosw. (N. Y.) 437.

25. Farnon v. Boston & A. R. Co., 180 Mass. 212, 62 N. E. 254.

26. Moore v. Saginaw, etc., R. Co., 119 Mich. 613, 78 N. W. 666, 5 Det. L. N. 936, 6 Am. Neg. Rep. 89.

27. Brainard v. Nassau Electric R.

Co., 44 App. Div. (N. Y.) 613, 61 N. Y. Supp. 74.

28. Henderson v. Nassau Electric R. Co., 46 App. Div. (N. Y.) 280, 61 N. Y. Supp. 690.

29. Lent v. New York Cent., etc., R. Co., 120 N. Y. 467; San Antonio, etc., R. Co. v. Choate, 22 Tex. Civ. App. 618, 56 S. W. 214; Sickles v.

to do so would charge him with contributory negligence.³⁰ Where a passenger voluntarily attempted to pass from one car to another while the train was running at a high rate of speed around a curve, and fell from the train,³¹ and where a person in charge of live stock, while the train was in motion, without due care, attempted to pass from the stock cars to the caboose over the tops of the intermediate cars while the train was passing through snow sheds in a severe storm,³² he has been held guilty of contributory negligence precluding recovery. So, where a passenger went from a caboose to an engine of a rapidly moving train when neither necessity nor duty called him.³³ And where a passenger, in making her passage from one car to another, without looking, and without necessity for so doing, stepped upon the buffers between the platforms as they separated with the movement of the train.³⁴ Where the passenger acts under the direction or at the command of the conductor or other servant of the carrier the courts have held that he was warranted in supposing that the conditions were such as to enable him to pass in safety and that he was, therefore, not guilty of contributory negligence.³⁵ But usually the question has been held to be one for the jury to determine under all the facts of the case whether it was negligent for the passenger to follow the direction or order of a servant of the carrier.³⁶

Missouri, etc., R. Co., 13 Tex. Civ. App. 434, 35 S. W. 493; Cleveland, etc., R. Co. v. Manson, 30 Ohio St. 451; Davis v. Louisville, etc., R. Co., 69 Miss. 136; Galveston, etc., R. Co. v. Morris (Tex.), 61 S. W. 709.

30. Burr v. Pennsylvania R. Co., (N. J.) 44 Atl. 845.

31. Dougherty v. Yazoo, etc., R. Co. (Miss.), 36 So. 699. See, however, Louisville & N. R. Co. v. Berg, 17 Ky. L. Rep. 1105, 32 S. W. 616; Chesapeake & O. R. Co. v. Clowes, 93 Va. 189, 24 S. E. 833.

32. Nelson v. Southern Pac. Co., 15 Utah 325, 49 Pac. 644. See also Neville v. St. Louis, etc., R. Co., 158 Mo. 293, 59 S. W. 123.

33. McDaniel v. Highland Ave., etc., R. Co., 90 Ala. 64.

34. Snowden v. Boston, etc., R. Co., 151 Mass. 220.

35. Lent v. New York Cent., etc., R. Co., 120 N. Y. 467; Hannibal, etc., R. Co. v. Martin, 111 Ill. 219; Louisville, etc., R. Co. v. Kelly, 92 Ind. 371, 47 Am. Rep. 149; Davis v. Louisville, etc., R. Co., 69 Miss. 136. But the suggestion of a conductor has been held not to be a command or direction, and a passenger, acting voluntarily, was held to have assumed the risk. Stewart v. Boston, etc., R. Co., 146 Mass. 605.

36. McIntyre v. New York Cent., etc., R. Co., 37 N. Y. 287, and other cases cited under this section.

§ 21. Riding with part of person projecting from window.—
A passenger on a railway train is not guilty of negligence in sitting by an open window.³⁷ It has been held in most of the reported cases, contributory negligence *per se*, or as matter of law, for a passenger on railroads operated by steam consciously or unconsciously to protrude his arm, head, elbow, hand or any part of his person through the window beyond the outer surface of the side of the car or outer edge of the window, barring a recovery for an injury which would not have been sustained but for such negligence;³⁸ while in a few others it has been held that whether it is contributory negligence is a question of fact for the determination of the jury under all the circumstances of the case.³⁹ The question does not seem to have been determined definitely in the appellate courts of New York,⁴⁰ although the judgment in one case was to the effect that whether the plaintiff was negligent in riding with her arm out of the window was not a question of law, but of fact,⁴¹ and in three other cases the records show that the jury in each case was instructed that if they found that the plaintiff was riding with his arm protruding from the open window, it was contributory negligence, and no recovery could be had, but the validity of the in-

37. O'Donnell v. Louisville & N. R. Co., 19 Ky. L. Rep. 1005, 42 S. W. 846.

38. Knauss v. Lake Erie & W. R. Co. (Ind. App.), 64 N. E. 95; Union Pac. R. Co. v. Roeser (Neb.), 95 N. W. 68; Clarke v. Louisville & N. R. Co., 101 Ky. 34, 18 Ky. L. Rep. 1082, 36 L. R. A. 123, 8 Am. & Eng. R. Cas. N. S. 355, 2 Am. Neg. Rep. 360, 39 S. W. 840, where elbow protruded inadvertently and did not extend more than one and a half inches beyond the outer surface of the side of the car; Shelton v. Louisville & N. R. Co., 19 Ky. L. Rep. 215, 39 S. W. 842; Richmond & D. R. Co. v. Scott, 88 Va. 958, 14 S. E. 763, 16 L. R. A. 91; Cummings v. Worcester, etc., St. R. Co., 166 Mass. 220, 44 N. E. 126; Carrico v. West Virginia, etc., R. Co., 35 W. Va. 389, 14 S. E. 12; Georgia, Pac. R. Co. v. Underwood,

90 Ala. 49; Indianapolis, etc., R. Co. v. Rutherford, 29 Ind. 82; Pittsburg, etc., R. Co. v. Andrews, 39 Md. 329, 17 Am. Rep. 568; Pittsburg, etc., R. Co. v. McClurg, 56 Pa. St. 294; Laing v. Colder, 8 Pa. St. 479, 49 Am. Dec. 533; Dun v. Seaboard, etc., R. Co., 78 Va. 645, 49 Am. Rep. 388; Todd v. Old Colony, etc., R. Co., 7 Allen (Mass.), 207, 83 Am. Dec. 679.

39. McCord v. Atlanta, etc., R. Co. (N. C.), 45 S. E. 1031; Chicago, etc., R. Co. v. Pondrom, 51 Ill. 333, 2 Am. Rep. 306; Spencer v. Milwaukee, etc., R. Co., 17 Wis. 487, 84 Am. Dec. 758; Quinn v. South Carolina R. Co., 29 S. C. 381.

40. Francis v. New York Steam Co., 114 N. Y. 385.

41. Holbrook v. Utica, etc., R. Co., 12 N. Y. 244, 64 Am. Dec. 502, 16 Barb. (N. Y.) 113.

structions was not considered in the higher courts.⁴² In one of the cases cited the court also charged that if the passenger's arm, while resting on the sill, was thrown out by a sudden lurch of the car, that fact would not defeat his right to recover.⁴³ And it has been so held in other States where the passenger's arm was not protruding beyond the car but was thrown outside the car by the force of a collision.⁴⁴ It has been held to be contributory negligence in a passenger on an elevated railroad to place his hand on the sill under the window, without looking to see that the window was raised to the proper height to be held by the latch if in proper order.⁴⁵ In reference to street railroad cases the New York courts have held that a general rule applicable to all cases cannot be laid down as to whether a passenger upon a street car was negligent in riding with his arm out of the window, and that whether the question is one of law or fact must be determined by the circumstances of each case, inasmuch as street railroads are operated under such widely different circumstances, some in the crowded thoroughfares of large cities and others in streets little used in suburban districts and villages.⁴⁶ But it has been held that the fact that a street car passenger, sitting beside an open window reading, with his arm resting on the sill, extended his arm not more than three inches outside the car, did not constitute contributory negligence, as a matter of law, precluding recovery for an injury to such arm caused by another car passing on a switch.⁴⁷ It has been held in other States, under similar circumstances, to be a question of fact.⁴⁸ And in Missouri it is held a question not to be determined by any arbitrary rule, the court saying that "it does not necessarily follow, however, that because the exposure of the person from the window of an ordinary railroad carriage moved by

42. Breen v. New York Cent., etc., R. Co., 109 N. Y. 297, 4 Am. St. Rep. 450; Hallahan v. New York, etc., R. Co., 102 N. Y. 194; Dale v. Delaware, etc., R. Co., 73 N. Y. 468.

43. Dale v. Delaware, etc., R. Co., 73 N. Y. 468.

44. Farlow v. Kelly, 108 U. S. 288; Winters v. Hannibal, etc., R. Co., 39 Mo. 468; Carrico v. West Virginia, etc., R. Co., 35 W. Va. 389.

45. Voorhees v. Kings County El. R. Co., 3 Misc. Rep. (N. Y.) 18, 21

N. Y. Supp. 775. But the contrary has been held in Gulf, etc., R. Co. v. Killebrew (Tex.), 20 S. W. 182.

46. Francis v. New York Steam Co., 114 N. Y. 385.

47. Tucker v. Buffalo Ry. Co., 53 App. Div. (N. Y.) 571, 65 N. Y. Supp. 989.

48. Dahlberg v. Minnesota St. R. Co., 32 Minn. 404, 50 Am. Rep. 585; Summers v. Crescent city R. Co., 34 La. Ann. 139, 44 Am. Rep. 419.

steam is negligence, that the same exposure from the window of a street car is so. The motive power is much more under control in one case than the other, whether we speak of the carriage in which the passenger is or of anything likely to approach it from a parallel track, and the speed is less."⁴⁹

§ 22. Awaiting and seeking transportation.—Passengers must use the ways and means of going to and from trains provided at stations for that purpose.⁵⁰ They may lawfully use the platforms and premises provided for the use of passengers for any lawful purpose connected with their journey, and have a right to assume that they may be there without being exposed to unnecessary hazard or danger, but their use thereof must be limited to the purposes for which they were manifestly adapted.⁵¹ They are not chargeable with contributory negligence, as a matter of law, if injured while, in the exercise of due care and prudence, they are making use of the platforms and premises and other ways and means provided for their use while awaiting and seeking transportation.⁵² But for a failure to use ordinary care and prudence in

49. Miller v. St. Louis R. Co., 5 Mo. App. 471.

Projection of body from moving car.—As to injury by being struck by trolley pole at the side of a car, Huber v. Cedar Rapids, etc., R. Co., 3 St. Ry. Rep. 245, 124 Iowa, 556, 100 N. W. 478; Cummings v. Wichita R. & L. Co. (Kan.), 2 St. Ry. Rep. 278, 74 Pac. 1104; injury to passenger where his arm was protruding, see Zeliff v. North Jersey St. Ry. Co. (N. J.), 1 St. Ry. Rep. 541, 55 Atl. 95; see note on collisions with obstacles near track, 2 St. Ry. Rep. 278. Fort Wayne Tract. Co. v. Hardendorf, 3 St. Ry. Rep. 164 (Ind.), 72 N. E. 593 and notes.

50. Cleveland, etc., R. Co. v. Wade, 18 Ind. App. 346, 48 N. E. 12; Cincinnati, etc., R. Co. v. Wagner, 15 Ohio C. C. 395; Anderson v. Grand Trunk R. Co., 24 Ont. App. 672.

51. Dobiecki v. Sharp, 88 N. Y.

203; Weston v. New York Elev. R. Co., 73 N. Y. 595; Dotson v. Erie R. Co. (N. J.), 54 Atl. 827, and while trains are passing a platform at a station, or are likely to pass, waiting passengers must keep such a distance from the edge of the platform next to the rail that they will not be struck by such projections as usually attach to ordinary trains.

But that one is guilty of contributory negligence in placing himself in a dangerous position on a railroad platform, will not prevent a recovery from the railroad company for an injury inflicted by an approaching train, if the employees of such train saw him in his dangerous position, or, by the exercise of reasonable care, might have discovered the situation in time to have averted the danger. Zumault v. Kansas City, etc., Air Line, 71 Mo. App. 670.

52. Chicago, etc., R. Co. v. Wool-

such use they are guilty of contributory negligence.⁵³ But the question of the passenger's contributory negligence as well as that of the carrier's negligence may be for the jury, as where a passenger standing on a depot platform was struck by a passing train,⁵⁴ or where a passenger tripped over a box upon the station platform, when running to catch a train a little distance away, in front of the freight station, and which the company's employes had signaled to the passenger was about to start,⁵⁵ or where the passenger fell over certain iron left on the station platform and there was a reasonable amount of room left for passengers to walk in boarding or leaving the cars.⁵⁶ A person going to a depot to become a passenger has a right to presume that the platforms are safe, and is not bound to keep a lookout, other than such as ordinary prudence might require.⁵⁷ The use by a passenger, in going

ridge, 32 Ill. App. 237; Caswell v. Boston, etc., R. Corp., 98 Mass. 194, 93 Am. Dec. 151; Renneker v. South Carolina R. Co., 20 S. C. 219, 18 Am. & Eng. R. Cas. 149; Hartwig v. Chicago, etc., R. Co., 49 Wis. 358; Texas, etc., R. Co. v. Brown, 78 Tex. 401; Missouri Pac. R. Co. v. Neiswanger, 41 Kan. 621, 13 Am. St. Rep. 304; St. Louis, etc., R. Co. v. Coulson, 8 Kan. App. , 54 Pac. 2, 4 Am. Neg. Rep. 629; Railroad Co. v. Aller, 56 Ohio St. 754, 49 N. E. 1114.

53. Bennett v. New York, etc., R. Co., 57 Conn. 422, descending from platform by unlighted instead of a lighted stairway; Forsyth v. Boston, etc., R. Co., 103 Mass. 510, stepping off platform into cattle guard; Missouri, etc., R. Co. v. Turley, 85 Fed. 369, 56 U. S. App. 1, 29 C. C. A. 196, stepping off an unrailed platform in the darkness for the purpose of sitting down on its edge, assuming without inquiring or examination that the ground is level with the platform as at the place where she enters upon it; Reed v. Axtell, 84 Va. 231; Gulf, etc., R. Co. v. Hodges (Tex. Civ. App.), 24 S. W. 563; Chewning v. Ensley R.

Co., 100 Ala. 493, 14 So. 204; Railroad Co. v. Aller, 56 Ohio St. 754, 49 N. E. 1114; Chicago, etc., R. Co. v. Dewey, 26 Ill. 255, 79 Am. Dec. 374, passing between cars of a freight train about to move; Smith v. Chicago, etc., R. Co., 55 Iowa, 33, passing under one of a train of freight cars.

54. Dobiecki v. Sharp, 88 N. Y. 203.

55. MacLennan v. Long Island R. Co., 52 N. Y. Super. Ct. 22, 107 N. Y. 623.

56. Mathieson v. Burlington, etc., R. Co. (Iowa), 100 N. W. 51.

57. Barker v. Ohio River R. Co., 51 W. Va. 423, 41 S. E. 148, and where a person, while trying to get her children on to the platform of the depot, steps back into a hole in the platform, she is not guilty of contributory negligence, though, if she had been walking face forward in the direction of the hole, she easily could have seen it.

But one who, in entering a railroad depot, passed over a place made unsafe by an accumulation of ice and knew of its dangerous condi-

to get checks for baggage, of a way commonly used between the ticket office and the baggage room, if no danger is apparent, will not be negligence, if the passenger is injured, although he could have used a different way safely.⁵⁸ One is not, as a matter of law, guilty of contributory negligence in attempting to use the approach to a platform of a railroad depot, precluding recovery for injuries due to the steepness of the incline, by the fact that he was acquainted with the conditions and had frequently used the approach.⁵⁹

§ 23. Standing near or between tracks and crossing intervening tracks. — An intending passenger who leaves a position of safety and takes one of manifest danger between two tracks, upon one of which his train is expected, and stands so near an approaching train that he is struck by a car,⁶⁰ or who, instead of occupying the premises and platforms provided by the railroad company for the use of passengers, chooses, without necessity, to stand between a baggage platform and the track, in a space not wide enough to protect him from the train which strikes him,⁶¹ is guilty of negligence which will prevent his recovery for injuries sustained thereby. A passenger is not in the exercise of due care who goes unnecessarily upon the track of a railroad, over which frequent trains are passing, and at a point where intervening objects obstruct a view of the track, although he has just alighted from a train, near a station where there is nothing to indicate to him any other mode of egress;⁶² nor one who, in daylight, attempts to cross the tracks at a station in front of an approaching train which she saw and which was so near that when she fell the engine

tion, yet who soon thereafter, while watching upon the platform for the incoming train, stepped backward upon the ice without looking or taking any precautions for his safety, whereby he fell to his injury, is guilty of contributory negligence. *Waterbury v. Chicago, etc., R. Co.*, 104 Iowa, 32, 73 N. W. 341.

58. *Exton v. Central R. Co.*, 62 N. J. L. 7, 42 Atl. 486, 5 Am. Neg. Rep. 675.

59. *Union Pac. R. Co. v. Evans*, 52 Neb. 50, 71 N. W. 1062.

60. *McGeehan v. Lehigh Valley R. Co.*, 149 Pa. St. 188, 24 Atl. 205, 30 W. N. C. 140, 1 Pa. Adv. R. 704.

61. *Little Rock, etc., R. Co. v. Cavenesse*, 48 Ark. 106.

62. *Bancroft v. Boston, etc., R. Co.*, 97 Mass. 275; *Illinois Cent. R. Co. v. Strauss*, 75 Miss. 367, 22 So. 822, nor one who attempted to pass through a small opening between the rear end of two trains, there being no necessity for him to do so.

struck her before she could recover herself, there being no need for her to cross the tracks, as she might have learned on inquiry which she had ample opportunity to make, the railroad company holding out no invitation for her to cross;⁶³ nor one who was not merely crossing but standing on a track in full view of an approaching train, which, under the circumstances, he might and should have seen, and whose signals he might and should have heard.⁶⁴ But whether a passenger was negligent in crossing a track in accordance with a custom acquiesced in by the carrier, instead of taking an unlighted street which passed under the track is a question for the jury.⁶⁵ A passenger, when taking or leaving a railroad car or train at a station, has a right to assume that the company will not expose him to unnecessary danger by passing trains; while he himself must exercise reasonable care, his watchfulness is naturally diminished by his reliance upon the discharge by the company of its duty to passengers to provide them a safe passage to and from the train. The general rule which obtains in case of a person crossing a railroad track that a failure to stop to look, and listen will constitute contributory negligence *per se*, does not apply to a passenger so alighting from or boarding a train, although the failure to do so may be a material and important fact to be considered by the jury upon the question of contributory negligence.⁶⁶ But it is the duty of a rail-

63. Young v. Old Colony R. Co., 156 Mass. 178, 30 N. E. 560. See also Wright v. Great Northern R. Co., L. R. 8 Ir. 257.

64. Weeks v. New Orleans, etc., R. Co., 40 La. Ann. 800.

65. Chicago, etc., R. Co. v. Lowell, 151 U. S. 209. So where an obstruction placed in his way by the carrier necessitated the passenger's stepping on a side track on leaving the station. Sanchez v. San Antonio, etc., R. Co., 3 Tex. Civ. App. 89.

66. Bucher v. Long Island R. Co., 161 N. Y. 222, 55 N. E. 899; Terry v. Jewett, 78 N. Y. 338; Graven v. Mac Leod, 92 Fed. 846, 35 C. C. A. 47, 14 Am. & Eng. R. Cas. N. S. 305; Brassell v. New York Cent., etc., R. Co., 84 N. Y. 241; St. Louis, etc., R.

Co. v. Johnson, 59 Ark. 122; Franklin v. Southern California Motor Road Co., 85 Cal. 63; Atchison, etc., R. Co. v. Shean, 18 Colo. 368; Pennsylvania Co. v. McCaffrey, 173 Ill. 169, 3 Chic. L. J. Wkly. 399, 50 N. E. 713; Pennsylvania Co. v. Kean, 41 Ill. App. 317; Philadelphia, etc., R. Co. v. Anderson, 72 Md. 519, 20 Am. St. Rep. 483; Burbridge v. Kansas City Cable R. Co., 36 Mo. App. 669; Atlantic City R. Co. v. Goodin, 62 N. J. L. 394, 42 Atl. 333, 5 Am. Neg. Rep. 407; Pennsylvania R. Co. v. White, 88 Pa. St. 327; Brown v. Great Western R. Co., 52 L. T. N. S. 622; Alabama G. S. R. Co. v. Coggins, 88 Fed. 455, 60 U. S. App. 140; Weeks v. New Orleans, etc., R. Co., 40 La. Ann. 800; Jewett v. Klein, 27

road passenger, on alighting, knowing that a train is just due, to look in the direction from which it should come, before attempting to cross the railroad track, and if he omits to do so, he is guilty of contributory negligence.⁶⁷ And so where he leaves the train before it is stopped and before any invitation or notice to leave the train has been given, and attempts to cross the intervening tracks,⁶⁸ or crosses another track after alighting from a cable car at his destination,⁶⁹ he is bound to use the same care as would be required of a person attempting to cross a railroad track upon a highway. The same rule has been applied, in Minnesota, where a passenger left his train, which was side tracked at an intermediate station to allow a train from the opposite direction to pass, and attempted to cross the track for the purpose of re-entering;⁷⁰ but in New York such an act is held not to be contributory negligence, as matter of law.⁷¹ In Massachusetts it has been held that the mere fact that a passenger began to cross a railroad track at a time when her view along the tracks was obstructed by a departing train,⁷² or that she did not at the instant of stepping on the track, look to ascertain whether a train was approaching,⁷³ was not conclusive of a want of due care, and that whether there was due care on the part of the passenger was a question for the jury.⁷⁴ But in a later case it was held that a passenger could not recover for personal injuries sustained by being struck by a train passing on another track, where he got off his train between the two tracks and attempted to cross when he could easily have seen the approaching train had he looked before attempting to cross.⁷⁵ Where the railroad track is the usual and only practicable route by which a passenger may go from the station to his train, the railroad company will not be heard to say that a passenger, by

N. J. Eq. 550; Warner v. Baltimore & O. R. Co., 168 U. S. 339, 42 L. Ed. 491.

67. Gonzales v. New York, etc., R. Co., 38 N. Y. 440, 98 Am. Dec. 58.

68. Parsons v. New York Cent., etc., R. Co., 37 Hun (N. Y.), 128.

69. Buzby v. Philadelphia Traction Co., 126 Pa. St. 559, 42 Am. & Eng. R. Cas. 144.

70. De Kay v. Chicago, etc., R. Co., 41 Minn. 178, 16 Am. St. Rep. 687.

71. Wandell v. Corbin, 38 Hun (N. Y.), 391, 17 St. Rep. (N. Y.) 718.

72. Mayo v. Boston, etc., R. Co., 104 Mass. 137.

73. Chaffee v. Boston, etc., R. Corp., 104 Mass. 108.

74. Gaynor v. Old Colony, etc., R. Co., 100 Mass. 208, 97 Am. Dec. 96.

75. Connolly v. New York, etc., R. Co., 158 Mass. 8. See also Debbins v. Old Colony R. Co., 154 Mass. 402, 47 Am. & Eng. R. Cas. 531, 28 N. E. 274.

taking such route, becomes guilty of negligence.⁷⁶ One who, after signaling an approaching street car which is about to round a curve, places himself in such close proximity to the track that he will be inevitably struck by the overhang of the car when it rounds the curve, assumes the risk incident to the dangerous position which he has taken, and cannot hold the street railroad company liable for his injuries.⁷⁷ But one who took a position which was safe with reference to the ordinary cars which the street railroad used, and with which he was familiar, having no notice up to the time he was struck by it that an approaching car was of greater width than the ordinary cars, did not assume the risk and was not guilty of contributory negligence.⁷⁸ A pedestrian who,

76. Chicago, etc., R. Co. v. Lager-
krans (Neb.), 91 N. W. 385.

77. Gravely v. Rhode Island Co.,
26 R. I. 89, 58 Atl. 456.

78. Denison & S. Ry. Co. v. Craig
(Tex. Civ. App.), 80 S. W. 865.

79. Copeland v. Metropolitan St.
R. Co., 177 N. Y. 570, 69 N. E. 1121,
affg. 78 App. Div. (N. Y.) 418, 79 N.
Y. Supp. 1054.

Street railway cases: Passenger passing back of standing car onto parallel track and in front of approaching car, Metropolitan St. Ry. Co. v. Ryan, 3 St. Ry. Rep. 259, 69 Kan. 538, 77 Pac. 267; failure of passenger on alighting from car to look out for an approaching car upon a parallel track before crossing it, Cleveland Elec. Ry. Co. v. Wadsworth, 2 St. Ry. Rep. 818, 25 Ohio Cir. Ct. 376; as to duty to look and listen, Indianapolis St. Ry. Co. v. Tenner (Ind.), 1 St. Ry. Rep. 179, 67 N. E. 1044; passing from behind obstructions upon track, Ames v. Waterloo & Cedar Falls Rapid Transit Co. (Iowa), 1 St. Ry. Rep. 199, 95 N. W. 161, 79 S. W. 999; see also note, 2 St. Ry. Rep. 433; as to injury caused by the burning out of a fuse, Cassady v. Old Colony St. Ry. Co. (Mass.), 1 St. Ry. Rep. 330, 68 N.

E. 10; as to use of effective brakes, Mack v. Los Angeles Tract. Co. (Cal.), 1 St. Ry. Rep. 19, 73 Pac. 455; duty of company as to appliances, Leveret v. Shreveport Belt Line Co. (La.), 1 St. Ry. Rep. 254, 34 So. 579; as to how the liability of the company is to be determined, Zimmerman v. Denver Consol. Tramway Co. (Colo.), 1 St. Ry. Rep. 21, 72 Pac. 807; see note 1 St. Ry. Rep. 331; note on appliances for protection of passengers, 1 St. Ry. Rep. 20; note on injuries from electricity, 1 St. Ry. Rep. 639.

Collision with persons who have alighted from cars.—A street railway company running a car past another, which is standing still, receiving or discharging passengers at the intersection of streets, must not unnecessarily expose pedestrians to the danger of collision. Consol. Tract. Co. v. Scott, 58 N. J. L. 682, 34 Atl. 1094, 33 L. R. A. 122, 55 Am. St. Rep. 620; Scott v. Third Ave. R. Co., 16 N. Y. Supp. 350; Driscoll v. Market St. R. Co., 97 Cal. 553.

Where a person starts to cross the track as soon as the car from which he had alighted has passed him, without turning his head in either direction to see if any train is coming,

after signaling an approaching car about half a block away to stop at a customary place for taking passengers, proceeds diagonally across the tracks to such place, assuming that the motorman, as the car approaches the stopping place, will use reasonable care to permit her to cross in safety, is not negligent, as a matter of law, for failing to look behind her after she started in her diagonal course across the tracks.⁷⁹

and regardless of a caution given him by the conductor, he is guilty of contributory negligence, and no recovery for his death can be had of the company. *Meserole v. Brooklyn City R. Co.*, 57 Hun, 591, 10 N. Y. Supp. 813.

Where a person had alighted from a street car and was injured as he passed around behind the car from which he alighted, by the car on the other track, he ceased to be a passenger when he had safely reached the street and the company was not under the high degree of care due a passenger to protect him. *Chattanooga Elec. Ry. Co. v. Roddy*, 105 Tenn. 666, 58 S. W. 646, 51 L.R.A. 885.

One who steps from a street railway car to the street is not upon the premises of the railway company, but upon a public place where he has the same rights as every other pedestrian, and over which the company has no control. His rights are then those of the traveler upon the highway and not those of the passenger.

Creamer v. West End St. Ry. Co., 4 Am. Elec. Cas. 476, 156 Mass. 320, 31 N. E. 391. After a person has alighted from a car and starts to cross a parallel track, it is his duty to look for an approaching car upon that track, and he is guilty of contributory negligence if he steps upon the track in front of an approaching car without so looking. *Ländrigan v. Brooklyn Heights R. Co.*, 32 App. Div. 43, 48 N. Y. Supp. 454. The circumstances, however, may be such as to relieve such a person from liability for his negligence. *Wise v. Brooklyn Heights R. Co.*, 46 App. Div. 246, 61 N. Y. Supp. 530. It has been held that the stopping of the car and the invitation to alight upon the side of the car next to the parallel track given by the company's employees, may be regarded as an assurance of the absence of danger. *Schneider v. Market St. Ry. Co. (Cal.)*, 66 Pac. 734.

CHAPTER XXVI.

DAMAGES.

- SECTION** 1. Compensation is the general rule as to measure of damages.
2. Injury aggravated by passenger's negligence or imprudence.
3. Injury aggravated by existing disease or injury.
4. Damages for failure to carry.
5. Damages for setting down passenger at place other than destination.
6. Damages for ejection or assault of passenger.
7. Damages for personal injuries.
8. Mental suffering as distinct cause of action or element of damage.
9. Exemplary damages.—Malice or wilfulness.
10. Exemplary damages.—Gross negligence.
11. Exemplary damages for carrier's acts.
12. Exemplary damages for acts of servants.
13. Elements affecting the amount of damages.
14. Excessive or inadequate damages.

§ 1. Compensation is the general rule as to measure of damages.—In an action for breach of contract the damages recoverable are only such as the parties may be reasonably supposed to have contemplated as a probable result from such breach, while the damages recoverable for a tort are not limited to such as the tort feasor and person injured may have contemplated, but include all which naturally and proximately flow from the injury.¹ Nonfeasance or the refusal or neglect to perform any duty on the part of a carrier, misfeasance or the negligent performance of any duty, or any breach of duty, have been generally held by the courts to furnish a ground of action in tort against the carrier, and, unless expressly brought on the contract, actions of this character are usually held to be actions in tort, regardless of the form of the declaration, and the damages recoverable to be such as are recover-

1. Cowan v. Western Union Tel. Co. (Iowa), 98 N. W. 281; Brown v. Chicago, etc., R. Co., 54 Wis. 342, 41 Am. Rep. 41; Georgia R. Co. v. Hayden, 71 Ga. 518, 51 Am. Rep. 274; Montgomery, etc., R. Co. v. Boring, 51 Ga. 582; Cincinnati, etc., R. Co. v. Eaton, 94 Ind. 474, 48 Am. Rep. 179; Cobb v. Great Western R. Co., 1 Q. B. 459, 58 Am. & Eng. R. Cas. 169; International, etc., R. Co. v. Harder (Tex. Civ. App.), 81 S. W. 356.

able in an action of tort.² Generally, the rule as to the measure of damages in actions of passengers against carriers for loss or injury occasioned by the carrier's negligence, or any breach of its general duty as a carrier, or for torts committed by the carrier through mistake, ignorance, or mere neglect, is that the passenger is entitled to compensatory damages or such damages as will fully or reasonably compensate him for the actual injury or loss sustained.³ The carrier is liable for the natural and proximate damages resulting from its negligence, both direct and consequential, but the damages must be certain, both in their nature, and as to the cause from which they proceed.⁴ For example, if one of the

2. Baltimore, etc., R. Co. v. Carr, 71 Md. 135; Evans v. St. Louis, etc., R. Co., 11 Mo. App. 463; Pittsburgh, etc., R. Co. v. Lyon, 123 Pa. St. 140, 10 Am. St. Rep. 517; New Orleans, etc. R. Co. v. Hurst, 36 Miss. 660, 74 Am. Dec. 785; Burnett v. Lynch, 5 B. & C. 589, 12 E. C. L. 327.

3. N. Y.—Parker v. Long Island R. Co., 13 Hun (N. Y.), 319; Morse v. Auburn, etc., R. Co., 10 Barb. (N. Y.) 625.

Cal.—Sloane v. Southern California R. Co., 111 Cal. 668; Morgan v. Southern Pac. R. Co., 95 Cal. 501, 29 Am. St. Rep. 143.

Colo.—Wall v. Cameron, 6 Colo. 275.

Del.—Wallace v. Wilmington, etc., R. Co., 8 Houst. (Del.) 529.

Ga.—Goins v. Western R. Co., 68 Ga. 190; Hughes v. Western R. Co., 61 Ga. 131.

Ill.—Illinois Cent. R. Co. v. Nelson, 59 Ill. 110.

Ky.—Louisville, etc., R. Co. v. Wilsey (Ky.), 12 S. W. 275, 39 Am. & Eng. R. Cas. 418.

La.—Hill v. New Orleans, etc., R. Co., 11 La. Ann. 292.

Md.—Philadelphia, etc., R. Co. v. Hoeflich, 62 Md. 300, 50 Am. Rep. 223.

Miss.—Chicago, etc., R. Co. v.

Scurr, 59 Miss. 456, 42 Am. Rep. 373; Memphis, etc., R. Co. v. Whitfield, 44 Miss. 466, 7 Am. Rep. 699; Dorrah v. Illinois Cent. R. Co., 65 Miss. 14, 7 Am. St. Rep. 629.

Mo.—Trigg v. St. Louis, etc., R. Co., 74 Mo. 147, 14 Am. Rep. 305, 6 Am. & Eng. R. Cas. 345.

Nev.—Quigley v. Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757; Johnson v. Wells, 6 Nev. 224, 3 Am. Rep. 245.

N. C.—Wallace v. Western North Carolina R. Co., 104 N. C. 442.

Pa.—Pittsburgh, etc., R. Co. v. Lyon, 123 Pa. St. 140, 10 Am. St. Rep. 517; Pennsylvania R. Co. v. Books, 57 Pa. St. 339, 98 Am. Dec. 229.

Tenn.—Louisville, etc., R. Co. v. Fleming, 14 Lea (Tenn.), 128.

Tex.—Texas, etc., R. Co. v. Pollard, 2 Tex. App. Civ. Cas. § 481.

Wis.—Spicer v. Chicago, etc., R. Co., 29 Wis. 580.

Wy.—Union Pac. R. Co. v. Hause, 1 Wy. 27.

U. S.—Mackoy v. Missouri Pac. R. Co., 5 McCrary (U. S.), 538.

Eng.—Young v. Fewson, 8 C. & P. 55, 34 E. C. L. 289.

4. Gulf, etc., R. Co. v. Moore (Tex. Civ. App.), 83 S. W. 362; East Tennessee, etc., R. Co. v. Lockhart, 79

passenger's limbs are broken, he may recover for the expenses of the sickness occasioned, and for the consequent loss of time, and also compensation for the bodily pain and suffering caused by such injury.⁵ And where a passenger, by reason of the carrier's failure to carry him as agreed, was detained in an unhealthy place, by reason of which he became sick after his return, he was held entitled to recover for his loss of health and loss of time, and his expenses during his sickness, and the expenses of his return home.⁶ And where one was ejected from a street car, the compensatory damages was held to embrace loss of time, fare on another car, and injury to feelings because of indignities suffered.⁷ But where the injury or loss is not the natural or probable consequences of the carrier's negligence, or the injury is not a direct result or natural concomitant of the wrongful act, or damages are produced by agencies other than those causing the injury, or by agencies remotely connected with those causing the injury, or are speculative or contingent, the damages sustained are too remote to entitle a recovery against the carrier.⁸ The New York courts have held that where the action is presented and tried as an action for breach of contract the plaintiff is entitled to recover substantial

Ala. 315; Pennsylvania R. Co. v. Aspell, 23 Pa. St. 147, 62 Am. Dec. 323; Smith v. St. Paul, etc., R. Co., 30 Minn. 169, 9 Am. & Eng. R. Cas. 262.

5. Curtis v. Rochester, etc., R. Co., 18 N. Y. 534; Ransom v. New York, etc., R. Co., 15 N. Y. 415.

6. Williams v. Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; Weed v. Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474; Heirn v. McCaughan, 32 Miss. 17, 66 Am. Dec. 588; Texas, etc., R. Co. v. Mayes (Tex. App.), 15 S. W. 43. See also Cincinnati, etc., R. Co. v. Eaton, 94 Ind. 474, 48 Am. Rep. 179; Pullman Palace Car Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89; Smith v. St. Paul, etc., R. Co., 30 Minn. 169, 9 Am. & Eng. R. Cas. 262.

7. Jacobs v. Third Ave. R. Co., 71 App. Div. (N. Y.) 199, 10 N. Y. Ann. Cas. 462, 75 N. Y. Supp. 679; Hamil-

ton v. Third Ave. R. Co., 53 N. Y. 25; Ray v. Cortland, etc., R. Co., 19 App. Div. (N. Y.) 530, 46 N. Y. Supp. 521.

8. Indianapolis, etc., R. Co. v. Birney, 71 Ill. 391; Alabama, etc., R. Co. v. Arnold, 80 Ala. 600; Georgia R. Co. v. Hayden, 71 Ga. 518, 51 Am. Rep. 274, loss of theatrical manager's engagement; Hamlin v. Great Northern R. Co., 1 H. & N. 408; Yonge v. Pacific Mail Steamship Co., 1 Cal. 353, loss of possible wages; Francis v. St. Louis Trans. Co., 5 Mo. App. 7; Trigg v. St. Louis, etc., R. Co., 74 Mo. 147, 41 Am. Rep. 305; Hoffman v. Northern Pac. R. Co., 45 Minn. 53; McClary v. Sioux City, etc., R. Co., 3 Neb. 44, 19 Am. Rep. 631; Scheffer v. Washington City, etc., R. Co., 105 U. S. 249; Cobb v. Great Western R. Co., 1 Q. B. 459, 58 Am. & Eng. R. Cas. 169, loss from robbery on

damages sufficient to make good the pecuniary loss which he has actually suffered by reason of such breach of contract, but not damages for mere inconvenience, annoyance, and delay, in the absence of proof of actual physical or mental injury, but the rule is otherwise when the action is one of tort.⁹

§ 2. Injury aggravated by passenger's negligence or imprudence.—A passenger, when injured, is bound by law to use ordinary care to render the injury no greater than necessary under the circumstances.¹⁰ The carrier is liable to a passenger injured through its negligence for the damages sustained by the passenger at the time the injury was inflicted and for those directly and proximately resulting subsequently therefrom, but it is not liable for any aggravation of those injuries by the passenger's own acts, or for the damages resulting from such aggravation, or for consequences which were avoidable by care on the part of the passenger.¹¹ A passenger cannot recover for pain or suffering, either physical or mental, which he may have sustained by reason of his failure to use ordinary care in having himself treated or operated upon by physicians.¹² But where he has used ordinary care in the selection of a physician of ordinary skill, any injury or pain resulting from the manner in which the injury was treated or the operation performed is properly regarded as within and a part of the result of which the injury, occasioned by the negligence of the

over-crowded train; Texas, etc., R. Co. v. Rea (Tex. Civ. App.), 65 S. W. 1115, damages for injury in holding child of another in an overcrowded train.

9. Miller v. Baltimore, etc., R. Co., 89 App. Div. (N. Y.) 457, 85 N. Y. Supp. 883; Miller v. King, 166 N. Y. 394, 59 N. E. 1114, 32 App. Div. (N. Y.) 389, 53 N. Y. Supp. 123, 21 App. Div. (N. Y.) 192, 47 N. Y. Supp. 534, 88 Hun (N. Y.), 181, 34 N. Y. Supp. 425, 84 Hun (N. Y.), 308, 32 N. Y. Supp. 332. See also cases cited note 7, *ante*.

10. Pullman Palace Car Co. v. Bluhm, 109 Ill. 20, 50 Am. Rep. 601, 18 Am. & Eng. R. Cas. 87; Hannibal, etc., R. Co. v. Martin, 111 Ill. 219;

Indianapolis, etc., R. Co. v. Birney, 71 Ill. 391; Klutts v. St. Louis, etc., R. Co., 75 Mo. 642; Le Blanche v. London, etc., R. Co., 1 C. P. Div. 286.

11. Benson v. New Jersey R., etc., Co., 9 Bosw. (N. Y.) 412, unreasonable expense incurred by a passenger who had been delayed; Owens v. Baltimore, etc., R. Co., 35 Fed. 715; Second v. St. Paul, etc., R. Co., 5 McCrary (U. S.), 515; Klutts v. St. Louis, etc., R. Co., *supra*, but aggravation of an injury, due to a cursory examination of the injured passenger by the carrier's surgeon, cannot be imputed to the passenger's negligence.

12. Texas, etc., R. Co. v. White, 101 Fed. 928, 42 C. C. A. 86.

carrier, was the proximate cause, and the carrier liable therefor.¹³ But the same rule has been applied in favor of the carrier and it has been held that the duty of a railway company assuming to furnish a surgeon to a passenger injured by a collision is discharged when it provides one possessing ordinary skill. Such surgeon is liable for any damage caused by his negligence.¹⁴ A passenger cannot recover for injuries caused by his resistance to the conductor who lawfully ejected him,¹⁵ or who unlawfully ejected him, unless the expulsion was malicious or wanton.¹⁶

§ 3. Injury aggravated by existing disease or injury.—Where an injury to a passenger resulting from the carrier's negligence, or physical or mental suffering caused thereby, is increased, intensified, or aggravated by the physical condition of the passenger or by an existing disease, or injury, the passenger is entitled to recover compensatory damages therefor, whether such fact was known to the carrier,¹⁷ or was not known and could not have been foreseen by the carrier.¹⁸ The carrier is presumed to know and to contemplate all the natural and proximate consequences, as well

13. Hickenbottom v. Delaware, etc., R. Co., 122 N. Y. 91, competent to show that, after amputation of plaintiff's arm, he experiences pain seemingly in the amputated member; Pullman Palace Car Co. v. Bluhm, *supra*, where the bones of a broken arm failed to unite, thereby making a false joint.

14. Secord v. St. Paul, etc., R. Co., *supra*.

15. Wright v. California Cent. R. Co., 78 Cal. 360.

16. Pennsylvania R. Co. v. Connell, 112 Ill. 295, 54 Am. Rep. 238, 127 Ill. 419; Chicago, etc., R. Co. v. Griffin, 68 Ill. 499; Chicago, etc., R. Co. v. Wilson, 23 Ill. App. 63. But see Louisville, etc., R. Co. v. Wolfe, 128 Ind. 347, 25 Am. St. Rep. 436.

17. Texas, etc., R. Co. v. Lynch (Tex. Civ. App.), 73 S. W. 65.

18. Fell v. Northern Pac. R. Co., 44 Fed. 248; Montgomery, etc., R. Co.

v. Mallette, 92 Ala. 209; East Tennessee, etc., R. Co. v. Lockhart, 79 Ala. 315; Louisville, etc., R. Co. v. Jones, 83 Ala. 376; Louisville, etc., R. Co. v. Miller, 141 Ind. 533; Louisville, etc., R. Co. v. Snyder, 117 Ind. 435, 10 Am. St. Rep. 60; Ohio, etc., R. Co. v. Hecht, 115 Ind. 443; Louisville, etc., R. Co. v. Wood, 113 Ind. 544; Dawson v. Louisville, etc., R. Co. (Ky.), 11 Am. & Eng. R. Cas. 134; Brown v. Hannibal, etc., R. Co., 66 Mo. 588.

Damages for a miscarriage and the suffering incident thereto have been held proper where a pregnant woman was put off the cars at a place other than her destination and compelled to walk home, the walk and exposure resulting in a miscarriage. Brown v. Chicago, etc., R. Co., 54 Wis. 342, 41 Am. Rep. 41; Augusta, etc., R. Co. v. Randall, 79 Ga. 304, 34 Am. & Eng. R. Cas. 439.

those that probably may, as those that certainly will, flow from its wrongful act, and, therefore, a predisposition or tendency of an injured passenger to certain diseases will not relieve the carrier from consequences therefrom.¹⁹ But it has been held that the increased risk arising from conditions of health affecting the fitness of a passenger to travel, certainly where such conditions are unknown to the carrier, must be assumed by the passenger.²⁰

§ 4. Damages for failure to carry.—The measure of damages for the failure or refusal of a carrier to carry a passenger, or for delay in carrying a passenger, is, ordinarily, the necessarily increased expenses while awaiting the arrival of the conveyance, the expense of reaching his destination by another means, and the loss, or injury actually sustained in his business as the direct and necessary consequences of the failure to carry or delay in carrying.²¹ Loss of time,²² or earnings,²³ personal inconvenience,²⁴ and

19. Baltimore City Pass. R. Co. v. Kemp, 61 Md. 74, 47 Am. Rep. 381; Sloane v. Southern California R. Co., 111 Cal. 668; Wallace v. Wilmington, etc., R. Co., 8 Houst. (Del.) 529.

20. Pullman Palace Car Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89, and where a sleeping car caught fire through the carrier's negligence, and a woman who was "unwell" was thereby compelled to leave the car half clad, and caught cold, resulting in the suppression of her menses, this was held to be a remote and not the proximate result of the carrier's negligence, and not to be considered in reckoning the damages.

21. Schmidt v. Cleveland, etc., R. Co., 25 Ky. L. Rep. 11, 74 S. W. 674; Indianapolis, etc., R. Co. v. Birney, 71 Ill. 391; Morse v. Duncan, 14 Fed. 396; The Zenobia, Abb. Adm. 80; Northern Cent. R. Co. v. O'Conner, 76 Md. 207, 35 Am. St. Rep. 422, 52 Am. & Eng. R. Cas. 176; Baltimore, etc., R. Co. v. Carr, 71 Md. 135; Francis vff St. Louis Transfer Co., 5 Mo. App. 7; Hamlin v. Great Nor-

thern R. Co., 1 H. & N. 408, 2 Jur. N. S. 1122, 26 L. J. Exch. 20; Cranton v. Marshall, 5 Exch. 395.

Special instances.—The sale of a passage ticket, by a certain steamer, does not constitute an agreement to carry a person buying such ticket unconditionally and at all hazards, but only gives him a right to passage on that steamer; and if, at the time of such sale, and unknown to both parties to the transaction, the steamer had been lost at sea, the holder of the ticket can recover only the amount he paid for the same, with interest, there being no obligation on the part of the carrier to provide substitute passage. Bonsteel v. Vanderbilt, 21 Barb. (N. Y.) 26; Briggs v. Vanderbilt, 19 Barb. (N. Y.) 346.

But where passage was guaranteed and the passenger had taken part of the trip, if there were other routes open, the passenger might recover the cost of reaching his destination by the other route, including reasonable pay for delay and special damages sustained by reason of the

sickness resulting proximately from the carrier's negligence,²⁵ and suffering from being compelled to remain over night in an unheated and unlighted station²⁶ have also been held to be elements of damage for failure or delay in carriage. Inconvenience is an element when capable of being stated in a tangible form and assessed at a money value.²⁷ But disappointment occasioned by

delay; or, if there was no other route open, the measure of damages would be the expenses back, expenses while at the place where his trip was interrupted, necessary expenses on the road, and loss of time in making the passage there and back. Central R. Co. v. Combs, 70 Ga. 533, 18 Am. & Eng. R. Cas. 298.

22. Cooley v. Pennsylvania R. Co., 40 Misc. Rep. (N. Y.) 239, 81 N. Y. Supp. 692; Mobile & O. R. Co. v. Reeves, 25 Ky. L. Rep. 2236, 80 S. W. 471; Miller v. Southern Ry. Co., 69 S. C. 116, 48 S. W. 99, but a passenger is not entitled to damages for inconvenience, loss of time, or fatigue caused by the delay of a train, unless it has produced some pecuniary damages or personal loss resulting. See also Bullock v. White Star S. S. Co., 30 Wash. 448, 70 Pac. 1106.

A lawyer can recover merely the value of his time, based on the average of his earnings for the year preceding, in the absence of notice to the carrier of special circumstances requiring him to arrive on schedule time. Cooley v. Pennsylvania R. Co., *supra*.

23. Stewart v. Baltimore & O. R. Co., 88 N. Y. Supp. 377, where a passenger suffered no loss of earnings, by reason of three hours' delay, caused by his ticket having been taken away and not returned, and incurred no expense to which he would not have been put had he reached his destination, he was not

entitled to any damages except the price of the ticket.

Cost of price of ticket has been held the only proximate damages for breach of contract of carrier in De Leon v. McKernan, 25 Misc. Rep. (N. Y.) 182, 54 N. Y. Supp. 167, delay in delivery of a passenger's trunk; Rose v. King, 76 App. Div. (N. Y.) 308, 78 N. Y. Supp. 419, the complaint not having asked for special damages, and no circumstances of humility or indignity having been shown; Miller v. Baltimore, etc., R. Co., 89 App. Div. (N. Y.) 457, 85 N. Y. Supp. 883, not entitled to recover for mere inconvenience, annoyance, and delay, in the absence of proof of actual physical or mental injury.

Living expenses, wages, and cost of outfit for plaintiff and his workmen, held proper elements of damages. Bullock v. White Star S. S. Co., 30 Wash. 448, 70 Pac. 1106.

24. Mobile, etc., R. Co. v. Reeves, *supra*; Southern Ry. Co. v. Marshall, 23 Ky. L. Rep. 813, 64 S. W. 418.

25. Williams v. Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; Heirn v. McCaughan, 32 Miss. 17, 66 Am. Dec. 588. But not when caused by the passenger's negligence or imprudence. Morse v. Duncan, 14 Fed. 396; Indianapolis, etc., R. Co. v. Birney, 71 Ill. 391; Francis v. St. Louis Transfer Co., 5 Mo. App. 7.

26. Brown v. Georgia, etc., R. Co., 119 Ga. 88, 46 S. E. 71.

27. Northern Cent. R. Co. v. O'Con-

the delay or failure to reach destination has been held not to be a proper element of damage, at least in an action for breach of contract,²⁸ although damages for disappointment, sense of wrong, or injured feelings might be recoverable in an action of tort.²⁹ Where the engineer and fireman in charge of a train, through no fault of their own, fail to see or obey a signal to stop at a flag station, the company will not be liable for failure to stop the train; while, if they fail to see the signal because of negligence on their part, the person damaged is entitled to recover compensatory damages; and if the signal is seen and understood by them, and their action in not stopping the train is malicious, wanton, or capricious, then punitive damages may be recovered.³⁰

§ 5. Damages for setting down passenger at place other than destination.—Where in violation of the carrier's contract, a passenger has been set down by the carrier before reaching his destination, he may recover for the inconvenience of having to walk to his destination,³¹ or the cost of conveyance to his destination by another means,³² and for sickness resulting from having to walk to his destination.³³ But where he has been carried beyond his destination, the carrier is responsible in damages for the discomfort and inconvenience in getting back to his destination,³⁴ for sickness resulting from walking back where unable to procure a con-

ner, *supra*; Baltimore, etc., R. Co. v. Carr, *supra*; St. Louis, etc., R. Co. v. Berry, 4 Tex. App. Civ. Cas. § 166.

28. Bonsteel v. Vanderbilt, *supra*; Briggs v. Vanderbilt, *supra*. But see St. Louis, etc., R. Co. v. Berry, *supra*, holding that damages for annoyance, vexation, and trouble occasioned by delay are recoverable.

29. Walsh v. Chicago, etc., R. Co., 42 Wis. 23, 24 Am. Rep. 376, 15 Am. Ry. Rep. 71. Or for mental anguish suffered by a wife's being separated from her children because of failure of the train to stop long enough for her to board it. International, etc., R. Co. v. Anchonda, (Tex. Civ. App.), 68 S. W. 743.

30. Southern R. Co. v. Lanning (Miss.), 35 So. 417; Southern R. Co.

v. White (Miss.), 33 So. 970; Yazoo, etc., R. Co. v. Faust (Miss.), 32 So. 9.

31. Walsh v. Chicago, etc., R. Co., 42 Wis. 23, 24 Am. Rep. 376; Hobbs v. London, etc., R. Co., L. R. 10 Q. B. 111.

32. Francis v. St. Louis Transfer Co., 5 Mo. App. 7.

33. Brown v. Chicago, etc., R. Co., 54 Wis. 342, 41 Am. Rep. 41.

34. Alabama G. S. R. Co. v. Sellers, 93 Ala. 9, 30 Am. St. Rep. 17; East Tennessee, etc., R. Co. v. Lockhart, 79 Ala. 315; Cincinnati, etc., R. Co. v. Eaton, 94 Ind. 474, 48 Am. Rep. 179; Trigg v. St. Louis, etc., R. Co., 74 Mo. 147, 41 Am. Rep. 305, 6 Am. & Eng. R. Cas. 345; Pennsylvania R. Co. v. Aspell, 23 Pa. St. 147, 62 Am. Dec. 323.

veyance and acting with care and prudence,³⁵ for any personal injury sustained by reason of dangers encountered in walking to his destination known to the carrier, and the proximate result of the carrier's wrong, and not attributable to his own negligence or other independent cause,³⁶ and for the expenses of conveyance and other charges shown to have been the direct, natural, and proximate result of the breach of contract.³⁷ But no recovery can be had for mental suffering unaccompanied by physical injury.³⁸ Some of the cases hold that damages for fright is recoverable;³⁹ others that they are not.⁴⁰

§ 6. Damages for ejection or assault of passenger.—Where a passenger has been wrongfully and unlawfully expelled or ejected by the carrier from a train or car, he may recover in an action against the carrier the amount of the fare to the place to which he

35. Cincinnati, etc., R. Co. v. Eaton, *supra*; East Tennessee, etc., R. Co. v. Lockhart, *supra*; Mobile, etc., R. Co. v. McArthur, 43 Miss. 180; International, etc., R. Co. v. Terry, 62 Tex. 380, 50 Am. Rep. 529.

But the carrier is not liable for sickness resulting from the passenger's own negligence or imprudence in walking without first trying to find shelter, or where the walk was unnecessarily taken. Ohio, etc., R. Co. v. Burrows, 32 Ill. App. 161; Gulf, etc., R. Co. v. Head (Tex. Civ. App.), 15 S. W. 504; Texas, etc., R. Co. v. Cole, 66 Tex. 562.

36. Rawlings v. Wabash R. Co., 97 Mo. App. 515, 71 S. W. 535; Evans v. St. Louis, etc., R. Co., 11 Mo. App. 463; Winkler v. St. Louis, etc., R. Co., 21 Mo. App. 99; Kreuziger v. Chicago, etc., R. Co., 73 Wis. 158; Stutz v. Chicago, etc., R. Co., 73 Wis. 147, 9 Am. St. Rep. 769.

But the carrier is not liable for injury caused by the passenger's own negligence or imprudence. Lewis v. Flint, etc., R. Co., 54 Mich. 55, 52 Am. Rep. 790; Henry v. St. Louis,

etc., R. Co., 76 Mo. 288, 43 Am. Rep. 762.

37. International, etc., R. Co. v. Terry, 62 Tex. 380, 50 Am. Rep. 529, 21 Am. & Eng. R. Cas. 323; Alabama G. S. R. Co. v. Sellers, *supra*.

38. Kansas City, etc., R. Co. v. Dalton, 65 Kan. 661, 70 Pac. 645; Trigg v. St. Louis, etc., R. Co., 74 Mo. 147, 41 Am. Rep. 305, 6 Am. & Eng. R. Cas. 345; Dorrah v. Illinois Cent. R. Co., 65 Miss. 14, 7 Am. St. Rep. 629, 30 Am. & Eng. R. Cas. 576.

39. East Tennessee, etc., R. Co. v. Lockhart, 79 Ala. 315; Cincinnati, etc., R. Co. v. Eaton, 94 Ind. 474, where the fright was directly produced by the wrongful act.

40. Rawlings v. Wabash R. Co., 97 Mo. App. 511, 71 S. W. 534, damages for sickness owing to having fallen down in the mud and become wet and frightened held not recoverable; Georgia R. Co. v. Dorsey, 116 Ga. 719, 42 S. E. 1024, fright from hearing loud voices not recoverable unless the locality was known to the carrier to be one in which such occasion of fright was likely to occur.

was entitled to be carried, damages for the loss of time occasioned by the delay, and any other pecuniary loss necessarily caused thereby and proven to be a proximate result of the ejection, and a reasonable compensation for the indignity, humiliation, wounded pride, and mental suffering involved in and resulting from such wrongful expulsion.⁴¹ He may recover for such indignity and humiliation, whether the act was wanton, malicious, or wilful, or merely negligent or mistaken;⁴² whether forcibly ejected,⁴³ or forced to leave because of threatened violence;⁴⁴ or where he pays an illegally exacted fare to avoid ejection;⁴⁵ and although he may

41. Kansas City, etc., R. Co. v. Little, 66 Kan. 378, 71 Pac. 820, 61 L. R. A. 122; Choctaw, etc., R. Co. v. Hill (Tenn.), 75 S. W. 963; Pennsylvania R. Co. v. Connell, 127 Ill. 419, 112 Ill. 295, 54 Am. Rep. 238; Delaware, etc., R. Co. v. Walch, 47 N. J. L. 548; Allen v. Camden, etc., Ferry Co., 46 N. J. L. 198; Baltimore, etc., Turnpike Road v. Boone, 45 Md. 344; McGinnis v. Missouri Pac. R. Co., 21 Mo. App. 399; Willson v. Northern Pac. R. Co., 5 Wash. 621. But see Gorman v. Southern Pac. R. Co., 93 Cal. 1, 33 Am. St. Rep. 157, holding that compensatory damages for indignity and humiliation are only recoverable where the expulsion is accompanied by undue violence, or by insult and abuse. See also N. Y. cases, note 7, § 1, *ante*.

Loss of time.—Proof in a passenger's action for wrongful expulsion that he was a lawyer of prominence, that his time was of value, and that he lost one day, there being no proof as to what the value of his time was, is insufficient to warrant the jury to award damages for loss of time. Pennsylvania Co. v. Scofield, 121 Fed. 814, 58 C. C. A. 176; Gulf, etc., R. Co. v. Daniels (Tex. Civ. App.), 29 S. W. 426.

42. Coine v. Chicago, etc., R. Co.,

123 Iowa, 458, 99 N. W. 134; St. Louis, etc., R. Co. v. Trimble, 54 Ark. 354; Lake Erie etc., R. Co. v. Christison, 39 Ill. App. 495; Toledo, etc., R. Co. v. Kid, 29 Ill. App. 353; Chicago, etc., R. Co. v. Flagg, 43 Ill. 364, 92 Am. Dec. 133; Chicago, etc., R. Co. v. Holdridge, 118 Ind. 281; Louisville, etc., R. Co. v. Wilsey (Ky.), 12 S. W. 275, 39 Am. & Eng. R. Cas. 418; Philadelphia, etc., R. Co. v. Hoeflich, 62 Md. 300, 50 Am. Rep. 223; Smith v. Pittsburgh, etc., R. Co., 23 Ohio St. 11. But see Mallott v. Woods, 109 Ill. App. 512, holding that a passenger, required to leave a train at a station short of her destination, cannot recover for the humiliation and indignity, in the absence of proof of any actual malice or wantonness on the part of the conductor.

43. Allen v. Camden, etc., Ferry Co., 46 N. J. L. 198; Georgia R. Co. v. Olds, 77 Ga. 673; City, etc., R. Co. v. Brauss, 70 Ga. 380.

44. Delaware, etc., R. Co. v. Walsh, 47 N. J. L. 548.

45. Pennsylvania Co. v. Bray, 125 Ind. 229; Chicago, etc., R. Co. v. Conley, 6 Ind. App. 9; Hoffman v. Northern Pac. R. Co., 45 Minn. 53; Willson v. Northern Pac. R. Co., 5 Wash. 621.

not have received any physical injury,⁴⁶ or suffered any pecuniary loss.⁴⁷ The passenger may also recover for any personal injury and consequent physical pain and suffering, though slight, and mental distress naturally resulting from the wrongful ejection,⁴⁸ and for inconvenience,⁴⁹ annoyances, vexation and risk, to which he may have been subjected by reason of being compelled to walk to another station or place.⁵⁰ But he cannot recover for injuries caused by his forcible resistance to the efforts to eject him, unless the ejection is malicious or wanton.⁵¹ If, in lawfully ejecting a passenger, unnecessary force or violence is used,⁵² or if the ejection

46. Georgia R., etc., Co. v. Baker, 120 Ga. 991, 48 S. E. 355; Chicago, etc. R. Co. v. Chisholm, 79 Ill. 584; Missouri, etc., R. Co. v. Tarwater (Tex. Civ. App.), 75 S. W. 937; Mabry v. City Electric R. Co., 116 Ga. 624, 42 S. E. 1025, 59 L. R. A. 590.

47. Chicago, etc., R. Co. v. Flagg, 43 Ill. 364, 92 Am. Dec. 133.

Evidence of abusive and insulting conduct and contemptuous manner of the carrier's servants while unlawfully expelling a passenger is admissible to enhance the damages. Sloane v. Southern California R. Co., 111 Cal. 668; Chicago, etc., R. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641; McGinnis v. Missouri Pac. R. Co., 21 Mo. App. 399; Toledo, etc., R. Co. v. McDonough, 53 Md. 289; International, etc., R. Co. v. Gilbert, 64 Tex. 536; Coppin v. Braithwaite, 8 Jur. 875.

The honest expression of opinion, however, by a conductor that money offered to him for fare is counterfeit, and his refusal to accept it on that account, he not charging that the passenger knew it was counterfeit, is not a tort, or an element of damages. Breen v. St. Louis Transit Co., 102 Mo. App. 479.

48. Breen v. St. Louis Transit Co., 102 Mo. App. 479, 77 S. W. 78;

Houston, etc., R. Co. v. McNeil (Tex. Civ. App.), 76 S. W. 206; Smith v. Pittsburg, etc., R. Co., 23 Ohio St. 11, injurious consequences of exposure held to be a proper element of damages. See also Sloane v. Southern California R. Co., 111 Cal. 668; Ohio, etc., R. Co. v. Burrow, 32 Ill. App. 161; Evans v. St. Louis, etc., R. Co., 11 Mo. App. 463; Louisville, etc., R. Co. v. Fleming, 14 Lea (Tenn.), 128; International, etc., R. Co. v. Gilbert, 64 Tex. 541.

49. Central R., etc., Co. v. Strickland, 90 Ga. 562; Georgia R. Co. v. Olds, 77 Ga. 673; City, etc., R. Co. v. Brauss, 70 Ga. 380.

50. Chicago, etc., R. Co. v. Flagg, 43 Ill. 364, 92 Am. Dec. 133; New York, etc., R. Co. v. Willing, 24 Ohio Cir. Ct. Rep. 74.

51. Pennsylvania R. Co. v. Connell, 112 Ill. 295, 54 Am. Rep. 238, 127 Ill. 419; Chicago, etc., R. Co. v. Griffin, 68 Ill. 499; Chicago, etc., R. Co. v. Wilson, 23 Ill. App. 63. *Contra:* Louisville, etc., R. Co. v. Wolfe, 128 Ind. 347, 25 Am. St. Rep. 436.

52. Jardine v. Cornell, 50 N. J. L. 485; Philadelphia, etc., R. Co. v. Larkin, 47 Md. 155, 28 Am. Rep. 442; Mykleby v. Chicago, etc., R. Co., 39 Minn. 54; Brown v. Hannibal, etc., R. Co., 66 Mo. 588; Chicago, etc., R. Co. v. Herring, 57 Ill. 59.

is made at an improper time, as from a moving train,⁵³ or at any improper place instead of a regular station,⁵⁴ the carrier will be liable for damages resulting therefrom, including compensation for the mortification and indignity suffered.⁵⁵ A passenger illegally arrested by the carrier's servants,⁵⁶ or wrongfully assaulted by the carrier's servants,⁵⁷ or by fellow passengers in the presence of the employes of the carrier and without interference by them to protect him,⁵⁸ may recover of the carrier for the physical injury inflicted, pain and suffering, and for the mental suffering and disgrace and humiliation to which he was subjected by the arrest or assault. Compensatory damages, which may be recovered for the wrongful act of a conductor in expelling a passenger, are not subject to mitigation, nor is the liability of the principal for such damages defeated, by proof that the act which caused the injury was provoked by abusive language. In an action for wrongful ejection and assault on a passenger, words of provocation may be considered in mitigation of punitive, but not of compensatory damages.⁵⁹ But only actual damages and

53. *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343, 80 Am. Dec. 286.

54. *Toledo, etc., R. Co. v. Patterson*, 63 Ill. 304.

55. *New Jersey Steamboat Co. v. Brochett*, 121 U. S. 637; *Philadelphia, etc., R. Co. v. Larkin*, 47 Md. 155, 28 Am. Rep. 442.

56. *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101; *Fisher v. Metropolitan Elev. R. Co.*, 34 Hun (N. Y.), 433.

57. *Niendorf v. Manhattan R. Co.*, 4 App. Div. (N. Y.) 46; *East Tennessee, etc., R. Co. v. Hyde*, 89 Ga. 721; *Sherley v. Billings*, 8 Bush (Ky.) 147, 8 Am. Rep. 451; *Randolph v. Hannibal, etc., R. Co.*, 18 Mo. App. 609; *Craker v. Chicago, etc., R. Co.*, 36 Wis. 657; *Missouri Pac. R. Co. v. Martino*, 2 Tex. Civ. App. 634; *O'Donnell v. St. Louis Transit Co.* (Mo. App.), 80 S. W. 315.

58. *International, etc., R. Co. v. Giesen* (Tex. Civ. App.), 69 S. W.

653; *Richmond, etc., R. Co. v. Jefferson*, 89 Ga. 554; *New Orleans, etc., R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689.

59. *Mahoning Valley R. Co. v. De Pascale*, 70 Ohio St. 179, 71 N. E. 633. But see *Harrison v. Fink*, 42 Fed. 787, holding that a passenger could not recover for a conductor's acts or words in ejecting him, having provoked them by resisting the ejection. Also *Terre Haute, etc., R. Co. v. Vanatta*, 21 Ill. 188, 74 Am. Dec. 96, holding that a passenger's attempt to impose upon a carrier by offering a void ticket may be shown to mitigate damages. See also *Houston, etc., R. Co. v. Batchler* (Tex. Civ. App.), 73 S. W. 981.

60. *St. Louis, etc., R. Co. v. Trimble*, 54 Ark. 354; *Cincinnati, etc., R. Co. v. Cole*, 29 Ohio St. 126, 23 Am. Rep. 729; *Holmes v. Carolina Cent. R. Co.*, 94 N. C. 318, 26 Am. & Eng. R. Cas. 190.

nothing for wounded feelings or pain of mind, can be recovered by a passenger where he enters a car or train for the purpose of being ejected in order to bring an action for damages.⁶⁰

§ 7. Damages for personal injuries.—Damages for personal injuries sustained by a passenger through the negligence of a carrier should consist of reasonable compensation for the injuries received, the sufferings experienced, and the consequent loss sustained by the passenger.⁶¹ Not only the direct pecuniary expenses incurred by the injured person, and loss of time, the bodily and mental suffering, expense of cure, and incurable hurt caused by the injury, but also such future damages as may result from the loss of health, time, and use of limbs, bodily and mental pain and suffering, having in view the effect of the injury upon his ability to labor and attend to his business, are proper elements of damage for the consideration of the jury.⁶² Loss of time after the injury during which the passenger is disabled from attending to his business or profession as well as actual and reasonable expenses for medical attendance, medicines and nursing are recoverable.⁶³

61. Williams v. Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; Morse v. Auburn, etc., R. Co., 10 Barb. (N. Y.) 621; Storrs v. Los Angeles Tract. Co., 134 Cal. 91, 66 Pac. 72; Railroad v. Myers, 87 Fed. 149, 58 U. S. App. 131, 32 C. C. A. 19; Rutherford v. Shreveport, etc., R. Co., 41 La. Ann. 893, 41 Am. & Eng. R. Cas. 129; Pennsylvania R. Co. v. Books, 57 Pa. St. 339, 98 Am. Dec. 229; Ohio, etc., R. Co. v. Dickerson, 59 Ind. 317; Wallace v. Wilmington, etc., R. Co., 8 Houst. (Del.) 529; International, etc., R. Co. v. Irvine (Tex.), 18 Am. & Eng. R. Cas. 294.

62. Curtis v. Rochester, etc., R. Co., 18 N. Y. 534, 20 Barb. (N. Y.) 282; Brignoli v. Chicago, etc., R. Co., 4 Daly (N. Y.) 182; The Oriflame, 3 Sawy. (U. S.) 397; Secord v. St. Paul, etc., R. Co., 5 McCrary (U. S.) 515, 18 Fed. 221; Mackoy v. Missouri Pac. R. Co., 5 McCrary (U. S.)

538; Seymour v. Chicago, etc., R. Co., 3 Biss. (U. S.) 43; Wall v. Cameron, 6 Colo. 275; St. Louis, etc., R. Co. v. Cantrell, 37 Ark. 519, 40 Am. Rep. 105, 3 Am. & Eng. R. Cas. 198; Hill v. New Orleans, etc., R. Co., 11 La. Ann. 292; Klutts v. St. Louis, etc., R. Co., 75 Mo. 642; Whalen v. St. Louis, etc., R. Co., 60 Mo. 323, 9 Am. Ry. Rep. 224; Laing v. Colder, 8 Pa. St. 479, 49 Am. Dec. 533; Memphis, etc., R. Co. v. Whitfield, 44 Miss. 466, 7 Am. Rep. 699; Texas, etc., R. Co. v. Pollard, 2 Tex. App. Civ. Cas. § 424; Spicer v. Chicago, etc., R. Co., 29 Wis. 580; Southern Kansas R. Co. v. Walsh, 45 Kan. 653; Wallace v. Western North Carolina R. Co., 104 N. C. 442; Phillips v. London, etc., R. Co., 5 Q. B. Div. 78.

63. See cases cited in preceding notes to this section. Also Pennsylvania Co. v. Marion, 104 Ind. 239, recovery for nursing although gratu-

Although no precise and accurate estimate of physical and mental suffering is possible, the jury may allow such an amount as, in the exercise of a sound discretion, they deem reasonable for the physical pain, and mental suffering accompanying and resulting from such physical pain, which are the proximate results of the injury caused by the negligence of the carrier.⁶⁴ Damages are allowable for future or prospective, as well as past, physical and mental suffering and loss of time, and other pecuniary loss;⁶⁵ but such damages must be such as are reasonably certain to result,⁶⁶ and

itous allowed; *Hopkins v. Atlantic, etc., R. Co.*, 36 N. H. 9, 72 Am. Dec. 287, husband may recover for past and prospective loss of wife's services and expenses of medical treatment; *Ohio, etc., R. Co. v. Crosby*, 107 Ind. 32, but wife cannot so recover in absence of circumstances to rebut presumption of husband's right; *Ohio, etc., R. Co. v. Dickerson*, 59 Ind. 317; *Missouri Pac. R. Co. v. Jarrard*, 65 Tex. 560, actual deduction from salary for time lost not essential; *Montgomery, etc., R. Co. v. Mallette*, 92 Ala. 209, no recovery for loss of time unless compensation was in fact stopped or diminished; *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 23 Am. St. Rep. 345, loss of time and loss of wages are the same; *Galveston, etc., R. Co. v. Thornsberry (Tex.)*, 17 S. W. 521, amount of expenses for medical treatment and value of loss of time must be shown.

64. *Hickenbottom v. Delaware, etc., R. Co.*, 122 N. Y. 91; *Ransom v. New York, etc., R. Co.*, 15 N. Y. 415; *Harding v. New York Cent., etc., R. Co.*, 36 Hun (N. Y.) 72; *Quinn v. Long Island R. Co.*, 34 Hun (N. Y.) 331; *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260; *Morgan v. Southern Pac. R. Co.*, 95 Cal. 501, 29 Am. St. Rep. 143; *Hannibal, etc., R. Co. v. Martin*, 111 Ill. 219; *Illinois Cent.*

R. Co. v. Robinson, 58 Ill. App. 181; *Toledo, etc., R. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71; *Dawson v. Louisville, etc., R. Co. (Ky.)*, 11 Am. & Eng. R. Cas. 134; *Quigley v. Central Pac. R. Co.*, 11 Nev. 350, 21 Am. Rep. 757; *Pennsylvania, etc., R. Co. v. Allen*, 53 Pa. St. 276; *International, etc., R. Co. v. Kentle*, 2 Tex. App. Civ. Cas. § 303, 10 Am. & Eng. R. Cas. 337. See also cases generally cited in preceding notes to this section.

65. *Nash v. Sharp*, 19 Hun (N. Y.) 365; *Matteson v. New York Cent. R. Co.*, 62 Barb. (N. Y.) 364; *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571; *Johnson v. Northern Pac. R. Co.*, 47 Minn. 430; *Stutz v. Chicago, etc., R. Co.*, 73 Wis. 147, 9 Am. Rep. 769. See also cases cited in notes 62 and 63, *ante*.

66. *Diffenbach v. New York, etc., R. Co.*, 5 App. Div. (N. Y.) 91, 38 N. Y. Supp. 788; *Koetter v. Manhattan R. Co.*, 13 N. Y. Supp. 458; *Curtis v. Rochester, etc., R. Co.*, 18 N. Y. 534; *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571; *Louisville, etc., R. Co. v. Wood*, 113 Ind. 544; *Louisville, etc., R. Co. v. Minogue*, 90 Ky. 369, 29 Am. St. Rep. 378; *Stutz v. Chicago, etc., R. Co.*, 73 Wis. 147, 9 Am. St. Rep. 769; *Spicer v. Chicago, etc., R. Co.*, 29 Wis. 580.

not such as may possibly result.⁶⁷ A passenger is entitled to recover compensation for permanent injuries caused by the carrier's negligence, or such as are reasonably certain to prove so, as well as for temporary injuries, and to compensation for pain and suffering and for loss sustained by reason of such permanent injuries or disabilities.⁶⁸ Included in permanent injuries are permanent reduction of the power or ability or diminished capacity to earn money,⁶⁹ inability to perform work,⁷⁰ or to continue professional practice,⁷¹ disfigurement,⁷² impairment of mental faculties,⁷³ diminished capacity for mental and physical development,⁷⁴ injuries rendering one a physical wreck and hopeless invalid, incapacitated to enjoy the pleasures of life, whether or not a wage earner.⁷⁵ The rule is well settled that the plaintiff can only be

67. Strohm v. New York, etc., R. Co., 96 N. Y. 305; Ohio, etc., R. Co. v. Wood, 107 Ind. 32.

68. Dale v. Brooklyn City, etc., R. Co., 1 Hun (N. Y.) 146; Southern Pac. R. Co. v. Rauh, 49 Fed. 696; Frink v. Schroyer, 18 Ill. 416; Louisville, etc., R. Co. v. Miller, 141 Ind. 533; Maysville, etc., R. Co. v. Herwick, 13 Bush. (Ky.) 122; Louisville, etc., R. Co. v. Thompson, 64 Miss. 584, 30 Am. & Eng. R. Cas. 541; Laing v. Colder, 8 Pa. St. 479, 49 Am. Dec. 533; International, etc., R. Co. v. Brazzil, 78 Tex. 314, 44 Am. & Eng. R. Cas. 437; Farish v. Reigle, 11 Gratt. (Va.) 697, 62 Am. Dec. 666; Quaife v. Chicago, etc., R. Co., 48 Wis. 513, 33 Am. Rep. 821.

69. Hegeman v. Western R. Corp., 16 Barb. (N. Y.) 353; Mooney v. Hudson River R. Co., 1 Sweeny (N. Y.) 325; Lowry v. Mt. Adams, etc., R. Co., 68 Fed. 827; Boyce v. California Stage Co., 25 Cal. 460; Wall v. Cameron, 6 Colo. 275; North Chicago St. R. Co. v. Broms, 62 Ill. App. 127; Chicago, etc., R. Co. v. Meech, 59 Ill. App. 69; Louisville, etc., R. Co. v. Miller, *supra*; Pittsburg, etc., R. Co. v. Andrews, 39 Md. 329, 17 Am. Rep. 568, 10 Am. Ry. Rep. 485;

Whalen v. St. Louis, etc., R. Co., *supra*; Wedekind v. Southern Pac. R. Co., 20 Nev. 292; Houston, etc., R. Co. v. Boehm, 57 Tex. 152, 9 Am. & Eng. R. Cas. 366; Sears v. Seattle Consol. St. R. Co., 6 Wash. 227; Cogsville v. West St., etc., Elec. R. Co., 5 Wash. 46.

70. Stutz v. Chicago, etc., R. Co., 73 Wis. 147, 9 Am. St. Rep. 769, 37 Am. & Eng. R. Cas. 137.

71. Walker v. Erie R. Co., 63 Barb. (N. Y.) 260; Phillips v. London, etc., R. Co., 5 C. P. Div. 280, 49 L. J. C. P. Div. 233, 42 L. T. N. S. 6.

72. Heddles v. Railroad Co., 77 Wis. 228, 46 N. W. 115. The Ori-flamme, 3 Sawy. (U. S.) 397; Texas, etc., R. Co. v. Pollard, 2 Tex. App. Civ. Cas., § 481.

73. Toledo, etc., R. Co. v. Baddeley, 54 Ill. 19, 5 Am. Rep. 71.

74. Houston, etc., R. Co. v. Boehm, 57 Tex. 152.

75. Tuthill v. Long Island R. Co., 81 Hun. (N. Y.) 616, 30 N. Y. Supp. 959; Koetter v. Manhattan R. Co., 13 N. Y. Supp. 458; The Washington, 9 Wall. (U. S.) 513; Howland v. Oakland Consol. St. R. Co., 110 Cal. 513; Illinois Cent. R. Co. v. Robinson 58 Ill. App. 181; Southern Kan-

allowed to recover for such permanent injuries as in the ordinary course of nature, are reasonably certain to ensue. Expert witnesses may state what, in their judgment, is reasonably certain to be the future course of the disability, considering the nature of the injury, the extent, rapidity or slowness of the recovery, the constitution of the man, and all those other conditions upon which a judgment of a physician is ordinarily based. It is then for the jury upon that testimony, in connection with the physical condition of the plaintiff, to say whether a permanent disability is reasonably certain to ensue, and, if not so, then how long it is probable that the plaintiff will suffer from the injuries, and to award the amount of damages necessary to compensate him for his future suffering.⁷⁶ But evidence of experts as to future consequences which are contingent, speculative, or merely possible, is incompetent.⁷⁷ Where the proximate cause of a disease was an injury received in an accident, or there is a progressive, complete connection between any disease and the injury inflicted, such disease may be taken into consideration by the jury as an element of damages for which a recovery may be had, even though it was not discovered until some time after the accident.⁷⁸

§ 8. Mental suffering as distinct cause of action or element of damage.—Mental suffering or distress of mind, or injured feelings, when connected with bodily injury, are the subject of damages, but they must be connected in order to be included, unless the injury is accompanied by circumstances of malice, insult, or inhumanity.⁷⁹ There can be no recovery for

sas R. Co. v. Walsh 45 Kan. 653; Olson v. St. Paul, etc., R. Co., 45 Minn. 536, 22 Am. St. Rep. 749; Missouri Pac. R. Co. v. Mitchell, 72 Tex. 171.

76. Dissenbach v. New York, etc., R. Co., 5 App. Div. (N. Y.) 91, 38 N. Y. Supp. 788; Clapp v. Hudson River R. Co., 19 Barb. (N. Y.) 461;

And see Louisville, etc., R. Co. v. Snyder, 117 Ind. 435, 10 Am. St. Rep. 60; Missouri Pac. R. Co. v. Aiken, 71 Tex. 373; and the cases cited in notes 68, 69 and 73 to this section.

77. Strohm v. New York, etc., R. Co., 96 N. Y. 305.

78. Wood v. New York Cent., etc., R. Co., 83 App. Div. (N. Y.) 604, 82 N. Y. Supp. 160; Louisville, etc., R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Baltimore City Pass. R. Co. v. Kemp, 61 Md. 74, 619, 48 Am. Rep. 134; McGarrahan v. New York, etc., R. Co., 171 Mass. 211, 50 N. E. 610; Dickson v. Hollister, 123 Pa. 421, 16 Atl. 484; Houston, etc., R. Co. v. Leslie, 57 Tex. 83.

79. Rawlings v. Wabash R. Co., 97 Mo. App. 515, 71 S. W. 535; Morse v. Duncan, 14 Fed. 396; Dawson v. Louisville, etc., R. Co. (Ky.),

fright which results in physical injuries or mental distress, in the absence of contemporaneous injury to plaintiff,⁸⁰ unless the fright is the proximate result of a legal wrong against plaintiff by defendant.⁸¹ But fright,⁸² or terror,⁸³ or mental anguish caused by impending peril,⁸⁴ and mental suffering or nervous shock generally,⁸⁵ have been held to be proper elements of compensatory damages, whether connected with physical suffering or not, whenever they were the natural and proximate result of the wrong done, if such wrong gave the injured party a cause of action, though not of themselves a sufficient cause of action.

§ 9. Exemplary damages.—Malice or wilfulness.—To authorize the giving of exemplary, punitive, or vindictive damages, it must appear that there was an intentional violation of another's rights, or a malicious intent to injure another in person or property, or that a proper act was done with an excess of force and violence, or that there was such a degree of negligence as indicates a wanton and reckless indifference to consequences.⁸⁶

11 Am. & Eng. R. Cas. 134; Dorrah v. Illinois Cent. R. Co., 65 Miss. 14
7 Am. St. Rep. 629; Spohn v. Missouri Pac. R. Co., 116 Mo. 617;
Trigg v. St. Louis, etc., R. Co., 74 Mo. 147, 41 Am. Rep. 305; Winkler v. St. Louis, etc., R. Co., 21 Mo. App. 99; Randolph v. Hannibal, etc., R. Co., 18 Mo. App. 609; Johnson v. Wells, 6 Nev. 224, 3 Am. Rep. 245.

80. Ohliger v. Toledo Traction Co., 23 Ohio Cir. Ct. Rep. 65.

81. Sanderson v. Northern Pac. R. Co., 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403.

82. East Tennessee, etc., R. Co. v. Lockhart, 79 Ala. 315; Stutz v. Chicago, etc., R. Co., 73 Wis. 147, 9 Am. St. Rep. 769, 37 Am. & Eng. R. Cas. 187; Kreuziger v. Chicago, etc., R. Co., 73 Wis. 158.

83. Louisville, etc., R. Co. v. Whitman, 79 Ala. 328.

84. Harding v. New York, etc., R. Co., 36 Hun (N. Y.), 72; Quinn v. Long Island R. Co., 34 Hun (N. Y.), 331; Fell v. Northern Pac. R. Co., 44

Fed. 252; Chicago, etc., R. Co. v. Flagg, 43 Ill. 364, 92 Am. Dec. 133.

85. Gillespie v. Brooklyn Heights R. Co., 178 N. Y. 347; Shepard v. Chicago, etc., R. Co., 77 Iowa, 54; Lake Erie, etc., R. Co. v. Fix, 88 Ind. 381, 45 Am. Rep. 464; Illinois Cent. R. Co. v. Latimer, 28 Ill. App. 552; Southern Kansas R. Co. v. Hinsdale, 38 Kan. 507; Missouri Pac. R. Co. v. Kaiser, 82 Tex. 144; Stutz v. Chicago, etc., R. Co., 73 Wis. 147, 9 Am. St. Rep. 769.

86. Peck v. New York Cent. R. Co., 6 Sup. Ct. (N. Y.) 409, note; Parker v. Long Island R. Co., 13 Hun (N. Y.), 319; Kansas City, etc., R. Co. v. Little, 66 Kan. 378, 71 Pac. 820, 61 L. R. A. 122; Oliver v. Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307; Griffin v. Southern Ry. Co., 65 S. C. 122, 43 S. E. 445; Louisville, etc., R. Co. v. Wurl, 62 Ill. App. 381; Northern Cent. R. Co. v. O'Conner, 76 Md. 207, 35 Am. St. Rep. 422; Baltimore, etc., R. Co. v. Carr, 71 Md. 135; Chicago, etc., R. Co. v. Scurr, 59 Miss. 456,

Exemplary, punitive, or vindictive damages, each meaning the same thing, is something beyond actual compensation, something not given as due the injured person, but is awarded, regardless of the amount of damages actually sustained, upon public considerations, as a punishment of the defendant for the wrong inflicted, and for the protection of the public against the repetition of similar acts. In such cases the law uses the suit of a private party as an instrument of public protection; not for the sake of the suitor, but for that of the public. It is not the form of the action, but the moral culpability of the defendant, that confers the right to give punitive damages, and they are given in actions *ex delicto*, as a punishment of the defendant and admonition to others, for the prevention of fraud, malice, and oppression. They are not allowed where there has been no intentional offense, and defendant has done what he honestly believed to be his duty, but only where the wrong is done with evil intent, malice, wilfulness, or in wanton indifference to the rights of others.⁸⁷ It is not necessary that

42 Am. Rep. 373, 6 Am. & Eng. R. Cas. 341; Memphis, etc., R. Co. v. Whitfield, 44 Miss. 466, 7 Am. Rep. 699; Knowles v. Norfolk Southern R. Co., 102 N. C. 59; Rose v. Wilmington, etc., R. Co., 106 N. C. 168; Holmes v. Carolina Cent. R. Co., 94 N. C. 318; Pittsburgh, etc., R. Co. v. Lyon, 123 Pa. St. 140, 10 Am. St. Rep. 517; Louisville, etc., R. Co. v. Fleming, 14 Lea (Tenn.), 128; Appleby v. South Carolina, etc., R. Co., 60 S. C. 48, 38 S. E. 237.

The right to give exemplary damages in any case has been questioned.—Wardrobe v. California Stage Co., 7 Cal. 119, 68 Am. Dec. 231; Fay v. Parker, 53 N. H. 342, 16 Am. Rep. 270; McKeon v. Citizens R. Co., 42 Mo. 79; Quigley v. Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

87. Hamilton v. Third Ave. R. Co., 53 N. Y. 25. See also Alabama G. S. R. Co. v. Sellers, 93 Ala. 9, 30 Am. St. Rep. 17; Denver Tramway Co. v.

Cloud, 6 Colo. App. 445; Georgia, etc., R. Co. v. Eskew, 86 Ga. 641. 22 Am. St. Rep. 490, 47 Am. & Eng. R. Cas. 635; Pullman Palace Car Co. v. Reed, 75 Ill. 125, 20 Am. Rep. 232; Philadelphia, etc., R. Co. v. Hoeflich, 62 Md. 300, 50 Am. Rep. 223; Hoffman v. Northern Pac. R. Co., 45 Minn. 53; Vicksburg, etc., R. Co. v. Scanlan, 63 Miss. 413; and cases cited in note 86, *ante*.

Wanton and wilful expulsion of a passenger entitles him to recover punitive damages: Dagnall v. Southern Ry. Co., 69 S. C. 110, 48 S. E. 97; Story v. Norfolk, etc., R. Co., 133 N. C. 59, 45 S. E. 349; Lake Erie, etc., R. Co., Christison, 39 Ill. App. 495; Louisville, etc., R. Co. v. Wolfe, 128 Ind. 347, 25 Am. St. Rep. 436; Gorman v. Southern Pac. R. Co., 97 Cal. 1, 33 Am. St. Rep. 157.

A brusque or dictatorial manner is not an insult which justifies punitive damages: Northern Cent. R. Co. v. Newman (Md.), 56 Atl.

harsh and unnecessary means be used in doing an act to show malice. It may be inferred from circumstances of time and

973; Louisville, etc., R. Co. v. Ballard, 85 Ky. 307, 7 Am. St. Rep. 600, 28 Am. & Eng. R. Cas. 135.

In action for ejection the passenger is not entitled to exemplary damages where he limits his claim for recovery to breach of contract. Moon v. Interurban St. Ry. Co., 85 N. Y. Supp. 363; Eddy v. Syracuse, etc., R. Co., 50 App. Div. (N. Y.) 109, 63 N. Y. Supp. 645; Monnier v. New York, etc., R. Co., 175 N. Y. 281, 67 N. E. 569; Carleton v. Lombard, Ayres & Co., 19 App. Div. (N. Y.) 297, 46 N. Y. Supp. 120; Fink v. Albany, etc., R. Co., 4 Lans. (N. Y.) 147; Brown v. Rapid Ry. Co. (Mich.), 90 N. W. 290, 9 Det. L. N. 127.

Insult and villification accompanying ejection entitles to exemplary damages. Georgia R. Co. v. Olds, 77 Ga. 673; Louisville, etc., R. Co. v. Ballard, 88 Ky. 159.

Intent to injure, degrade, or oppress passenger by wrongfully expelling him held to justify exemplary damages. Palmer v. Charlotte, etc., R. Co., 3 S. C. 580.

Wilful refusal to carry entitles to exemplary damages. Memphis, etc., R. Co. v. Green, 52 Miss. 779; Heirn v. M'Caughan, 32 Miss. 17, 66 Am. Dec. 588.

Ejection of passenger from moving train a cause for exemplary damages. Galena v. Hot Springs R. Co., 4 McCrary (U. S.) 371.

Lawful ejection but in a wanton manner and with unnecessary force will entitle a passenger to punitive damages. Philadelphia, etc., R. Co. v. Larkin, 47 Md. 155, 28 Am. Rep. 442; Tomlinson v. Wilming-

ton, etc., R. Co., 107 N. C. 327, 47 Am. & Eng. R. Cas. 620.

A malicious assault by a conductor on a passenger entitles a recovery for punitive damages. Lexington Ry. Co. v. Cozine, 23 Ky. L. Rep. 1137, 64 S. W. 848; Atlantic, etc., R. Co. v. Condor, 75 Ga. 51.

Gross neglect causing a collision entitles to award of punitive damages. Louisville, etc., R. Co. v. McClain, 23 Ky. L. Rep. 1878, 66 S. W. 391.

Delay in transportation due to carrier's negligence entitles only to actual and not to exemplary damages. Illinois Cent. R. Co. v. Pearson, (Miss.) 31 So. 435.

Ejection of a passenger elsewhere than at a station does not justify exemplary damages, in the absence of improper conduct. Chicago, etc., R. Co. v. Parks, 18 Ill. 460, 68 Am. Dec. 562; Chicago, etc., R. Co. v. Wilson, 23 Ill. App. 63.

Failure to protect passengers from assault or insult does not entitle to punitive damages, unless there has been a wilful refusal or failure to do so when called upon, or the injury occurs in the employe's presence. New Orleans, etc., R. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689, 9 Am. Ry. Rep. 308.

Wantonly carrying passenger beyond destination entitles to punitive damages. Birmingham Ry., etc., Co. v. Nolan (Ala.), 32 So. 715; Samuels v. Richmond, etc., R. Co., 35 S. C. 493, 28 Am. St. Rep. 883, 52 Am. & Eng. R. Cas. 315; Packet Co. v. Nagle, 97 Ky. 9, 29 S. W. 743; Higgins v. Louisville, etc., R. Co., 64

place and the existing conditions that the act was done in a spirit of malice or wantonness.⁸⁸

§ 10. Exemplary damages.—Gross negligence.—In some of the authorities it is held that negligence of a carrier which is gross and wanton, or gross neglect of the carrier's employes, is sufficient to entitle the injured person to punitive or exemplary damages.⁸⁹ But more generally the rule held seems to be that exemplary damages may be awarded for negligence which is so gross as to evince an entire want of care and is sufficient to raise a presumption of conscious indifference to consequences, or so gross as to be equivalent to positive misconduct.⁹⁰ A neglect of duty not

Miss. 80; Vicksburg, etc., R. Co. v. Scanlan, 63 Miss. 413; Dawson v. Louisville, etc., R. Co. (Ky.), 11 Am. & Eng. R. Cas. 134; Hall v. South Carolina R. Co., 28 S. C. 261.

But failure to carry to destination, there being no proof of willfulness, wantonness, or rudeness, does not entitle to exemplary damages. Fort v. Southern Ry. Co. (S. Co.), 42 S. E. 196; Alabama, etc., R. Co. v. Purnell, 69 Miss. 652; Louisville, etc., R. Co. v. Champion, 24 Ky. L. Rep. 87, 68 S. W. 143.

And carrying beyond station, in the absence of malice, insult or wilful wrong, does not entitle to exemplary damages. Kansas City, etc., R. Co. v. Fite, 67 Miss. 373.

Evidence of conductor as to his intent and honest belief in ejecting a passenger is proper upon the question of exemplary damages, though not material as to compensatory damages. Yates v. New York Cent. etc., R. Co., 67 N. Y. 100; Hamilton v. Third Ave. R. Co., 53 N. Y. 25; Georgia R. Co. v. Homer, 73 Ga. 251. See Hendricks v. Sixth Ave. R. Co., 44 N. Y. Super. Ct. 11.

88. Alabama G. S. R. Co. v. Sellers, 93 Ala. 9, 30 Am. St. Rep. 17; City, etc., R. Co. v. Brauss, 70 Ga.

368; Jeffersonville R. Co. v. Rogers, 33 Ind. 116, 10 Am. Rep. 103; New Orleans, etc., R. Co. v. Hurst, 36 Miss. 661, 74 Am. Dec. 85; Evans v. St. Louis, etc., R. Co., 11 Mo. App. 463.

89. Kansas Pacific R. Co. v. Kessler, 18 Kan. 523; Frink v. Coe, 4 Green (Iowa), 555, 61 Am. Dec. 141; Louisville Southern R. Co. v. Minogue, 90 Ky. 369, 29 Am. St. Rep. 378; Taylor v. Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229; Hopkins v. Atlantic, etc., R. Co., 36 N. H. 9, 72 Am. Dec. 287; Maysville, etc., R. Co. v. Herrick, 13 Bush (Ky.) 122; Louisville, etc., R. Co. v. McCoy, 81 Ky. 403, absence of slight care is gross negligence.

90. Fisher v. Metropolitan Elev. R. Co. 34 Hun (N. Y.), 433; Milwaukee, etc., R. Co. v. Arms, 91 U. S. 489, 6 Am. Ry. Rep. 512; Richmond, etc., R. Co. v. Greenwood, 99 Ala. 501; Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 30 Am. St. Rep. 65; Richmond, etc., R. Co. v. Vance, 93 Ala. 144, 30 Am. St. Rep. 41; Alabama G. S. R. Co. v. Arnold, 80 Ala. 600; Chattanooga, etc., R. Co. v. Liddle, 85 Ga. 482, 21 Am. St. Rep. 169; Augusta, etc., R. Co. v. Randall, 79 Ga. 304, 34 Am. & Eng.

attended with any circumstances of insult, aggravation of feelings, of injury to the person or his property, or of bodily or mental suffering, would not amount to gross negligence and justify the imposition of exemplary damages.⁹¹

§ 11. Exemplary damages for carrier's acts.—The carrier, whether a corporation or a private person, is liable in exemplary damages for acts of a reckless and criminal nature, or so gross and culpable as to evince utter recklessness; for instance, knowingly and wantonly employing an incompetent servant, or retaining him in its employ after knowledge of his incompetency or unfitness,⁹² or wilfully, maliciously, or so negligently as to indicate a wanton disregard of the rights of others, enforcing arbitrary, unreasonable and illegal regulations,⁹³ or wilfully and knowingly failing to provide safe appliances or to construct and keep its road and machinery in proper and safe condition.⁹⁴ For the purpose of

R. Cas. 439, the facts need not show criminal liability; Rutherford v. Shreveport, etc., R. Co., 41 La. Ann. 793; Memphis, etc., R. Co. v. Whitfield, 44 Miss. 466, 7 Am. Rep. 699; Missouri Pac. R. Co. v. Mitchell, 72 Tex. 171; Missouri Pac. R. Co. v. Shepherd, 72 Tex. 165, 37 Am. & Eng. R. Cas. 194; Union Pac. R. Co. v. Hause, 1 Wyoming, 27.

91. Southern R. Co. v. Kendrick, 40 Miss. 374, 90 Am. Dec. 332; Chicago, etc., R. Co. v. Scurr, 59 Miss. 456, 42 Am. Rep. 373, holding that the dicta, in New Orleans, etc., R. Co. v. Bailey, 40 Miss. 395, that any negligence of a railroad company operated by steam is gross, and, in Memphis, etc., R. Co. v. Green, 52 Miss. 779, that punitive damages may be inflicted on a carrier for mere omission of duty, are incorrect. See also Spicer v. Chicago, etc., R. Co., 29 Wis. 580; Seymour v. Chicago, etc., R. Co., 3 Biss. (U. S.) 43; Kentucky Cent. R. Co. v. Dills, 4 Bush (Ky.), 593.

92. Cleghorn v. New York Cent.,

etc. R. Co., 56 N. Y. 44, 15 Am. Rep. 375; Lake Shore, etc., R. Co. v. Prentice, 147 U. S. 101; Porter v. Erie R. Co., 32 N. J. L. 261; Ackerson v. Erie R. Co., 32 N. J. L. 254; Sullivan v. Oregon R., etc., Co., 12 Or. 392, 53 Am. Rep. 364; Hagan v. Providence, etc., R. Co., 3 R. I. 88, 62 Am. Dec. 377; Texas Trunk R. Co. v. Johnson, 75 Tex. 158; Dillingham v. Russell, 73 Tex. 47, 15 Am. Rep. 753; Galveston, etc., R. Co. v. Donahoe, 56 Tex. 162; Hays v. Houston, etc., R. Co., 46 Tex. 272; Frink v. Coe, 4 Green (Iowa), 555, 61 Am. Dec. 141.

93. Illinois Cent. R. Co. v. Johnson, 67 Ill. 312; Illinois Cent. R. Co. v. Cunningham, 67 Ill. 316; Pittsburgh, etc., R. Co. v. Lyon, 123 Pa. St. 140, 10 Am. St. Rep. 517, 37 Am. & Eng. R. Cas. 231.

94. Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 30 Am. St. Rep. 65, 90 Ala. 71, 24 Am. St. Rep. 764; Missouri Pac. R. Co. v. Shuford, 72 Tex. 165, 37 Am. & Eng. R. Cas. 194; Taylor v. Grand Trunk

fixing such liability on the corporation a superintending agent with power to employ and discharge men may be deemed the corporation itself,⁹⁵ or, as to passengers on the train, the conductors in charge,⁹⁶ although it has been held that only the president and general manager, or in his absence the vice-president, actually wielding the executive power, may be treated as the corporation, but not the conductor or other subordinate or servant.⁹⁷

§ 12. Exemplary damages for acts of servants.—For injuries by the negligence of a servant while engaged in the business of the carrier, within the scope of his employment, the latter is liable for compensatory damages; but it is not liable in punitive damages for such negligence, however wilful or malicious, gross or culpable, unless it is also chargeable with gross misconduct. Such misconduct on the part of the carrier may be established by showing that the act of the servant was authorized or ratified, or that the carrier employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied.⁹⁸ This rule has been maintained in many cases and applied to cases of gross negligence of servants in the running of trains,⁹⁹ unlawful ejection,¹

R. Co., 48 N. H. 304, 2 Am. Rep. 229; Missouri Pac. R. Co. v. Mitchell, 72 Tex. 171. But for cases where the facts were held not to justify exemplary damages, see Chattanooga, etc., R. Co. v. Liddell, 88 Ga. 482, 21 Am. St. Rep. 169; Rutherford v. Shreveport, etc., R. Co., 41 La. Ann. 793; International, etc., R. Co. v. Brazzil, 78 Tex. 314; Union Pac. R. Co. v. Hause, 1 Wyoming, 27; Richmond, etc., R. Co. v. Vance, 93 Ala. 144, 30 Am. St. Rep. 41, knowledge of defect held essential to recovery.

95. Cleghorn v. New York Cent., etc., R. Co., 56 N. Y. 44, 15 Am. Rep. 375.

96. Bass v. Chicago, etc., R. Co., 42 Wis. 654, 24 Am. Rep. 437, 15 Am. Ry. Rep. 45.

97. Lake Shore, etc., R. Co. v. Prentice, 147 U. S. 101.

98. Cleghorn v. New York Cent., etc., R. Co., 56 N. Y. 44, 15 Am. Rep. 375.

99. Ackerson v. Erie R. Co., 32 N. J. L. 254; Porter v. Erie R. Co., 32 N. J. L. 261; Wardrobe v. California Stage Co., 7 Cal. 118, 68 Am. Dec. 231; Texas Trunk R. Co. v. Johnson, 75 Tex. 158.

1. Pittsburgh, etc., R. Co. v. Russ, 57 Fed. 822; Sullivan v. Oregon R., etc., Co., 12 Or. 392, 53 Am. Rep. 364, 21 Am. & Eng. R. Cas. 391; Hagan v. Providence, etc., R. Co., 3 R. I. 88, 62 Am. Dec. 377; Galveston, etc., R. Co. v. Donahoe, 56 Tex. 162; Hays v. Houston, etc., R. Co., 46 Tex. 272; Bass v. Chicago, etc., R. Co., 42 Wis. 654, 24 Am. Rep.

assaults by employes,² and wrongfully procuring the arrest of a passenger.³ The rule more generally followed, however, both in cases where any distinction between the acts of the carrier and those of its servants is rejected as unjust, and those which do not refer to such a distinction, is that exemplary damages should be awarded against the carrier for the malicious act or gross negligence of its servants, or where the injury complained of was accompanied by unnecessary force and was inflicted by a servant of the carrier in the line of his duty, without reference to any express or implied participation in the tort by the carrier, by authorizing it before or approving it after its commission.⁴ And it has been held that there is no class of cases where the rule can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers, and that it might as well not be applied to them at all as to limit its application to cases where the servant is directed or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for such cases will never occur.⁵

437; Milwaukee, etc., R. Co. v. Finney, 10 Wis. 388.

2. Randolph v. Hannibal, etc., R. Co., 18 Mo. App. 609; Dillingham v. Russell, 73 Tex. 47, 15 Am. St. Rep. 753; Ricketts v. Chesapeake, etc., R. Co., 33 W. Va. 433, 25 Am. St. Rep. 901; Craker v. Chicago, etc., R. Co., 36 Wis. 659.

3. Fisher v. Metropolitan El. R. Co., 34 Hun (N. Y.), 433; Lake Shore, etc., R. Co. v. Prentice, 147 U. S. 101.

4. **Cases holding the rule of the text and rejecting the distinction between the act of the carrier and that of its servants.**—Fell v. Northern Pac. R. Co., 44 Fed. 249; Baltimore, etc., R. Co. v. Blocher, 27 Md. 277; Quigley v. Central Pac. R. Co., 11 Nev. 250, 21 Am. Rep. 757; Spellman v. Richmond, etc., R. Co., 35 S. C. 475, 28 Am. St. Rep. 858; Samuels v. Richmond, etc.,

R. Co., 35 S. C. 495, 28 Am. St. Rep. 883; Quinn v. South Carolina R. Co., 29 S. C. 381, 37 Am. & Eng. R. Cas. 166; Springer Transp. Co. v. Smith, 16 Lea (Tenn.), 498.

Cases maintaining the rule of the text without reference to the distinction.—See cases cited generally in notes to § 9, *ante*, from the following States: Alabama, California, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Mississippi, Missouri and Tennessee.

5. Goddard v. Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39. See also Kansas City, etc., R. Co. v. Sanders, 98 Ala. 293; Jeffersonville R. Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103; Louisville, etc., R. Co. v. Ballard, 85 Ky. 307, 7 Am. St. Rep. 600, 28 Am. & Eng. R. Cas. 135; Hanson v. European, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404; Taylor v. Grand Trunk R. Co., 48 N. H. 304, 2 Am.

§ 13. Elements affecting the amount of damages.—The rule by which damages are to be estimated, where they are such as are not capable of direct proof and assessment, and what elements are to be considered and within what limits the damages may be estimated, are as a general principle, matters of law for the court to determine and instruct the jury for their guidance. The amount of compensation to be awarded for physical disability and physical and mental pain and suffering, and the future consequences reasonably certain to result from a personal injury, are not capable of exact proofs, or accurate measurement, and no precise rule exists or is capable of being applied by which the extent of the recovery can be prescribed. Accordingly, in this class of cases, the law commits to the determination of the jury, under proper instructions from the court as to the elements to be considered, the amount of damages to be awarded, and the jury, in estimating them, may consider the facts and circumstances, in connection with their knowledge, observation and experience in the affairs of life, and award such an amount as will reasonably compensate for the injuries received according to the evidence in the case.⁶ The elements proper to be taken into consideration by the jury to enable it to ascertain and fix the amount of damages have been held by the courts to be a consideration of the injured person's position, condition, and circumstances in life,⁷ the business or profession

Rep. 229; Hopkins v. Atlantic, etc., R. Co., 36 N. H. 9, 72 Am. Dec. 287; Atlantic, etc., R. Co. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; Palmer v. Charlotte, etc., R. Co., 3 S. C. 580.

6. Walker v. Erie R. Co., 63 Barb. (N. Y.) 360; Hill v. Union Ry. Co., 25 R. I. 565, 57 Atl. 374; North Chicago St. R. Co. v. Fitzgibbons, 180 Ill. 466, 54 N. E. 483, 79 Ill. App. 632; Washington & G. R. Co. v. Patterson, 9 App. D. C. 423, 25 Wash. L. Rep. 36; Morgan v. Southern Pac. R. Co., 95 Cal. 501, 29 Am. St. Rep. 143; Chicago, etc., R. Co. v. Holdridge, 118 Ind. 281; Hill v. New Orleans, etc., R. Co., 11 La. Ann. 292; Baltimore, etc., R. Co. v. Carr, 71 Md. 135; Winkler v. Missouri, etc.,

R. Co., 21 Mo. App. 99; Pennsylvania R. Co. v. Allen, 53 Pa. St. 276; Gulf, etc., R. Co. v. Head (Tex. App.), 15 S. W. 504; Abbot v. Toliver, 71 Wis. 64; Blanchard v. Windsor, etc., R. Co., 10 Nova Scotia, 8; Phillips v. London, etc., R. Co., 5 Q. B. Div. 78.

7. Mackoy v. Missouri Pac. R. Co., 5 McCrary (U. S.), 538; The Ori-fiamme, 3 Sawy. (U. S.) 397; Brignoli v. Chicago, etc., R. Co., 4 Daly (N. Y.), 182; Macon, etc., R. Co. v. Johnson, 38 Ga. 409; Louisville, etc., R. Co. v. Miller, 141 Ind. 533; Southern R. Co. v. Kendrick, 40 Miss. 374, 90 Am. Dec. 332; Whalen v. St. Louis, etc., R. Co., 60 Mo. 323.

Evidence of character.—Compensatory damages for physical pain

in which he is engaged and the extent and amount of his ordinary business,⁸ the means at his disposal and ability and capacity to earn money,⁹ and the extent to which they are injured or impaired by reason of the injuries sustained.¹⁰ The injured passenger cannot show the number of his family and their dependence on him for support for the purpose of increasing the damages.¹¹ Nor can the carrier show a life or accident policy or the payment and receipt of moneys thereon in mitigation of damages.¹²

and suffering cannot be diminished by showing that plaintiff is an obscure man, a bartender, a professional gambler, or even a vagrant. *Hardy v. Minneapolis, etc., R. Co.*, 56 Fed. 657; *Brown v. Memphis, etc., R. Co.*, 4 Fed. 51, 5 Fed. 499; *Boyle v. Case*, 18 Fed. 880.

But evidence that a man was an habitual drunkard is competent on the question of his ability to earn full wages. *Cleveland, etc., R. Co. v. Sutherland*, 19 Ohio St. 151.

And evidence that a female is of unchaste character is competent upon the question of her ability to earn money or take care of a family. *Abbot v. Tolliver*, 71 Wis. 64.

8. *Wade v. Leroy*, 20 How. (U. S.) 34; *Rio Grande Western R. Co. v. Rubenstein*, 5 Colo. App. 121; *Ohio, etc., R. Co. v. Hecht*, 115 Ind. 443; *Wallace v. Western North Carolina R. Co.*, 104 N. C. 442, 41 Am. & Eng. R. Cas. 212.

9. *San Antonio, etc., R. Co. v. Turney* (Tex. Civ. App.), 78 S. W. 256.

Decrease in earning capacity may be shown by proving what the business was worth for the year preceding the accident and after the accident. *Chicago, etc., R. Co. v. Meech*, 59 Ill. App. 69; *Galveston, etc., R. Co. v. Cooper*, 2 Tex. Civ. App. 42.

Amount of earnings at his trade, immediately before the accident, is admissible on the question of

damages. *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287; *Beisiegel v. New York Cent. R. Co.*, 40 N. Y. 9.

Past earnings of a professional man are competent on the question of damages. *Simonin v. New York, etc., R. Co.*, 36 Hun (N. Y.), 214; *Nash v. Sharpe*, 19 Hun (N. Y.), 365; *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260; *Phillips v. London, etc., R. Co.*, 5 Q. B. Div. 78.

10. Expectation of life may be shown, where the injury is permanent, and standard life tables may be introduced for this purpose, so as to estimate the damage or loss sustained as nearly as possible. *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409; *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533; *Galveston, etc., R. Co. v. Cooper*, 2 Tex. Civ. App. 42.

But such evidence is not essential.—*Houston, etc., R. Co. v. Boehm*, 57 Tex. 152, 9 Am. & Eng. R. Cas. 366.

11. *Southern Pac. R. Co. v. Rauh*, 49 Fed. 696; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339, 98 Am. Dec. 229; *Laing v. Colder*, 8 Pa. St. 479, 49 Am. Dec. 533; *Kreuziger v. Chicago, etc., R. Co.*, 73 Wis. 158.

12. *Kellogg v. New York Cent., etc., R. Co.*, 79 N. Y. 72; *Althorff v. Wolfe*, 22 N. Y. 355; *Missouri, etc., R. Co. v. Flood* (Tex. Civ. App.), 79 S. W. 1106; *Pittsburg, etc., R. Co. v. Thompson*, 56 Ill. 138, 3 Am. Ry. Rep. 454; *North Pennsylvania R. Co.*

§ 14. Excessive or inadequate damages.—Where the damages awarded by the jury are either so large or so small as to be so obviously disproportionate to the injury proved as to force upon the mind the conviction that the jury have acted under the influence of a perverted judgment, or have been influenced by partiality or prejudice, or misled by a mistaken view of the merits of the case, it is the duty of the court to set aside the verdict as excessive or inadequate and grant a new trial; but when it is not thus obviously excessive or inadequate the verdict of the jury should be sustained. This rule is generally observed both as to compensatory and exemplary damages.¹³

v. Kirk, 90 Pa. St. 15; Harding v. Townshend, 43 Vt. 536, 5 Am. Rep. 304; Bradburn v. Great Western R. Co., L. R. 10 Exch. 1.

13. Clapp v. Hudson River R. Co., 19 Barb. (N. Y.) 461; Tinney v. New Jersey Steamboat Co., 5 Lans. (N. Y.) 507, 12 Abb. Pr. N. S. (N. Y.) 1; Mullady v. Brooklyn H. R. Co., 65 App. Div. (N. Y.) 549, 72 N. Y. Supp. 911; Sullivan v. Metropolitan St. Ry. Co., 54 App. Div. (N. Y.) 632, 66 N. Y. Supp. 609.

U. S.—Fell v. Northern Pac. R. Co., 44 Fed. 248.

Cal.—Morgan v. Southern Pac. R. Co., 95 Cal. 501, 29 Am. St. Rep. 143.

Ga.—Atlantic, etc., R. Co. v. Condor, 75 Ga. 51.

Ill.—Chicago, etc., R. Co. v. Chisholm, 79 Ill. 584.

Kan.—Union Pac. R. Co. v. Hand, 7 Kans. 380.

Ky.—Louisville Southern R. Co. v. Minogue, 90 Ky. 369, 29 Am. St. Rep. 378.

N. J.—Hanley v. North Jersey St. R. Co., (N. J. Sup.) 47 Atl. 445.

Tex.—International, etc., R. Co. v. Brazzil, 78 Tex. 314.

Va.—Farish v. Reigle, 11 Gratt. (Va.) 697, 62 Am. Dec. 666.

Wis.—Stutz v. Chicago, etc., R. Co., 73 Wis. 147, 9 Am. St. Rep. 769. See also Nellis' Street Railroad Accident Law, 609-630, and cases there cited.

CHAPTER XXVII.

INTERSTATE TRANSPORTATION.

- SECTION**
- 1. Regulation of interstate transportation.
 - 2. The Interstate Commerce Act.
 - 3. Carriers subject to the act.
 - 4. Charges must be just and reasonable.
 - 5. Unjust discrimination.
 - 6. Unjust discrimination in specific cases.
 - 7. Undue or unreasonable preference or advantage.
 - 8. Undue preference in particular cases.
 - 9. Equal facilities for interchange of traffic.
 - 10. Charges for long and short hauls.
 - 11. Schedules of rates, fares, and charges.
 - 12. Pooling or dividing freights or earnings.
 - 13. Interruption of continuous carriage.
 - 14. Mileage, excursion, or commutation tickets.
 - 15. Enforcement of the act.
 - 16. Railroad rate legislation.

§ 1. Regulation of interstate transportation.—The commerce clause of the Constitution provides that Congress shall have power “to regulate commerce with foreign nations and among the several States and with the Indian tribes.”¹ It is well settled that under this clause the power to regulate interstate commerce is vested exclusively in Congress.² Interstate commerce, or commerce among the several States of the union, consists in intercourse and traffic, including navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.³ Transportation is the means by which commerce is carried on,⁴ and is a constituent part of commerce

1. Const. U. S. art. 1, § 8, cl. 3.

States v. Joint Traffic Assoc., 171 U.

2. Hannibal, etc., R. Co. v. Husen, 95 U. S. 469; Brown v. Houston, 114 U. S. 622; Crutcher v. Kentucky, 141 U. S. 57; State Freight Tax Case, 15 Wall. (U. S.) 232.

S. 505; Hooper v. California, 155 U. S. 648; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Welton v. Missouri, 91 U. S. 280; Gibbons v. Ogden, 9 Wheat. (U. S.) 194.

3. Henderson v. New York, 92 U. S. 259; Addyston Pipe, etc., Co. v. United States, 175 U. S. 211; United

Council Bluffs v. Kansas City, etc., R. Co., 45 Iowa, 338, 24 Am. Rep. 773.

itself.⁵ The transportation of freight or passengers from one State to another, or through more than one State, either by land or water, constitutes interstate commerce, regardless of the distance from which it comes or to which it is bound before or after crossing a State line.⁶ The means of transportation and the time of transit are immaterial. The business of receiving and landing passengers and freight is incident to their transportation and constitutes a part of interstate commerce.⁷

§ 2. The Interstate Commerce Act.—By the Interstate Commerce act of 1887, Congress, in pursuance of its constitutional power to regulate commerce among the States, assumed control of the interstate railway traffic of the country. The principle objects of that act were “to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar conditions and circumstances; to prevent undue and unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights.”⁸ To secure these ends certain regulations applicable to railway carriers engaged in interstate transportation were established, and a commission created charged with the administration and enforcement of the act. The act has been held to be constitutional,⁹ and to be liberally construed so as to promote and facilitate commerce, and not to hamper or destroy it, and not so as to abridge or take away the common law right

5. Hopkins v. United States, 171 U. S. 578; Bowman v. Chicago, etc., R. Co., 125 U. S. 479; Kaeiser v. Illinois Cent. R. Co., 18 Fed. 151; Chicago, etc., R. Co. v. Fuller, 17 Wall. (U. S.) 560.

6. Philadelphia, etc., Steamship Co. v. Pennsylvania, 122 U. S. 326; Rhodes v. Iowa, 170 U. S. 412; North River Steamboat Co. v. Livingston, 3 Cow. (N. Y.) 713; People v. Raymond, 34 Cal. 492; Fry v. State, 63 Ind. 562; Bennett v. American Express Co., 83 Me. 236; State v. Carri gan, 39 N. J. L. 35; Texas, etc., R. Co. v. Avery (Tex. Civ. App.), 33 S.

W. 704; Fargo v. Michigan, 121 U. S. 230; Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204.

7. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

8. Interstate Commerce Com. v. Cincinnati, etc., R. Co., 167 U. S. 510; Texas, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 197; Interstate Commerce Com. v. Baltimore, etc., R. Co., 145 U. S. 263; United States v. Missouri Pac. R. Co., 65 Fed. 905.

9. Interstate Commerce Com. v. Brimson, 154 U. S. 448; Bullard v. Northern Pac. R. Co., 10 Mont. 168.

of the carrier to make contracts, and adopt proper business methods, further than its terms and recognized purposes required. The act was intended primarily for the benefit of interstate traffic and not for the benefit of the carriers.¹⁰ The interstate commerce commission has no legislative powers. It is not a court, and has no judicial power, although it has and exercises a *quasi* judicial power. It is an administrative board exercising administrative powers.¹¹ The powers and duties of the commission are to some extent defined by the act. Generally, it is authorized to inquire into the management of the business of all common carriers subject to the provisions of the act, and to demand from such carriers full and complete information necessary to enable the commission to perform its duties, and it has power to execute and enforce the provisions of the act. The act provides for complaints, investigations, reports, and orders as to alleged violations.¹² It is not within the scope of this work to treat of these subjects in detail. The commission has no power to fix or establish rates for the future, either maximum or minimum,¹³ or to require the adoption

10. Interstate Commerce Com. v. East Tennessee, etc., R. Co., 85 Fed. 107; Interstate Commerce Com. v. Louisville, etc., R. Co., 73 Fed. 409; Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 63 Fed. 775; Chicago, etc., R. Co. v. Osborne, 52 Fed. 914; Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. 567. See also cases cited in preceding notes to this section.

11. See cases in preceding notes to this section. Interstate Commerce Com. v. Cincinnati, etc., R. Co., 76 Fed. 183, 64 Fed. 981; Cincinnati, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 184; Maximum Rate Case, 167 U. S. 479. "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act. The power to prescribe a tariff of rates for carriage

by a common carrier is a legislative and not an administrative or judicial function, and having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attached to such carriage, is a power of supreme delicacy and importance." Maximum Rate Case, 167 U. S. 479.

12. See cases cited in note 1 to this section.

13. Southern Pac. R. Co. v. Colorado Fuel & Iron Co., 101 Fed. 779, 42 C. C. A. 12; Interstate Commerce Com. v. Chicago, etc., R. Co., 94 Fed. 272; Interstate Commerce Com. v. Northeastern R. Co., 83 Fed. 611; Farmers L. & T. Co. v. Northern Pac. R. Co., 83 Fed. 249; Shinkle, etc., R. Co. v. Louisville, etc., R. Co., 76 Fed. 1007; Interstate Commerce Com. v. Lehigh Valley R. Co., 74 Fed. 784; Interstate Commerce Com. v. Ala-

of rates on an equal and uniform mileage basis,¹⁴ or to raise rates,¹⁵ or to establish through rates between connecting lines.¹⁶ Neither have the courts power to fix rates.¹⁷ The authority of the commission and the courts is limited to determining whether the rates fixed by the carriers are for any reason in violation of the statute.¹⁸ A common carrier is prohibited by the common law from making any unjust and unreasonable charges, and this common law prohibition has been reinforced by the interstate commerce act as to all interstate rates of railway companies.¹⁹ The legislature of a State can regulate the charges of railway companies for the transportation of passengers and freight wholly within the State,²⁰ but a State cannot regulate the charges in respect to interstate commerce.²¹ The power of a State to regulate the charges of railway companies in respect of transportation wholly within the State is subject to the Fourteenth Amendment of the Constitution of the United States and a State statute, or a regulation made under authority of a State statute, limiting or fixing the rates of a railway company within the State in such a manner as to deprive the company of reasonable compensation, would be in violation of the Constitution.²² While Congress can prohibit railway companies from charging more than reasonable compensation for the

bama M. R. Co., 69 Fed. 227, 74 Fed. 715; Interstate Commerce Com. v. Western, etc., R. Co., 93 Fed. 83; Thatcher v. Delaware, etc., Canal Co., 1 Int. Com. C. Rep. 152; Thatcher v. Fitchburg R. Co., 1 Int. Com. Rep. 356. See also cases cited in previous notes to this section.

See also Act to Regulate Commerce, approved February 4, 1887, as amended by act approved March 2, 1889 (act approved February 10, 1891, act approved February 8, 1895, and act approved February 19, 1903).

14. LaCrosse Mfrs., etc., Union v. Chicago, etc., R. Co., 2 Int. Com. Rep. 9, 1 Int. Com. C. Rep. 629.

15. Poughkeepsie Iron Co. v. New York Cent., etc., R. Co., 3 Int. Com. Rep. 248, 4 Int. Com. C. Rep. 195; Matter of Chicago, etc., R. Co., 2 Int. Com. Rep. 137, 2 Int. Com. C. Rep.

231; Interstate Commerce Com. v. Cincinnati, etc., R. Co., 56 Fed. 925.

16. Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. 567.

17. Interstate Commerce Com. v. East Tennessee, etc., R. Co., 85 Fed. 107.

18. Thatcher v. Delaware, etc., Canal Co., 1 Int. Com. C. Rep. 152; Coxe v. Lehigh Valley R. Co., 3 Int. Com. Rep. 460, 4 Int. Com. C. Rep. 535.

19. Maximum Rate Case, 167 U. S. 479; Cincinnati, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 184.

20. Munn v. Illinois, 94 U. S. 113; Chicago, etc., Ry. Co. v. Iowa, 94 U. S. 155.

21. Hanley v. Kansas City S. Ry. Co., 187 U. S. 617.

22. Smyth v. Ames, 169 U. S. 466.

services rendered by them in interstate transportation, it has not unlimited power to interfere with them in their interstate transportation, or to exercise unlimited control over interstate railway companies in the use of their property, or in the transaction of their business. It is well settled that the Fifth Amendment and the Fourteenth Amendment not only prevent Congress and the several States from actually confiscating property or destroying its value, but also protect their liberty of contract and the liberty of the owner of property in its use and enjoyment.²³ Rates can be fixed by Congress, or a commission created by Congress, only on the basis of allowing the carrier to charge in each case reasonable compensation for the services rendered. Whether the rate charged by the carrier requires the payment of more than reasonable compensation for the services rendered is the question in each instance.²⁴ It has been held that "the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public."²⁵ But this may not necessarily confine such rates to a reasonable net return on the original cost, or the cost of reproduction, of the property. Other elements may be taken into consideration in determining whether rates will pay a railway company a reasonable compensation for its services.²⁶ The commission has no authority to establish through routes by requiring connecting carriers to make a joint tariff for through routing and billing.²⁷

§ 3. Carriers subject to the act.—The carriers subject to the Interstate Commerce Act are those engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used,²⁸ under a common control,

23. Lake Shore, etc., R. Co. v. Smith, 173 U. S. 684; Allgeyer v. Louisiana, 165 U. S. 578; Lochner v. New York, 25 S. Ct. 539, Adv. S. U. S. 539.

24. Cotting v. Stock Yards Co., 183 U. S. 79; Canada Southern Ry. Co. v. International Bridge Co., 8 App. Cas. 723.

25. Smyth v. Ames, 169 U. S. 466.

26. San Diego Land Co. v. Na-

tional City, 174 U. S. 754. See also cases cited last two preceding notes.

27. New York, etc., R. Co. v. Platt, 7 Int. Com. Rep. 323; Gulf, etc., R. Co. v. Miami Steamship Co., 86 Fed. 407. See also cases cited note 60, § 9, *post*.

28. United States v. Morsman, 42 Fed. 448, only railway carriers are included.

Where commerce is carried by

management, or arrangement, for a continuous carriage or shipment,²⁹ from one State or territory of the United States, or the District of Columbia, to any other State or territory of the United States, or the District of Columbia, or from any place in the United States through a foreign country to any other place in the United States, and also in the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of trans-shipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country.³⁰ The act is intended to regulate all the commerce subject to the exclusive jurisdiction of the United States, including the agents and instrumentalities employed and the commodities carried, with only the limitations provided in the act itself.³¹ It has no application to the transportation of passengers or property, or to the receiving, delivering, storing or handling of property, wholly within one State, and not shipped to a foreign country from any State or territory or from a foreign country to any State or territory.³² It does not apply to any water craft unless it is used in

way of the high seas, though from one point in a State to another in the same State, it is under federal control. *Lord v. Steamship Co.*, 102 U. S. 541. But see *New Orleans Exch. v. Ry. Co.*, 2 Int. Com. C. Rep. 375; *State v. Ry. Co.* (Minn.), 41 N. W. 1047.

Carrying passengers on a steamboat is not interstate commerce, although the boat may touch the shores of different States. *State v. Seagraves* (Mo.), 85 S. W. 925.

29. *Cincinnati, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 184; *Trammell v. Clyde Steamship Co.*, 5 Int. Com. C. Rep. 324; *Boston Fruit, etc., Exch. v. New York, etc., R. Co.*, 3 Int. Com. Rep. 493, 4 Int. Com. C. Rep. 664; *Ex parte Koehler*, 30 Fed. 867; *Interstate Commerce Com. v. Cincinnati, etc., R. Co.*, 56 Fed. 925; *Ft. Worth, etc., R. Co. v. Whitehead*, 6 Tex. Civ. App. 595; *Re An-*

napolis, etc., R. Co., 1 Int. Com. Rep. 315; *Chicago, etc., R. Co. v. Osborne*, 52 Fed. 912.

30. *Interstate Commerce Act, § 1; Texas, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 197, carriage through foreign country; *Interstate Commerce Com. v. Brimson*, 154 U. S. 457.

31. *Mattingly v. Pennsylvania Co.*, 2 Int. Com. Rep. 806, 3 Int. Com. C. Rep. 592; *Savery v. New York Cent., etc., R. Co.*, 2 Int. Com. Rep. 210, 2 Int. Com. C. Rep. 338, the act does not extend to immigrants arriving at the port of New York for interior points.

32. *New Jersey Fruit Exch. v Central R. Co.*, 2 Int. Com. Rep. 84 2 Int. Com. C. Rep. 142; *Missouri etc., Co. v. Cape Girardeau, etc., R. Co.*, 1 Int. Com. Rep. 607, 1 Int. Com. C. Rep. 30. See also cases cited in preceding notes to this section.

connection with a railway for transportation between the places, in the manner, and by the carriers described in the act.³³ The act does not apply to transfer and switching companies,³⁴ or express companies,³⁵ or bridge or ferry companies,³⁶ or stock yards companies,³⁷ not operating railway lines. But a railroad company conducting the express business is subject to the act.³⁸

§ 4. Charges must be reasonable and just.—Section one of the Interstate Commerce Act provides that all charges made for any services rendered or to be rendered in the transportation of passengers or of property or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such services is prohibited and declared to be unlawful.³⁹ This has been held to be an express adoption by the national legislature of the principles of the common law.⁴⁰ In determining the reasonableness of rates the legitimate interests of carrying companies, as well as of traders and shippers, should be considered, whether they afford the carrier a proper return for the service rendered, as well as the result of the business to the shipper or producer of the traffic.⁴¹ Common carriers may under this act make special contracts looking to the increase of their business, classify their traffic, adjust

33. *Re Joint Water, etc., Lines*, 2 Int. Com. Rep. 486, 2 Int. Com. C. Rep. 645.

34. *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. 567.

35. *Southern Indiana Express Co. v. United States Express Co.*, 92 Fed. 1022, 88 Fed. 659.

36. *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. 567, but a railway company using a bridge is subject to the act.

37. *Cotting v. Kansas City Stock Yards Co.*, 82 Fed. 839.

38. *Pacific Express Co. v. Seibert*, 44 Fed. 310; *United States v. Morsman*, 42 Fed. 448; *Re Express Co.*, 1 Int. Com. Rep. 677.

39. *Interstate Commerce Com. v. Cincinnati, etc., R. Co.*, 167 U. S.

479; *Interstate Commerce Com. v. Brimson*, 154 U. S. 447.

40. *Tift v. Southern R. Co.*, 123 Fed. 789.

41. *Texas, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 197; *Loud v. South Carolina, etc., R. Co.*, 4 Int. Com. Rep. 205; *Interstate Commerce Com. v. Alabama Midland R. Co.*, 74 Fed. 715; *Proctor v. Cincinnati, etc., R. Co.*, 3 Int. Com. Rep. 131, 4 Int. Com. C. Rep. 87; *Buchanan v. Northern Pac. R. Co.*, 3 Int. Com. Rep. 655, 5 Int. Com. C. Rep. 7; *Martin v. Southern Pac. R. Co.*, 2 Int. Com. Rep. 1, 2 Int. Com. C. Rep. 1; *Rice v. Western New York, etc., R. Co.*, 2 Int. Com. Rep. 298, 2 Int. Com. C. Rep. 389; *Hurlburt v. Lake Shore, etc., R. Co.*, 2 Int.

and apportion their rates so as to meet the necessities of commerce, and generally manage their important interests on the same principles which are recognized as sound in other trades and pursuits, subject to the prohibition that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or advantage, or subject to undue prejudice or disadvantage, persons or traffic similarly circumstanced.⁴² Whether their charges are reasonable or unreasonable is a question of fact.⁴³ The rate may be unreasonable because it is too low as well as because it is too high. In the one case it would be unjust to the stockholders, in the other to the shippers.⁴⁴ Interstate carriers have power to make commodity class rates and special class rates to meet the circumstances and conditions of traffic along their lines, and the market value of the commodities, the shipper's representations to the public as to their character, the volume of traffic, the special services by a carrier, such as the transportation of perishable freight, in fact, the interests of the carrier, the shipper and the general public, are to be considered.⁴⁵ Competition

Com. Rep. 81, 2 Int. Com. C. Rep. 122; Potter Mfg. Co. v. Chicago, etc., R. Co., 5 Int. Com. C. Rep. 514; Squire v. Michigan Cent. R. Co., 4 Int. Com. C. Rep. 611.

Reasonableness affected by distance carried.—Manufacturers, etc., Union v. Minneapolis, etc., R. Co., 3 Int. Com. Rep. 115, 4 Int. Com. C. Rep. 79; Lincoln Board of Trade v. Burlington, etc., R. Co., 2 Int. Com. Rep. 95, 2 Int. Com. C. Rep. 147; Business Men's Assoc. v. Chicago, etc., R. Co., 2 Int. Com. Rep. 41, 2 Int. Com. C. Rep. 52.

Classification of freights.—Thurber v. New York Cent., etc., R. Co., 2 Int. Com. Rep. 742, 3 Int. Com. C. Rep. 473; Harvard Co. v. Pennsylvania Co., 3 Int. Com. Rep. 257, 4 Int. Com. C. Rep. 212; Myers v. Pennsylvania Co., 2 Int. Com. Rep. 403, 2 Int. Com. C. Rep. 573; New Orleans Cotton Exch. v. Illinois Cent. R. Co., 2 Int. Com. Rep. 777, 3 Int. Com. C. Rep. 534.

Through and local rates.—Brady v. Pennsylvania R. Co., 2 Int. Com. Rep. 78, 2 Int. Com. C. Rep. 131; *Re* Passenger Tariffs, 2 Int. Com. Rep. 445, 2 Int. Com. C. Rep. 649.

42. Interstate Commerce Com. v. Alabama M. R. Co., 69 Fed. 227.

43. Cincinnati, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 184; Texas, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 197.

44. Interstate Commerce Com. v. Cincinnati, etc., R. Co., 167 U. S. 511.

45. New York Board of Trade v. Pennsylvania R. Co., 3 Int. Com. Rep. 417, 4 Int. Com. C. Rep. 447; Warner v. New York, etc., R. Co., 3 Int. Com. Rep. 74, 4 Int. Com. C. Rep. 32; Delaware State Grange, etc., v. New York, etc., R. Co., 3 Int. Com. Rep. 554, 4 Int. Com. C. Rep. 588; Covington, etc., R. Co. v. Sandford, 164 U. S. 578; Perry v. Florida Cent., etc., R. Co., 3 Int. Com. Rep. 740, 5 Int. Com. C. Rep. 97; Howell v. New

that affects rates should be considered as well in cases of traffic originating in foreign ports,⁴⁶ as in the case of traffic originating within the limits of the United States,⁴⁷ and in deciding whether rates and charges made at a low rate to secure freights, which would otherwise go by other competitive routes, are or are not undue and unjust, the fair interests of the carrier companies, and the welfare of the community, which is to receive and consume the commodities, are to be considered. For a special service by the carrier requiring quick movement, prompt delivery at destination, special fitting up of cars, their withdrawal from other service, and their return empty on fast time, a higher rate than for the carriage of ordinary freight is reasonable and just, but it should bear a just relation to the value of the service to the traffic, and is not wholly in the discretion of the carrier.⁴⁸ So, carriers may charge lower rates under special conditions, as for carrying coal in summer months in order to keep its coal cars and coal crews employed,⁴⁹ or for the transportation of ten or more persons from the same place on "party rate tickets" at a rate less than that charged an individual for a like transportation,⁵⁰ provided such rates are offered in good faith to all persons upon equal terms. Equality of rates is the general policy of the law. In determining whether rates are just and reasonable in themselves, a comparison may be made between the particular rates charged and those accepted else-

York, etc., R. Co., 2 Int. Com. Rep. 162, 2 Int. Com. C. Rep. 272; Riddle v. New York, etc., R. Co., 1 Int. Com. Rep. 787, 1 Int. Com. C. Rep. 594, failure of shipper to secure profit not conclusive that rate is unreasonable; Reagan v. Farmers L. & T. Co., 154 U. S. 162, failure of carrier to secure profit is not conclusive that rate is unjust and unreasonable.

46. Interstate Commerce Com. v. Southern R. Co., 105 Fed. 703.

47. Squire v. Michigan Cent. R. Co., 3 Int. Com. Rep. 515, 4 Int. Com. C. Rep. 611; La Crosse Manufacturers', etc., Union v. Chicago, etc., R. Co., 2 Int. Com. Rep. 9; Business Men's Assoc. v. Chicago, etc., R. Co., 2 Int. Com. Rep. 41, 2 Int. Com. C. Rep. 52; Interstate Commerce Com.

v. Western, etc., R. Co., 93 Fed. 84.

48. Delaware State Grange, etc., Co. v. New York, etc., R. Co., 3 Int. Com. Rep. 561, 4 Int. Com. C. Rep. 605; Boston Fruit, etc., Exch. v. New York, etc., R. Co., 3 Int. Com. Rep. 493, 4 Int. Com. Rep. 664; Loud v. South Carolina R. Co., 5 Int. Com. C. Rep. 529.

49. Interstate Commerce Com. v. Louisville, etc., R. Co., 73 Fed. 409. See Interstate Commerce Com. v. Lehigh Valley R. Co., 74 Fed. 784, as to comparison of average cost of carriage on entire system with that on a particular line or part of the system.

50. Interstate Commerce Com. v. Alabama Midland R. Co., 168 U. S. 165. And see cases cited note 8, § 6, *post*.

where for similar services, as for a longer and a shorter haul,⁵¹ but the rates to other points are only circumstances to be considered in connection with other proof.⁵² A finding that the rates charged by railroads for shipment to a particular point are unreasonable in themselves, cannot properly be based on evidence which only tends to show that they are too high as compared with the rates charged between the initial points and one or two other points.⁵³ A reduction in rates does not necessarily imply that former rates were unreasonable, as increase in volume of traffic and decrease in cost of transportation may account therefor.⁵⁴ So, an advance in rates may be satisfactorily accounted for, but it may be held unjust where rates which have long been maintained are advanced where the traffic affected is large, important, and constantly increasing.⁵⁵ The fact that a railroad line operated as a part of a great railway system, considered as a separate road, fails to pay expenses, does not justify the charging of unjust and unreasonable rates nor undue discrimination in rates.⁵⁶

§ 5. Unjust discrimination.—Section two of the Interstate Commerce Act provides in substance that if any common carrier subject to its provisions shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and condi-

51. Interstate Commerce Com. v. East Tennessee, etc., R. Co., 85 Fed. 107.

52. Interstate Commerce Com. v. Louisville, etc., R. Co., 73 Fed. 409; Interstate Commerce Com. v. Western, etc., R. Co., 88 Fed. 186.

53. Interstate Commerce Com. v. Nashville, etc., R. Co., 120 Fed. 934, 57 C. C. A. 224.

54. Loud v. South Carolina R. Co., 5 Int. Com. C. Rep. 529.

55. Railroad Commission v. Savannah, etc., R. Co., 3 Int. Com. Rep.

414, 5 Int. Com. C. Rep. 13; Coxe v Lehigh Valley R. Co., 3 Int. Com. Rep. 460, 4 Int. Com. C. Rep. 535.

56. Interstate Commerce Com. v. Louisville & N. R. Co., 118 Fed. 613

The making of a through rate on shipments by the joint action of connecting railroads is the act of each, and brings each within the scope of the interstate commerce act and renders it responsible for such rate, without regard to the proportion thereof received for its own service. *Id.*

tions, such common carrier shall be deemed guilty of unjust discrimination, which is thereby prohibited and declared to be unlawful.⁵⁷ This section was modeled on the "Equality Clause" of the English Railway act,⁵⁸ and its purpose is to enforce equality as to rates between shippers over the same line under substantially the same circumstances and conditions.⁵⁹ It does not include unjust discriminations as to conveniences and facilities, which is provided for in section three,⁶⁰ or discrimination as between localities.⁶¹ One act of the carrier may, however, violate each of the first four sections of the act.⁶² A shipper has, by the common law, a right of action for unjust discrimination in freight charges.⁶³ But mere inequality of rates, the charges of transportation being reasonable, did not constitute unjust discrimination under the common law,⁶⁴ as the rule is now under the Interstate Commerce Act, when the transportation is under substantially similar circumstances and conditions.⁶⁵ Actual discrimination in rates charged is necessary to constitute a violation of the Interstate Commerce Act; and the mere making or offering of a discriminating rate, under which it is not shown that any shipment was ever made, constitutes no legal injury to a shipper who is charged with a higher

57. Interstate Commerce Com. v. Brimson, 154 U. S. 447; Mattingly v. Pennsylvania Co., 2 Int. Com. Rep. 806, 3 Int. Com. C. Rep. 592; Interstate Commerce Com. v. Texas, etc., R. Co., 52 Fed. 187; Cutting v. Florida R., etc., Co., 30 Fed. 663; United States v. Egan, 47 Fed. 112; *Re* Underbilling, 1 Int. Com. Rep. 813, 1 Int. Com. C. Rep. 633; Heck v. East Tennessee, etc., R. Co., 1 Int. Com. Rep. 775, 1 Int. Com. C. Rep. 495.

58. Texas, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 197.

59. Interstate Commerce Com. v. Alabama Midland R. Co., 168 U. S. 144; Wight v. United States, 167 U. S. 512.

60. United States v. Delaware, etc., R. Co., 40 Fed. 101, section three includes every form of unjust discrimination, including rates.

61. Interstate Commerce Com. v. Western, etc., R. Co., 88 Fed. 186.

62. Phillips v. Louisville & N. R. Co., 8 Int. Com. Rep. 93; Interstate Commerce Com. v. Western, etc., R. Co., 93 Fed. 83, 35 C. C. A. 217.

63. Murray v. Chicago, etc., R. Co., 92 Fed. 868, 35 C. C. A. 62; State v. Cincinnati, etc., R. Co., 47 Ohio St. 130; Louisville, etc., R. Co. v. Wilson, 132 Ind. 517; Fitzgerald v. Grand Trunk R. Co., 63 Vt. 169; Cook v. Chicago, etc., R. Co., 81 Iowa, 551.

64. Interstate Commerce Com. v. Baltimore, etc., R. Co., 145 U. S. 263; Missouri Pac. R. Co. v. Texas, etc., R. Co., 30 Fed. 2.

65. United States v. Delaware, etc., R. Co., 40 Fed. 101. See also Great Western R. Co. v. Sutton, L. R. 4 H. L. 226.

rate.⁶⁶ Only unjust and unreasonable discriminations are illegal and where there is an adequate consideration for reduced rates such rates are not an unjust discrimination.⁶⁷ It is not necessary that a preference in rates should be brought about by means of some "device" to render it illegal,⁶⁸ but where a mere device is used to cover an intentional giving of a less rate it will render the transaction unlawful.⁶⁹ The burden is on the shipper to prove unjust discrimination where the rates are equal;⁷⁰ but the burden is on the carrier to justify the rates where they are unequal.⁷¹ The proportion in which freight earned by two connecting railroads under a joint-tariff schedule is divided between them is a matter for their consideration alone, and cannot be taken cognizance of by a court for the purpose of determining that the share received by one constitutes an unjust and discriminative rate.⁷² The classification of freights is not unlawful unless it is used as a device to cover unjust discrimination.⁷³ Freights are generally and properly classified according to expense of carriage, volume of business, weight, bulk, value, risk, competition, and other considerations affecting the cost and value of the transportation, and goods which are as matter of fact in the same class should be carried at the same rate.⁷⁴ Goods classified improperly as compared with the classifica-

66. Lehigh Valley R. Co. v. Rainey, 112 Fed. 487.

67. Interstate Commerce Com. v. Baltimore, etc., R. Co., 145 U. S. 281; Interstate Commerce Com. v. Texas, etc., R. Co., 52 Fed. 187.

68. Scofield v. Lake Shore, etc., R. Co., 2 Int. Com. Rep. 67, 2 Int. Com. C. Rep. 90.

69. Interstate Commerce Com. v. Chesapeake & O. Ry. Co., 128 Fed. 59.

70. Brownell v. Columbus, etc., R. Co., 4 Int. Com. Rep. 285, 5 Int. Com. C. Rep. 638.

71. McMorran v. Grand Trunk R. Co., 2 Int. Com. Rep. 604, 3 Int. Com. C. Rep. 254.

72. Allen & Lewis v. Oregon R. & Nav. Co., 98 Fed. 16.

73. Warner v. New York Cent., etc., R. Co., 3 Int. Com. Rep. 74, 4 Int. Com. C. Rep. 32; New York

Board of Trade v. Pennsylvania R. Co., 3 Int. Com. Rep. 417, 4 Int. Com. C. Rep. 447; Coxe v. Lehigh Valley R. Co., 3 Int. Com. Rep. 460, 4 Int. Com. C. Rep. 535; Brownell v. Columbus, etc., R. Co., 4 Int. Com. Rep. 285, 5 Int. Com. C. Rep. 638.

74. Independent Refiners Assoc. v. Western New York, etc., R. Co., 4 Int. Com. Rep. 162, 5 Int. Com. C. Rep. 415; Board of Trade v. Chicago, etc., R. Co., 3 Int. Com. Rep. 233, 4 Int. Com. C. Rep. 158; Anthony Salt Co. v. Missouri Pac. R. Co., 4 Int. Com. Rep. 33, 5 Int. Com. C. Rep. 299; Martin v. Southern Pac. R. Co., Int. Com. Rep. 1, 2 Int. Com. C. Rep. 1; Bates v. Pennsylvania R. Co., Int. Com. Rep. 715, 3 Int. Com. C. Rep. 535; Pyle v. East Tennessee, etc., R. Co., 1 Int. Com. Rep. 767, Int. Com. C. Rep. 465; New York

tion of analogous goods constitutes unlawful discrimination.⁷⁵ Railway companies subject to the provisions of the Interstate Commerce Act are only bound to give equal rates to all persons for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, and inequality of conditions or difference in circumstances justifies an equality of rates.⁷⁶ It devolves upon the carrier to determine in the first instance, in fixing and adjusting rates, whether substantially similar circumstances and conditions exist or the reverse,⁷⁷ and its action is subject to revision by the commission, and ultimately by the courts.⁷⁸ A difference in the cost or character of the service may justify a difference in rates,⁷⁹ but no device, such as payment of unreasonable rent for use of cars furnished by shippers, can be practiced to evade the duty of equal

Board of Trade v. Pennsylvania R. Co., 3 Int. Com. Rep. 417, 4 Int. Com. C. Rep. 447; Andrews Soap Co. v. Pittsburgh, etc., R. Co., 3 Int. Com. Rep. 77, 4 Int. Com. C. Rep. 41; Beaver v. Pittsburg, etc., R. Co., 3 Int. Com. Rep. 564, 4 Int. Com. C. Rep. 733, soaps used for like purposes should receive the same classification and rates; McMorran v. Grand Trunk R. Co., 2 Int. Com. Rep. 604, 3 Int. Com. C. Rep. 252, grain and grain products should be classified the same; Kauffman Milling Co. v. Missouri Pac. R. Co., 3 Int. Com. Rep. 400, 4 Int. Com. C. Rep. 417, wheat and wheat flour belong to the same class; Rice v. Western New York, etc., R. Co., 3 Int. Com. Rep. 162, 4 Int. Com. C. Rep. 131, oil and its products belong to the same class; Reynolds v. Western New York, etc., R. Co., 1 Int. Com. Rep. 685, 1 Int. Com. C. Rep. 393, railroad ties and lumber should be classed the same.

75. Brownell v. Columbus, etc., R. Co., 4 Int. Com. Rep. 285, 5 Int. Com. C. Rep. 638; Reynolds v. Western New York, etc., R. Co., *supra*.

76. Atchison, etc., R. Co. v. Den-

ver, etc., R. Co., 110 U. S. 667; Gulf, etc., R. Co. v. Miami Steamship Co., 86 Fed. 407; Interstate Commerce Com. v. Louisville, etc., R. Co., 73 Fed. 409; Burton Stock Car Co. v. Chicago, etc., R. Co., 1 Int. Com. Rep. 329, 1 Int. Com. C. Rep. 132; Larrison v. Chicago, etc., R. Co., 1 Int. Com. Rep. 369, 1 Int. Com. C. Rep. 147; United States v. Tozer, 39 Fed. 369; Cowan v. Bond, 39 Fed. 54. See also cases cited notes 58, 59 and 75 to this section.

Whether circumstances and conditions are substantially similar is a question of fact. Detroit, etc., R. Co. v. Interstate Commerce Com., 74 Fed. 803, 43 U. S. App. 308.

77. Interstate Commerce Com. v. Alabama Midland R. Co., 168 U. S. 169.

78. Louisville, etc., R. Co. v. Behlmer, 175 U. S. 648; Interstate Commerce Com. v. East Tennessee, etc., R. Co., 85 Fed. 107.

79. Interstate Commerce Com. v. Texas, etc., R. Co., 52 Fed. 187; United States v. Delaware, etc., R. Co., 40 Fed. 101.

charges for equal service.⁸⁰ In deciding as to the lawfulness of lower rates to import traffic than to domestic traffic, in order to secure foreign freights which would otherwise go by other competitive routes, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered. Ocean competition may constitute a dissimilar condition, and circumstances and conditions which exist beyond the seaboard of the United States can be legitimately regarded for the purpose of justifying a difference in rates charged by railroads between import and domestic traffic.⁸¹ But competition between rival routes is a condition to be considered in reference to the phrase "under substantially similar conditions and circumstances," in the third and fourth sections relative to undue preferences and long and short hauls, rather than as used in this section, where it refers to the matter of carriage merely.⁸² The term "a like kind of traffic," as used in this section, does not mean traffic that is identical, but traffic that is of "a like kind" with other freight in the elements of a fair and just classification for the purpose of arriving at a just and reasonable rate and a rate that will avoid unjust discrimination and unlawful preference.⁸³

§ 6. Unjust discrimination is specific cases.—A railroad company is not required by the interstate commerce act to give the same carload rates on interstate shipments to forwarding agents who solicit property for shipment from different owners, each having less than a carload, and combine it into carload lots, that it makes on carload shipments by a single owner;⁸⁴ nor the same rates on quantities less than carloads that it does on carload lots;⁸⁵ but an excessive difference in such rates which would destroy com-

80. Rice v. Western New York, etc., R. Co., 3 Int. Com. Rep. 162, 4 Int. Com. C. Rep. 131; *Re Relative Tank, etc., Rates on Oil*, 2 Int. Com. Rep. 245, 2 Int. Com. C. Rep. 365.

81. Texas, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 197. But see Interstate Commerce Com. v. Texas, etc., R. Co., 52 Fed. 189. *Compare Burlington, etc., R. Co. v. Northwestern Fuel Co.*, 31 Fed. 652;

Hays v. Pennsylvania Co., 12 Fed. 309.

82. Wight v. United States, 167 U. S. 512; *Interstate Commerce Com. v. Alabama Midland R. Co.*, 168 U. S. 144.

83. New York Board of Trade v. Pennsylvania R. Co., 3 Int. Com. Rep. 417, 4 Int. Com. C. Rep. 447.

84. Lundquist v. Grand Trunk Western Ry. Co., 121 Fed. 915.

petition between large and small dealers is an unlawful discrimination.⁸⁶ Discounts from schedule rates for large shipments constitute unjust discrimination,⁸⁷ but a guarantee of large quantities and full train loads at regular periods justifies a reduced rate, where the object of the carrier is to obtain a greater remunerative profit by the diminished cost of carriage.⁸⁸ Excessive mileage paid for the use of the shipper's cars amounts to a rebate and is an unjust discrimination, but a compensation for the use or rent of such cars, which will not put others at a disadvantage, is lawful.⁸⁹ An arbitrary manufacturer's rate to some persons and not to others is unlawful.⁹⁰ Group rates on shipments from all points within a certain territory do not, however, constitute unjust discrimination in favor of the more distant shippers as against those nearer the common terminus.⁹¹ The doctrine that an estimated proportion of a through rate must not be less according to distance than the local rate from an intermediate point to another point named in the line covered by the through rate is untenable,⁹² provided

85. Murphy v. Wabash R. Co., 3 Int. Com. Rep. 725, 5 Int. Com. C. Rep. 122; Brownell v. Columbus, etc., R. Co., 4 Int. Com. Rep. 285, 5 Int. Com. C. Rep. 638; Thurber v. New York Cent., etc., R. Co., 2 Int. Com. Rep. 742, 3 Int. Com. C. Rep. 473.

86. See cases cited in last preceding note.

87. Providence Coal Co. v. Providence, etc., R. Co., 1 Int. Com. Rep. 363, 1 Int. Com. C. Rep. 107; United States v. Tozer, 39 Fed. 369.

88. Interstate Commerce Com. v. Texas, etc., R. Co., 52 Fed. 187.

89. Independent Refiners' Assoc. v. Western New York, etc., R. Co., 4 Int. Com. Rep. 162, 5 Int. Com. C. Rep. 415; Rice v. Western New York, etc., R. Co., 3 Int. Com. Rep. 162, 4 Int. Com. C. Rep. 131; Scofield v. Lake Shore, etc., R. Co., 2 Int. Com. Rep. 67, 2 Int. Com. C. Rep. 90; Shamberg v. Delaware, etc., R. Co., 3 Int. Com. Rep. 502, 4 Int. Com. C. Rep. 630; Rice v. Louisville,

etc., R. Co., 1 Int. Com. Rep. 722, 1 Int. Com. C. Rep. 503.

90. Matter of Louisville, etc., R. Co., 5 Int. Com. C. Rep. 466.

91. Howell v. New York, etc., R. Co., 2 Int. Com. Rep. 162, 2 Int. Com. C. Rep. 272; Rend v. Chicago, etc., R. Co., 2 Int. Com. Rep. 313, 2 Int. Com. C. Rep. 540; Imperial Coal Co. v. Pittsburgh, etc., R. Co., 2 Int. Com. Rep. 436, 2 Int. Com. C. Rep. 618.

92. Poughkeepsie Iron Co. v. New York Cent., etc., R. Co., 3 Int. Com. Rep. 248, 4 Int. Com. C. Rep. 195; Coxe v. Lehigh Valley R. Co., 3 Int. Com. Rep. 460, 4 Int. Com. C. Rep. 535; Interstate Commerce Co. v. Baltimore, etc., R. Co., 145 U. S. 281, 43 Fed. 37; Milwaukee Chamber of Commerce v. Flint, etc., R. Co., 2 Int. Com. Rep. 393, 2 Int. Com. C. Rep. 553; Parsons v. Chicago, etc., R. Co., 63 Fed. 903, 167 U. S. 447; Chicago, etc., R. Co. v. Osborne, 52 Fed. 912, rule applied to connecting lines.

that the local rate is reasonable when compared with the through rate,⁹³ and that the provisions of section four as to long and short hauls is not violated.⁹⁴ The service rendered by a railroad company in transporting local passengers or freight from one point to another on its line is not identical with the service rendered in transporting through passengers or freight over the same rails, and the circumstances and conditions of carriage are substantially dissimilar.⁹⁵ Giving a rebate to a shipper which is denied to other shippers under similar conditions,⁹⁶ paying expenses of cartage to its station for one shipper and refusing to do so for others,⁹⁷ making an allowance to certain shippers for leakage and waste and denying it to others under similar circumstances,⁹⁸ giving lower rates for goods intended for re-shipment beyond the point of destination,⁹⁹ and underbilling of goods generally, where the favored shipper pays less than is charged to others for the same service,¹ is an unjust discrimination within the meaning of the act. The issuing of a free pass for transportation from one State to another to a person not in the excepted class mentioned in section twenty-two,² selling mileage tickets for use by commercial travelers only

93. Lippman v. Illinois Cent. R. Co., 2 Int. Com. Rep. 414, 2 Int. Com. C. Rep. 584.

94. Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 47 Fed. 567.

95. Texas, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 197; Union Pac. R. Co. v. United States, 117 U. S. 355; United States v. Tozer, 39 Fed. 369.

96. Interstate Commerce Com. v. Alabama M. R. Co., 168 U. S. 144; Wight v. United States, 167 U. S. 512; Willoughby v. Chicago Junction R., etc., Co., 50 N. J. Eq. 656; Matter of Louisville, etc., R. Co., 5 Int. Com. C. Rep. 466; Matter of Grand Trunk R. Co. 2 Int. Com. Rep. 496, 3 Int. Com. C. Rep. 89; Bullard v. Northern Pac. R. Co., 10 Mont. 168, 45 Am. & Eng. R. Cas. 234.

97. Hezel Milling Co. v. St. Louis, etc., R. Co., 3 Int. Com. Rep. 701, 5 Int. Com. C. Rep. 57; Wight v.

United States, 167 U. S. 512; Stone v. Detroit, etc., R. Co., 3 Int. Com. Rep. 60, 3 Int. Com. C. Rep. 613. But see Detroit, etc., R. Co. v. Interstate Commerce Com., 74 Fed. 803.

98. Rice v. Western New York, etc., R. Co., 3 Int. Com. Rep. 162, 4 Int. Com. C. Rep. 131; Rice v. Cincinnati, etc., R. Co., 3 Int. Com. Rep. 841, 5 Int. Com. C. Rep. 193.

99. Northwestern Iowa Grain, etc., Assoc. v. Chicago, etc., R. Co., 2 Int. Com. Rep. 431, 2 Int. Com. C. Rep. 604.

1. *Re Underbilling*, 1 Int. Com. Rep. 813, 1 Int. Com. C. Rep. 633.

2. Matter of Boston, etc., R. Co., 5 Int. Com. C. Rep. 69; Harvey v. Louisville, etc., R. Co., 3 Int. Com. Rep. 793, 5 Int. Com. C. Rep. 153; Slater v. Northern Pac. R. Co., 2 Int. Com. Rep. 243, 2 Int. Com. C. Rep. 359; Griffey v. Burlington, etc., R. Co., 2 Int. Com. Rep. 194, 2 Int. Com.

and refusing them to other travelers at the same rate,³ selling passenger tickets at reduced rates through brokers or "scalpers" under pretence of paying a commission,⁴ and giving special rates to certain points to immigrants which are less than half the rates charged the public generally for the same service,⁵ has been held to constitute an unjust discrimination. But a class rate may be made for immigrants which is denied to others, where the accommodations provided are different from those provided for other travelers.⁶ Selling a round-trip ticket for a less rate than a one-way ticket is not an unjust and unreasonable discrimination.⁷ The sale of party-rate tickets for the transportation of ten or more persons at a reduced rate from that charged an individual for a like transportation on the same trip is not an unjust discrimination, provided such tickets are offered to the public generally and the rate charged single passengers is reasonable, the transportation in the two cases not being substantially identical.⁸ The refusal to give to the government of the United States, in buying transportation on a railroad for its soldiers, in lots of ten or more, a reduced ten-party rate given by the railroad company's schedule to "theatrical, operatic, or concert companies, hunting and fishing parties, glee clubs, brass and string bands, boat, base ball, polo or tennis clubs, football teams, and other parties of like character," did not constitute an unjust discrimination against it, or subject it to undue prejudice or disadvantage, in violation of the Interstate Commerce Act, where it is shown that the purpose and effect

C. Rep. 301; *In re Charge to Grand Jury*, 66 Fed. 146; *Ex parte Koehler*, 31 Fed. 315.

3. *Larrison v. Chicago, etc., R. Co.*, 1 Int. Com. Rep. 369, 1 Int. Com. C. Rep. 147; *Associated Wholesale Grocers v. Missouri Pac. R. Co.*, 1 Int. Com. Rep. 393, 1 Int. Com. C. Rep. 156.

4. *Re Passenger Tariffs, etc.*, 2 Int. Com. Rep. 340, 2 Int. Com. C. Rep. 513.

5. *Elvey v. Illinois Cent. R. Co.*, 2 Int. Com. Rep. 804, 3 Int. Com. C. Rep. 652.

6. *Savery v. New York Cent., etc., R. Co.*, 2 Int. Com. C. Rep. 338.

7. *Interstate Commerce Com. v. Baltimore, etc., R. Co.*, 145 U. S. 263.

8. *Interstate Commerce Com. v. Alabama M. R. Co.*, 168 U. S. 165; *Texas, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 197; *Foster v. Cleveland, etc., R. Co.*, 56 Fed. 434; *Interstate Commerce Com. v. Baltimore, etc., R. Co.*, 145 U. S. 263, 43 Fed. 37. But see *Pittsburgh, etc., R. Co. v. Baltimore etc., R. Co.*, 2 Int. Com. Rep. 729, 3 Int. Com. C. Rep. 465; *Re Passenger Traffic*, 2 Int. Com. Rep. 445, 2 Int. Com. C. Rep. 513.

of the party rate given by the schedule is to increase the company's business, and that tickets sold thereunder are closely limited in time, and are paid for in cash in advance, while those furnished to the government are not so limited, are furnished on a requisition, and are only paid for after indefinite delay in the auditing and allowance of the claims by the War and Treasury Departments. In such case the conditions and circumstances under which the service is rendered are essentially different, and justify the making of different rates.⁹

§ 7. Undue or unreasonable preference or advantage.—Section three of the Interstate Commerce Act makes it unlawful for any common carrier subject to the provisions of the act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or to any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.¹⁰ The purpose of this section is to prevent unjust discriminations in favor of or against any party or place, by requiring carriers to give rates that are not only reasonable in themselves but relatively equal and reasonable.¹¹

9. United States v. Chicago, etc., R. Co., 127 Fed 785, 62 C. C. A. 465; **Detroit, etc., R. Co. v. Interstate Commerce Com.,** 74 Fed. 803; **Cincinnati, etc., Ry. Co. v. Interstate Commerce Com.,** 162 U. S. 184.

10. Interstate Commerce Com. v. Brimson, 154 U. S. 447; **United States v. Delaware, etc., R. Co.,** 40 Fed. 101; **Macloone v. Chicago, etc., R. Co.,** 3 Int. Com. Rep. 711, 5 Int. Com. C. Rep. 84; **Mattingly v. Pennsylvania Co.,** 2 Int. Com. Rep. 806, 3 Int. Com. C. Rep. 592.

This section is substantially the same as the provision of the English Traffic Act, and the construction given by the English courts to the language of that act will be presumed to have been adopted with the

adoption of the language of that act. **Interstate Commerce Com. v. Baltimore, etc., R. Co.,** 145 U. S. 284; **Texas, etc., R. Co. v. Interstate Commerce Com.,** 162 U. S. 197.

11. Milwaukee Chamber of Commerce v. Chicago, etc., R. Co., 7 Int. Com. Rep. 48; **Raworth v. Northern Pac. R. Co.,** 3 Int. Com. Rep. 857; **Manufacturers, etc., Union v. Minneapolis, etc., R. Co.,** 3 Int. Com. Rep. 115, 4 Int. Com. C. Rep. 79; **Detroit Board of Trade v. Grand Trunk R. Co.,** 2 Int. Com. Rep. 199, 2 Int. Com. C. Rep. 315; **Re Tariff of Transcontinental Lines,** 2 Int. Com. Rep. 203, 2 Int. Com. C. Rep. 324; **Toledo Produce Exch. v. Lake Shore, etc., R. Co.,** 3 Int. Com. Rep. 830, 5 Int. Com. C. Rep. 166; **Boards of Trade Union v.**

But although railroads may not discriminate against the people of any one State, they are not necessarily bound to give absolutely the same rates to the people of all the States, because the kind and the amount of business and the cost thereof vary in the several States.¹² Carriers cannot discriminate for the purpose of bringing about commercial equality, or make rates so as to deprive one place of its natural advantages over another, or so as to build up one place or section at the expense of another.¹³ It is neither sound in principle nor equitable in practice for railway lines to create artificial differences in market conditions by an arbitrary differential in rates, whereby the product of one section of the country is assigned to one market and the product of another section to another market.¹⁴ The Act to Regulate Commerce applies, not only in case of direct injury to particular individuals or industries, but also in cases involving indirect injury to the community as a whole; and in the absence of some justifying reason it will be improper for American railroads to permanently transact business for foreigners at a less rate than that for which they render a corresponding service to American citizens.¹⁵ Railway companies are not prohibited from preferring one person or one locality to another,¹⁶ nor is a preference or advantage in a given case necessarily unlawful,¹⁷ unless it amounts to an undue or un-

Chicago, etc., R. Co., 1 Int. Com. Rep. 608, 1 Int. Com. C. Rep. 215; Boston Chamber of Commerce v. Lake Shore, etc., R. Co., 1 Int. Com. Rep. 754, 1 Int. Com. C. Rep. 436; Bates v. Pennsylvania R. Co., 2 Int. Com. Rep. 715, 3 Int. Com. C. Rep. 435.

12. Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, 171 U. S. 361, 18 Sup. Ct. 888.

13. Commercial Club v. Chicago, etc., R. Co., 6 Int. Com. Rep. 647; Eau Claire Board of Trade v. Chicago, etc., R. Co., 4 Int. Com. Rep. 65, 5 Int. Com. C. Rep. 264; Potter Mfg. Co. v. Chicago, etc., R. Co., 4 Int. Com. Rep. 223, 5 Int. Com. C. Rep. 514; Chamber of Commerce v. Great Northern R. Co., 5 Int. Com. C. Rep. 71; Raymond v. Chicago, etc., R. Co., 1 Int. Com. Rep. 627, 1 Int.

Com. C. Rep. 230; Milwaukee Chamber of Commerce v. Flint, etc., R. Co., 2 Int. Com. Rep. 393, 2 Int. Com. C. Rep. 553; James v. Canadian Pac. R. Co., 5 Int. Com. C. Rep. 612.

14. *Re Export Rates*, 8 Int. Com. Rep. 185.

15. *Re Export & D. Rates*, 8 Int. Com. Rep. 214.

16. New York Produce Exch. v. Baltimore & O. R. Co., 7 Int. Com. Rep. 612.

17. Interstate Commerce Com. v. Cincinnati, etc., R. Co., 124 Fed. 624; Texas, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 197; Interstate Commerce Com. v. Alabama M. R. Co., 74 Fed. 175; Denaby Main Colliery Co. v. Manchester, etc., R. Co., 11 App. Cas. 97.

reasonable one.¹⁸ What is undue or unreasonable preference or advantage is not defined by the act, but it has been held to consist of doing or allowing to one party or place what is denied to another party or place under substantially the same circumstances and conditions.¹⁹ The questions whether a preference by railroad companies in freight rates charged, in favor of certain persons or localities as opposed to others, is undue or unreasonable, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are ones of fact in each individual case dependent upon the proofs.²⁰ The commission must ascertain the facts.²¹ The burden of proof is with the complaining party to prove an undue preference or prejudice.²² In considering and determining the question of undue preference or advantage to persons or traffic, the value of the goods, the cost of the service, the degree of risk to the carrier, among other considerations, have an important bearing on the relation of the rates on different kinds of traffic, as well as the reasonableness of a rate on a specified article.²³ Other elements to be considered are the fair interest of the carriers, the welfare of communities, the situation and circumstances of customers, whether competitive or otherwise, the relative volumes of the traffic involved, and the relative cost of carriage and profit to the carrier.²⁴ In cases in-

18. New York Produce Exch. v. Baltimore & Ohio R. Co., 7 Int. Com. Rep. 612; Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co., 61 Fed. 158, 51 Fed. 465; Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 59 Fed. 402; Interstate Commerce Com. v. Texas, etc., R. Co., 52 Fed. 187.

19. Martin v. Chicago, etc., R. Co., 2 Int. Com. Rep. 32, 2 Int. Com. C. Rep. 25; Crews v. Richmond, etc., R. Co., 1 Int. Com. Rep. 703, 1 Int. Com. C. Rep. 401; Little Rock, etc., R. Co. v. St. Louis Southwestern R. Co., 63 Fed. 775; Cowan v. Bond, 39 Fed. 54.

20. New York Produce Exch. v. Baltimore & O. R. Co., 7 Int. Com. Rep. 612; Cincinnati, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 184; Texas etc., R. Co. v. Interstate

Commerce Com., 162 U. S. 197; United States v. Tozer, 39 Fed. 369; Interstate Commerce Com. v. Alabama M. R. Co., 168 U. S. 170.

21. Riddle v. Baltimore, etc., R. Co., 1 Int. Com. Rep. 778, 1 Int. Com. C. Rep. 608.

22. Interstate Commerce Com. v. Louisville, etc., R. Co., 73 Fed. 409; Interstate Commerce Com. v. Baltimore, etc., R. Co., 43 Fed. 37.

23. Colorado Fuel & I. Co. v. Southern Pac. Co., 6 Int. Com. Rep. 488.

24. Interstate Commerce Com. v. Alabama M. R. Co., 168 U. S. 144, 74 Fed. 715; Interstate Commerce Com. v. Baltimore, etc., R. Co. 145 U. S. 284, 43 Fed. 51; Texas, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 197; Boston Chamber of Commerce v.

volving a difference in the rates between two points of shipment the mileage is a circumstance to be considered with other facts and conditions, but is not controlling or the most important.²⁵ The public benefits, the greater volume of business warranting lower rates and competition furnish reasons which sometimes outweigh the mere consideration of distance.²⁶ In considering the question of undue preference or advantage between localities, the welfare of the communities occupying the localities where goods are to be delivered is to be considered, as well as that of the communities which are in the locality of the place of shipment.²⁷ Differences in population and tonnage traffic may justify a difference in rates which would otherwise constitute an unlawful preference or advantage.²⁸ A local charge of a greater rate than its proportion of a through joint rate charge on the same article under an arrangement between connecting carriers does not violate the provision against preferential rates.²⁹ Collection and delivery are not required to be alike at places grouped under the same rate.³⁰ The right of one locality to equal rates with another is not diminished by municipal subscription for the building of the road.³¹ The circumstances of competition at one of two places, the rates to which from a third place made by a carrier are claimed to be discriminating, must be taken into consideration in determining as to such discrimination and the reasonableness of the rates.³² Any

Lake Shore, etc., R. Co., 1 Int. Com. Rep. 754, 1 Int. Com. C. Rep. 436.

25. Interstate Commerce Com. v. Louisville & N. R. Co., 73 Fed. 409.

26. Eau Claire Board of Trade v. Chicago, etc., R. Co., 4 Int. Com. Rep. 65, 5 Int. Com. C. Rep. 264; Detroit Board of Trade v. Grand Trunk R. Co., 2 Int. Com. Rep. 199, 2 Int. Com. C. Rep. 315; Imperial Coal Co. v. Pittsburgh, etc., R. Co., 2 Int. Com. Rep. 436, 2 Int. Com. C. Rep. 618; McMorran v. Grand Trunk R. Co., 2 Int. Com. Rep. 604, 3 Int. Com. C. Rep. 252.

27. Texas & P. R. Co. v. Interstate Commerce Com., 162 U. S. 197; Interstate Commerce Com. v. Alabama M. R. Co., 168 U. S. 165.

28. Detroit, etc., R. Co. v. Inter-

state Commerce Com., 74 Fed. 832; Martin v. Chicago, etc., R. Co., 2 Int. Com. Rep. 32, 2 Int. Com. C. Rep. 25.

29. Tozer v. United States, 52 Fed. 917; Chicago, etc., R. Co. v. Osborne, 52 Fed. 912. See also Perry v. Florida Cent., etc., R. Co., 3 Int. Com. Rep. 740, 5 Int. Com. C. Rep. 97.

30. Detroit, etc., R. Co. v. Interstate Commerce Com., 74 Fed. 803.

31. Lincoln Board of Trade v. Burlington, etc., R. Co., 2 Int. Com. Rep. 95, 2 Int. Com. C. Rep. 147.

32. Interstate Commerce Com. v. Louisville & N. R. Co., 73 Fed. 409; Texas, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 197; Manufacturers, etc., Union v. Minneapolis, etc., R. Co., 3 Int. Com. Rep. 115, 4

fact which produces an inequality of conditions and a change of circumstances justifies an inequality of charge.³³ But competition, if it is shown to exist, must be such as to be a controlling factor.³⁴

§ 8. Undue preference in particular cases.—Section three of the Interstate Commerce Act does not refer solely to facilities offered to shippers, but also to rates, and a discrimination in rates may constitute an undue preference or advantage within the meaning of this section.³⁵ A contract by an interstate carrier to furnish another carrier a certain amount of coal at a fixed price, where it appeared that the cost of the coal to the defendant added to the cost of transportation and discharge beyond its own line, and the freight over its own line at the published rates, exceeded the price received by a substantial sum, operated to give the purchaser an undue preference or advantage, or to subject some one or more parties concerned in other sales or shipments to undue prejudice or disadvantage, and was a violation of this section.³⁶ A through rate does not unjustly discriminate against an intermediate point or against local shippers because less, proportionally, than the rate from such point to the common destination.³⁷ Charging a greater rate for a shorter haul than for a longer one may constitute an undue preference or advantage under the third section, although undue preferences or advantages of this kind are

Int. Com. C. Rep. 79; King v. New York, etc., R. Co., 3 Int. Com. Rep. 272, 4 Int. Com. C. Rep. 251; New Orleans Cotton Exch. v. Cincinnati, etc., R. Co., 2 Int. Com. Rep. 289, 2 Int. Com. C. Rep. 375.

33. Interstate Commerce Com. v. Baltimore, etc., R. Co., 145 U. S. 283.

34. James v. Canadian Pac. R. Co., 4 Int. Com. Rep. 274, 5 Int. Com. C. Rep. 612; Interstate Commerce Com. v. Alabama M. R. Co., 168 U. S. 167, 74 Fed. 715; Interstate Commerce Com. v. Western, etc., R. Co., 93 Fed. 83.

35. United States v. Tozer, 2 Int. Com. Rep. 597; United States v. Delaware, etc., R. Co., 40 Fed. 101.

36. Interstate Commerce Com. v. Chesapeake & O. Ry. Co., 128 Fed. 59,

such contract was illegal and unenforceable. See also Interstate Commerce Com. v. Chesapeake & O. Ry. Co., *et al.*, U. S. Sup. Ct., Oct. Term, 1905, decided Feb. 19, 1906, modifying the decision in the case first cited by enjoining the taking of less than the published tariff of freight rates by means of dealing in the purchase and sale of coal, and affirming it, as modified.

37. Milwaukee Chamber of Commerce v. Flint, etc., R. Co., 2 Int. Com. Rep. 393, 2 Int. Com. C. Rep. 553; Lippman v. Illinois Cent. R. Co., 2 Int. Com. Rep. 414, 2 Int. Com. C. Rep. 584; Poughkeepsie Iron Co. v. New York Cent., etc., R. Co., 3 Int. Com. Rep. 248, 4 Int. Com. C. Rep. 195; Parsons v. Chicago, etc., R. Co., 63 Fed. 903.

specifically prohibited by the fourth section of the act.³⁸ But if such a charge is valid under the fourth section, because of a dissimilarity of circumstances and conditions, it is valid under the third section.³⁹ Cars must be furnished equally to all shippers and it is the legal duty of a railroad company, in furnishing cars to coal mines along its line where a limited number only can be supplied, to distribute the same impartially, without unjust discrimination or favoritism.⁴⁰ A shipper is not entitled to have his cattle carried in cars of a special construction, belonging to a third party, and superior to ordinary cattle cars, because of the fact that the carrier transports some cattle in other cars available to all shippers equally, which have some of the improvements of the former, but are furnished by another party under a special contract, and which, unlike the cars desired by the shipper by reason of their peculiar construction, can be used in the chief business of the road, that of carrying coal, when not in use for cattle, and the refusal to use the cars desired by the shipper is not unjust discrimination.⁴¹ It is not an unlawful discrimination for a carrier to prefer itself in the conduct of its own proper business as against a rival carrier,⁴² or to protect itself from physical or mechanical disadvantages, where its action is not a mere colorable device to evade the act.⁴³ A dissimilarity of circumstances which will justify cartage service at one point without extra charge and not at another, not in mercantile rivalry with the former, is created by the fact of a custom established and in adoption at the former place for many years prior to the passage of the Interstate Commerce Act, to abandon which, on account of the distant location of the station from the business portion of the town, would occasion enormous expense to secure traffic which would otherwise go

38. Raworth v. Northern Pac. R. Co., 3 Int. Com. Rep. 857, 5 Int. Com. C. Rep. 234; Lehmann v. Texas, etc., R. Co., 3 Int. Com. Rep. 706, 5 Int. Com. C. Rep. 44; Interstate Commerce Com. v. Western, etc., R. Co., 93 Fed. 83, 88 Fed. 136; Interstate Commerce Com. v. East Tennessee, etc., R. Co., 85 Fed. 107.

39. Interstate Commerce Com. v. Cincinnati, etc., R. Co., 56 Fed. 925; Interstate Commerce Com. v. Western, etc., R. Co., 88 Fed. 104.

40. United States v. West Vir-

ginia Northern R. Co., 125 Fed. 252; United States v. Norfolk, etc., R. Co., 109 Fed. 831; Riddle v. New York, etc., R. Co., 1 Int. Com. Rep. 787, 1 Int. Com. C. Rep. 594.

41. United States v. Delaware, etc., R. Co., 40 Fed. 101, 2 Int. Com. Rep. 617.

42. Ilwaco R., etc., Co. v. Oregon Short Line, etc., R. Co., 57 Fed. 673; Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co., 47 Fed. 771.

43. Detroit, etc., R. Co. v. Interstate Commerce Com., 74 Fed. 803.

to rival lines.⁴⁴ The issuing of a free pass to a person not within the exceptions of section 22 is an unlawful preference.⁴⁵ A party-rate ticket, which is a single ticket covering the transportation of ten or more persons from one place to another, is not in violation of this section, although sold at a reduction from the regular passenger rates.⁴⁶ The exercise by a railway company of the right to pre-payment of charges or to retain a lien upon the goods until payment is made, or to hold the consignee responsible in case of delivery before payment, or the waiver of some of such rights at different times, cannot be construed to be a denial of equal facilities or a discrimination.⁴⁷ A refusal by a carrier to all persons and all points alike of a through rate with the privileges of interrupting the transit at an intermediate point and re-shipping the goods, is not a discrimination, although it operates in favor of one place and against another.⁴⁸

§ 9. Equal facilities for interchange of traffic.—The second clause of section three of said act requires carriers subject to the provisions of the act to afford, according to their respective powers, all reasonable, proper, and equal facilities, for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivery of passengers and property to and from their several lines and those connecting therewith, and not to discriminate in their rates and charges between such connecting lines.⁴⁹ In the absence of statutory provision, the interchange of traffic between two connecting railroads is a matter for contract

44. Detroit, etc., R. Co. v. Interstate Commerce Com., 74 Fed. 803.

45. *Re Charge to Grand Jury*, 66 Fed. 146. But the act does not apply to passes issued for a money or other valuable consideration, *Curry v. Kansas*, etc., R. Co., 58 Kan. 6, 48 Pac. 579.

46. *Interstate Commerce Com. v. Alabama M. R. Co.*, 168 U. S. 144; *Interstate Commerce Com. v. Baltimore*, etc., R. Co., 145 U. S. 263; *Foster v. Cleveland*, etc., R. Co., 56 Fed. 434, a guaranty by a railroad company to an opera troupe transported over its line, of arrival at destination at a certain time, is not unlawful discrimination, although the

transportation is had upon party-rate tickets.

47. *Little Rock, etc., R. Co. v. St. Louis*, etc., R. Co., 59 Fed. 400.

48. *Crews v. Richmond*, etc., R. Co., 1 Int. Com. Rep. 703, 1 Int. Com. C. Rep. 401; *Cowan v. Bond*, 39 Fed. 54.

49. *Texas, etc., R. Co. v. Interstate Commerce Com.*, 162 U. S. 197; *Interstate Commerce Com. v. Brimson*, 154 U. S. 447; *New York, etc., R. Co. v. New York*, etc., R. Co., 50 Fed. 867; *Cutting v. Florida R. Co.*, 30 Fed. 663; *Scofield v. Lake Shore*, etc., R. Co., 2 Int. Com. C. Rep. 116; *United States v. Delaware*, etc., R. Co., 40 Fed. 101.

between them, and the courts have no power to compel such interchange, or to fix the terms on which it shall be made. Nor is such power conferred upon the courts by the Interstate Commerce Act.⁵⁰ The duty imposed by this clause to afford equal facilities to all connecting carriers only requires that facilities which are reasonable and proper be furnished, and only requires this where the circumstances and conditions are substantially similar and not where they are dissimilar, and such facilities are not required to be furnished without reference to its own interest.⁵¹ A connecting road with through facilities may be preferred to one with only local facilities, and the right to equal facilities is reciprocal.⁵² The statutory right to demand equal facilities is only at terminal points,⁵³ and a connecting railway desirous of an interchange of passengers and freight cannot demand as a matter of right an interchange at the point of physical connection without first furnishing at such point reasonable and proper facilities for the interchange sought, and cannot rely upon the terminal facilities at another point.⁵⁴ The right to sell through tickets and check through baggage arises out of contract and one company is not required by the statute to sell through tickets over another road,⁵⁵ nor is there any obligation on the part of either to honor tickets issued by the other.⁵⁶ The use of the tracks and terminal facilities of one carrier by another is not granted by the statute, and no

50. Central Stock Yards Co. v. Louisville & N. R. Co., 118 Fed. 113.

51. Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co., 61 Fed. 158, and the burden of proof is on the carrier alleging discrimination; Little Rock, etc., R. Co. v. St. Louis Southwestern R. Co., 63 Fed. 775; Atchison, etc., R. Co. v. Denver, etc., R. Co., 110 U. S. 667; Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 59 Fed. 403; Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. 624; Augusta Southern R. Co. v. Wrightsville, etc., R. Co., 74 Fed. 522; New York, etc., R. Co. v. New York, etc., R. Co., 50 Fed. 867, 3 Int. Com. Rep. 542, 4 Int. Com. C. Rep. 702.

52. Little Rock, etc., R. Co. v.

East Tennessee, etc., R. Co., 47 Fed. 771.

53. United States v. Delaware, etc., R. Co., 40 Fed. 101; But see New York, etc., R. Co. v. New York, etc., R. Co., 4 Int. Com. C. Rep. 702.

54. Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 59 Fed. 403.

The term "facilities" does not embrace car equipment for the transportation of freight over the carrier's own road. United States v. Delaware, etc., R. Co., 40 Fed. 101.

55. Chicago, etc., R. Co. v. Pennsylvania Co., 1 Int. Com. Rep. 357, 1 Int. Com. C. Rep. 86.

56. Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co., 61 Fed. 158.

common carrier can justly complain of another because it is not allowed the use of the tracks and terminal facilities of such other in the same manner and to the same extent a third carrier is.⁵⁷ In the absence of statutory provisions, the rights of a railroad company, under a lawful agreement for a specified use of the tracks of another railroad company, are measured, in respect to the tracks used, by the terms of the contract.⁵⁸ A railroad company cannot appropriate the grievance of a traffic or locality, under the clause prohibiting preference by a carrier to persons, firms or corporations, and to localities and traffic, and complain on account of it.⁵⁹ No authority to issue through tickets or through bills of lading for property, at through rates over connecting lines, is conferred by the Interstate Commerce Act, upon common carriers of interstate commerce, in the absence of voluntary arrangements between the companies, and the courts have no power or authority under the statute or the common law to provide for through routing and through rating.⁶⁰ Other connecting carriers are not entitled to through billing and rating, and to the use of the tracks and terminals of a carrier which has voluntarily made an arrangement giving these advantages to one connecting carrier, and a refusal to grant such facilities is not an unlawful discrimination.⁶¹ One or more individual railroad companies are not forbidden by either the common law or the Interstate Commerce Act to select as to which one of two or more corporations they will employ as auxil-

57. Little Rock, etc., R. Co. v. St. Louis, et., R. Co., 59 Fed. 402, 63 Fed. 775; Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co., 51 Fed. 475, 61 Fed. 158; St. Louis Drayage Co. v. Louisville, etc., R. Co., 65 Fed. 39; Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. 571; Chicago, etc., R. Co. v. Pennsylvania, etc., R. Co., 1 Int. Com. Rep. 86.

58. Alford v. Chicago, etc., R. Co., 2 Int. Com. Rep. 771, 3 Int. Com. C. Rep. 519.

59. Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co., 61 Fed. 158.

60. Little Rock v. East Tennessee, etc., R. Co., 3 Int. Com. C. Rep. 1;

Interstate Commerce Com. v. Western, etc., R. Co., 93 Fed. 83; St. Louis Drayage Co. v. Louisville, etc., R. Co., 65 Fed. 41; Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 63 Fed. 778, 59 Fed. 405, 41 Fed. 559; Capehart v. Louisville, etc., R. Co., 3 Int. Com. Rep. 278; Cincinnati, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 184.

61. Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 63 Fed. 775, 59 Fed. 400; Gulf, etc., R. Co. v. Miami Steamship Co., 86 Fed. 407; Chicago, etc., R. Co. v. Pennsylvania R. Co., 1 Int. Com. C. Rep. 86; Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. 567.

iary to their own line, as the agency by which they will send freight beyond such lines, or as their agent to receive freight on the auxiliary line to be transmitted to their own line upon through bills and without breaking bulk.⁶² The obligation to furnish equal facilities without discrimination does not require a common carrier to advance money to all other carriers on the same terms, or to give credit for the carriage of articles of trade and commerce to all carriers, because it extends credit for such services to some others.⁶³ The refusal by a railroad company to transport freight on foreign cars, when its own cars are not in use but are free to be employed in the transportation desired, or where a transfer of freight will not be injurious to it, is not a denial of reasonable and proper facilities.⁶⁴ The Interstate Commerce Commission has no power to compel a carrier to furnish any particular equipment of cars, or any cars at all,⁶⁵ or to compel it to receive and run the cars of a private company over its line or contract for the use thereof,⁶⁶ and the fact that carriers interchange cars with one another upon certain terms, does not entitle a private stock yard company which is not a "connecting line" to equal facilities for the interchange of traffic.⁶⁷ The refusal of a State court to limit the liability of a common carrier for its negligence in the execution of a contract for interstate carriage to the valuation agreed upon does not contravene the various provisions of the interstate commerce law making it obligatory to provide proper facilities for interstate carriage of freight, and preventing carriers from obstructing continuous shipments on interstate lines.⁶⁸

62. Prescott, etc., R. Co. v. Atchison, etc., R. Co., 73 Fed. 438; St. Louis Drayage Co. v. Louisville, etc., R. Co., 65 Fed. 39; Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 41 Fed. 563. But see New York, etc., R. Co. v. New York, etc., R. Co., 50 Fed. 867.

63. Southern Indiana Express Co. v. United States Express Co., 88 Fed. 659; Gulf, etc., R. Co. v. Miami Steamship Co., 86 Fed. 407; Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 63 Fed. 775, 59 Fed. 400; Matter of application of Clark, 2 Int. Com. Rep. 797, 3 Int. Com. C. Rep. 649.

64. Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co., 61 Fed. 158, 51 Fed. 465.

65. Rice v. Cincinnati, etc., R. Co., 3 Int. Com. Rep. 841, 5 Int. Com. C. Rep. 193; Scofield v. Lake Shore, etc., R. Co., 2 Int. Com. Rep. 67, 2 Int. Com. C. Rep. 90.

66. Worcester Excursion Car Co. v. Pennsylvania R. Co., 2 Int. Com. Rep. 792, 3 Int. Com. C. Rep. 577.

67. Burton Stock ar Co. v. Chicago, etc., R. Co., 1 Int. Com. Rep. 329.

68. Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 24 S. Ct. 132, 48 L. Ed. 268.

§ 10. Charges for long and short hauls.—Section four of the Interstate Commerce Act provides that it shall be unlawful for any common carrier subject to the provisions of the act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance.⁶⁹ Charging a greater sum for a shorter than for a longer haul may also constitute a violation of sections one, two and three.⁷⁰ The third section supplies the principle on which rests the fourth section.⁷¹ Under the fourth section equality of charges in the aggregate for long and short hauls is not unlawful provided it does not discriminate against any person or any kind of traffic.⁷² An aggregate charge proportionately less for a longer than for a shorter haul is not forbidden.⁷³ The fact that a shipper under a joint schedule of rates over two connecting railroads is charged a smaller rate on through shipment over the entire length of the joint line than to intermediate points does not establish a claim that the latter rates are unjust or unreasonable, nor does it entitle him to claim that

69. Merchants' Union v. Northern Pac. R. Co., 4 Int. Com. Rep. 183, 5 Int. Com. C. Rep. 478; **Lehmann v. Texas, etc., R. Co.,** 3 Int. Com. Rep. 706, 5 Int. Com. C. Rep. 44; **Northwestern Iowa Grain, etc., Assoc. v. Chicago, etc., R. Co.,** 2 Int. Com. Rep. 431, 2 Int. Com. C. Rep. 604; **Martin v. Southern Pac. R. Co.,** 2 Int. Com. Rep. 1, 2 Int. Com. C. Rep. 1; **Thatcher v. Delaware, etc., Canal Co.,** 1 Int. Com. Rep. 356, 1 Int. Com. C. Rep. 152; **Osborne v. Chicago, etc., R. Co.,** 48 Fed. 49.

70. Raworth v. Northern Pac. R. Co., 3 Int. Com. Rep. 857, 5 Int. Com. C. Rep. 234; **Re Southern R., etc., Assoc.,** 1 Int. Com. Rep. 278, 1 Int. Com. C. Rep. 31

71. Interstate Commerce Com. v. East Tennessee, etc., R. Co., 85 Fed. 107.

72. Texas, etc., R. Co. v. Inter-

state Commerce Com., 162 U. S. 197; **Interstate Commerce Com v. Brimson,** 154 U. S. 447; **Gerke Brewing Co. v. Louisville, etc., R. Co.,** 4 Int. Com. Rep. 267, 5 Int. Com. C. Rep. 596; **Lippman v. Illinois Cent. R. Co.,** 2 Int. Com. Rep. 414, 2 Int. Com. C. Rep. 584; **Detroit, etc., R. Co. v. Interstate Commerce Com.,** 74 Fed. 803.

73. Business Men's Assoc. v. Chicago, etc., R. Co., 2 Int. Com. Rep. 41; **New Orleans Cotton Exch. v. Cincinnati, etc., R. Co.,** 2 Int. Com. Rep. 289, 2 Int. Com. C. Rep. 375; **Farrar v. East Tennessee, etc., R. Co.,** 1 Int. Com. Rep. 764, 1 Int. Com. C. Rep. 480.

Free cartage for the collection and delivery of freight is a reduction or rebate from schedule rates and is unlawful. **Stone v. Detroit, etc., R. Co.,** 3 Int. Com. Rep. 60, 3 Int. Com. C. Rep. 613.

such rates are discriminative.⁷⁴ The prohibition against charging a greater compensation for a shorter haul than for a longer one applies only to cases where the circumstances and conditions of the carriage are substantially similar, and not to cases where the circumstances and conditions are substantially dissimilar.⁷⁵ The interests of the public, the shippers, and the carriers are to be considered in determining this question.⁷⁶ Competition between rival carriers affecting rates is a circumstance to be considered, and may be sufficient to render the circumstances and conditions so dissimilar as to justify a greater charge for a shorter than for a longer haul.⁷⁷ Where the rates charged by a railroad to a particular point are not unreasonable in themselves, the fact that lower rates are charged for a longer haul to other points does not create an unjust discrimination against such point, in violation of the interstate commerce law, where such lower rates are due to active

74. Allen & Lewis v. Oregon R. & Nav. Co., 98 Fed. 16; Parsons v. Chicago, etc., R. Co., 63 Fed. 903; Tozer v. United States, 52 Fed. 917; United States v. Mellen, 53 Fed. 229.

75. Louisville & N. R. Co. v. Behlmer, 175 U. S. 648; Interstate Commerce Com. v. Alabama M. R. Co., 168 U. S. 173; Interstate Commerce Com. v. Cincinnati, etc., R. Co., 167 U. S. 479, 56 Fed. 927; Cincinnati, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 184; Interstate Commerce Com. v. Western, etc., R. Co., 88 Fed. 192; Junod v. Chicago, etc., R. Co., 47 Fed. 290; Missouri Pac. R. Co. v. Texas, etc., R. Co., 31 Fed. 862; Trammell v. Clyde Steamship Co., 4 Int. Com. Rep. 120, 5 Int. Com. C. Rep. 324; James, etc., Buggy Co. v. Cincinnati, etc., R. Co., 3 Int. Com. Rep. 682, 4 Int. Com. C. Rep. 744; Milwaukee Chamber of Commerce v. Flint, etc., R. Co., 2 Int. Com. Rep. 393, 2 Int. Com. C. Rep. 553; Boston, etc., R. Co. v. Boston, etc., R. Co., 1 Int. Com. Rep. 571; Martin v. Southern Pac. R. Co., 2 Int. Com. Rep. 1.

Whether or not the circumstances and conditions are substantially similar is a question of fact. See cases cited above.

76. Louisville, etc., R. Co. v. Behlmer, 175 U. S. 648; Texas, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 197; *Re* Southern R., etc., Assoc., 1 Int. Com. Rep. 278.

77. Texas, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 197; Wight v. United States, 167 U. S. 512; Savannah Bureau of Freight, etc., v. Charleston, etc., R. Co.; 7 Int. Com. Rep. 479; Brewer v. Central of Ga. R. Co., 84 Fed. 258; Rice v. Atchison, etc., R. Co., 3 Int. Com. Rep. 263, 4 Int. Com. C. Rep. 228; Atchison, etc., R. Co. v. Denver, etc., R. Co., 110 U. S. 683; Interstate Commerce Com. v. Atchison, etc., R. Co., 50 Fed. 295; Lincoln Board of Trade v. Missouri Pac. R. Co., 2 Int. Com. Rep. 98; Interstate Commerce Com. v. Baltimore, etc., R. Co., 145 U. S. 263; *Ex parte* Koehler, 31 Fed. 315; New Orleans Cotton Exch. v. Cincinnati, etc., R. Co., 2 Int. Com. Rep. 289, 2 Int. Com. C. Rep. 375.

legitimate competition.⁷⁸ The possibility of competition arising at a particular point does not render freight rates to that point, though higher than those for a longer haul to a point where competition prevails, obnoxious to the prohibition against a greater charge for a shorter than for a longer haul under substantially similar circumstances and conditions. The same evidence which warrants a finding that dissimilar circumstances and conditions exist which justify a lower rate for a longer haul to one point than for a shorter haul to another also establishes that the charging of such rates does not give one point an undue preference and advantage over the other.⁷⁹ Competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstances and condition provided for by this section, and may justify a lesser charge for the longer than the shorter haul.⁸⁰ Competition which is actual and substantial in its effect upon rates, if resulting from the action of other carriers who are subject to the act to regulate commerce, may produce the dissimilarity of circumstances and conditions provided for in this section, so as to enable a carrier, in adjusting rates, to take into view such competition without the previous assent of the Interstate Commerce Commission.⁸¹ The Interstate Commerce law was enacted to encourage normal competition, but it is not in accord with the spirit or letter of that law to recognize, as a condition justifying discrimination against one locality, competition at a more distant locality, when competition at the nearer point is stifled or reduced, not by normal restrictions, but by agreement between those who otherwise would be competing carriers. The difference in conditions thus produced is effected by a restraint upon trade and commerce, which is not only violative of the common law, but of the federal anti-trust act.⁸²

78. Interstate Commerce Com. v. Southern R. Co., 122 Fed. 800.

79. Interstate Commerce Com. v. Louisville & N. R. Co., 190 U. S. 273, 23 S. Ct. 687, 47 L. Ed. 1047; Interstate Commerce Com. v. Nashville, etc., R. Co., 120 Fed. 934, 57 C. C. A. 224.

80. Interstate Commerce Com. v. Southern R. Co., 122 Fed. 800; Interstate Commerce Com. v. Alabama Midland R. Co., 168 U. S. 173; Louis-

ville, etc., R. Co. v. Behlmer, 175 U. S. 648; Interstate Commerce Com. v. Western, etc., R. Co., 88 Fed. 186.

81. Interstate Commerce Com. v. Clyde S. S. Co., 181 U. S. 29, 21 S. Ct. 512, 45 L. Ed. 729; East Tennessee, etc., R. Co. v. Interstate Commerce Com., 181 U. S. 1, 21 S. Ct. 516, 45 L. Ed. 719.

82. East Tennessee, etc., R. Co. v. Interstate Commerce Com., 99 Fed. 52, 39 C. C. A. 413; Interstate Com-

§ 11. Schedules of rates, fares and charges.—The sixth section of the Interstate Commerce Act makes it the duty of every common carrier subject to its provisions to print and keep for public inspection schedules showing the rates, fares, and charges for transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad.⁸³ It is further provided that the schedules shall plainly state the places upon its railroads between which property and passengers will be carried, shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, and charges.⁸⁴ Contracts are presumed to have been made with reference to such schedule rates.⁸⁵ It is made unlawful for a common carrier, after it has established and published its schedule of rates, fares, and charges as prescribed by the act, to charge, demand, collect, or receive from any person a greater or less compensation for transportation of persons or property, or for any service connected therewith, than is specified in such published

merce Com. v. Alabama M. R. Co., 168 U. S. 144, 164, 167, 18 S. Ct. 45, 42 L. Ed. 414; United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 I. Ed. 1007; United States v. Joint Traffic Assoc., 171 U. S. 505, 19 S. Ct. 25, 43 L. Ed. 259; United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141.

83. Boston Fruit, etc., Exch. v. New York, etc., R. Co., 3 Int. Com. Rep. 493, 4 Int. Com. C. Rep. 664; New Orleans Cotton Exch. v. Louisville, etc., R. Co., 3 Int. Com. Rep. 523, 4 Int. Com. C. Rep. 694; United States v. Howell, 56 Fed. 21; New York Board of Trade, etc., v. Pennsylvania R. Co., 3 Int. Com. Rep. 417, 4 Int. Com. C. Rep. 447; Gerber v. Wabash R. Co., 63 Mo. App. 145; *Re* Passenger Tariffs, 2 Int. Com. Rep. 445, 2 Int. Com. C. Rep. 649; *Re* Tariffs of Columbus, etc., R. Co., 2 Int. Com. Rep. 11, 1 Int. Com. C.

Rep. 626; Pittsburgh, etc., R. Co. v. Baltimore, etc., R. Co., 2 Int. Com. Rep. 729, 3 Int. Com. C. Rep. 465, applies to passengers' excursion rates; Larrison v. Chicago, etc., R. Co., 1 Int. Com. Rep. 369, 1 Int. Com. C. Rep. 167, applies to excursion rates; Interstate Commerce Com. v. Baltimore, etc., R. Co., 43 Fed. 37; Matter of Grand Trunk R. Co., 2 Int. Com. Rep. 496, 3 Int. Com. C. Rep. 89, schedules on international roads; *Re* Tariff of Trans-continental Lines, 2 Int. Com. Rep. 203, 2 Int. Com. C. Rep. 324; Chicago, etc., R. Co. v. Osborne, 52 Fed. 912, publication of tariff at non-competing point unnecessary; Dillingham v. Fischl, 1 Tex. Civ. App. 546.

84. Wight v. United States, 167 U. S. 512; Lehmann v. Texas, etc., R. Co., 3 Int. Com. Rep. 706, 3 Int. Com. C. Rep. 44.

85. Gerber v. Wabash R. Co., 63 Mo. App. 145.

schedule of rates, fares, and charges.⁸⁶ Connivance of a shipper to secure lower rates is a misdemeanor.⁸⁷ It is further provided that no advance shall be made in the rates, fares, and charges which have been so established and published, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect.⁸⁸

§ 12. Pooling or dividing freights or earnings.—Section five of the Interstate Commerce Act, which makes it unlawful for any common carrier subject to the provisions of the act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different or competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof, prohibits contracts for the division of earnings, and is violated by a contract having that purpose or effect, whether or not an actual division is made. It is no justification of a traffic pool that it is designed to prevent, and does prevent, unlawful rebates from connecting lines to shippers. Pooling and rebates are both within the prohibitions of the act, and one cannot be lawfully employed as a preventive of the other.⁸⁹ This section does not invalidate contracts containing such a provision in their entirety, although it

86. United States v. Mellen, 53 Fed. 229; United States v. Michigan Cent. R. Co., 43 Fed. 26; Wight v. United States, 167 U. S. 512; Mobile, etc., R. Co. v. Dismukes, 94 Ala. 131; Missouri, etc., R. Co. v. Trinity County Lumber Co., 1 Tex. Civ. App. 553.

87. United States v. Howell, 56 Fed. 21.

88. New York Produce Exch. v. New York Cent., etc., R. Co., 2 Int. Com. Rep. 553, 3 Int. Com. C. Rep. 137; *Re Passenger Tariffs, etc.*, Wars, 2 Int. Com. Rep. 340, 2 Int. Com. C. Rep. 513.

89. Interstate Commerce Com. v. Southern Pac. Co., 132 Fed. 829, a rule and practice adopted and put in

force by agreement between competing railroads and their connecting lines, by which a through rate on a certain class of traffic is conditioned on a reservation to the initial carrier of the absolute and unqualified power to route the shipments beyond its own line, for the declared purpose of enabling such initial carrier to control and maintain the rate so fixed by preventing competition, either direct or indirect between their connecting carriers, create in effect a traffic pool, within the meaning and in violation of this section.

The word "freights" in this section is used as meaning the commodities carried, and not the compensation paid for such carriage. Id.

prevents certain pooling provisions therein from being operative.⁹⁰ It does not apply to a pooling contract between a railroad company and a pipe line company for the transportation of oil.⁹¹ Any arrangement, oral or otherwise, or combination, which has for its purpose and eventuates in the pooling of freights of different and competing railroads, is within the prohibition of this section. Either a distribution of property offered for transportation among different and competing railroads in proportions and on percentages previously agreed upon, or a money pool, whereby the aggregate or net proceeds of certain different and competing roads are divided among them, is prohibited.⁹²

§ 13. Interruption of continuous carriage.—The seventh section of the Interstate Commerce Act makes it unlawful for any common carrier subject to the provisions of the act to enter into any combination, contract, or agreement, express or implied, to prevent by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no breaking of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freight from being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily to interrupt such continuous carriage or to evade any of the provisions of the act.⁹³ If the intent in starting a shipment from a point without a State was that the final destination should be at a point within the State, and such purpose was not abandoned, the shipment would be an interstate one, though there were temporary breaks by transfers from one carrier to another, and a rebilling at each transfer.⁹⁴

90. Ives v. Smith, 3 N. Y. Supp. 645, affd. 8 N. Y. Supp. 46.

91. Independent Refiners' Assoc. v. Western New York, etc., R. Co., 4 Int. Com. Rep. 162, 5 Int. Com. C. Rep. 415.

92. *In re Pooling Freights*, 115 Fed. 588. See also Interstate Commerce Com. v. Brimson, 154 U. S. 447.

93. Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 24 S. Ct. 132, 48 L. Ed. 268; Interstate Commerce Com. v. Brimson, 154 U. S. 447; Matter of Grand Trunk R. Co., 2 Int. Com. Rep. 496, 3 Int. Com. C. Rep. 89; Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. 567.

94. Gulf, etc., R. Co. v. Fort Grain Co. (Tex. Civ. App.), 73 S. W.

§ 14. Mileage, excursion, or commutation tickets.—Section twenty-two of the Interstate Commerce Act provides that nothing in the act shall prevent the carriage, storing, or handling of property free or at reduced rates in certain enumerated cases, or the carriage of certain enumerated classes of persons free or at reduced rates, or the issuance of mileage, excursion, or commutation passenger tickets.⁹⁵ This provision has been held not to be exclusive so as to prevent any discrimination other than as therein specified.⁹⁶ The families of officers and employes of the road are not included in any of the exceptions in this section.⁹⁷ A person who receives free transportation for favoring the company in a business way is not an employe.⁹⁸ Issuing free passes to persons eminent in the public service, high officers of the States, prominent officials of the United States, members of the legislative railroad committees of the several States, and persons whose good will was claimed to be important to the company, is a violation of the act.⁹⁹ Party-rate tickets, while neither mileage or excursion tickets, have been held to be commutation tickets, the rate being commuted in consideration of the frequency or quantity of the traffic, and are exempted from the provisions of the act.¹

§ 15. Enforcement of the act.—Section nine of the Interstate Commerce Act gives persons claiming to be damaged by a viola-

845; *Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 721, 3 Int. Com. C. Rep. 450, facts held to show that shipment was not a through shipment.

95. See *Re Inmates of National Homes*, 1 Int. Com. Rep. 75, 1 Int. Com. C. Rep. 28, as to disabled soldiers and sailors; *Re Religious Teachers*, 1 Int. Com. Rep. 21; *Smith v. Northern Pac. R. Co.*, 1 Int. Com. Rep. 611, 1 Int. Com. C. Rep. 208, as to land explorers or settlers; *Matter of U. S. Commissions of Fish, etc.*, 1 Int. Com. Rep. 606, 1 Int. Com. C. Rep. 21; *Matter of Indian Supplies*, 1 Int. Com. Rep. 22, 1 Int. Com. C. Rep. 15, as to government property.

96. *Interstate Commerce Com. v. Baltimore, etc., R. Co.*, 145 U. S. 263.

97. *Ex parte Koehler*, 31 Fed. 315; *Re Order of Railway Conductors*, 1 Int. Com. Rep. 18, 1 Int. Com. C. Rep. 8.

98. *Slater v. Northern Pac. R. Co.*, 2 Int. Com. Rep. 243, 2 Int. Com. C. Rep. 359.

99. *Re Boston, etc., R. Co.*, 3 Int. Com. Rep. 717, 5 Int. Com. C. Rep. 69.

1. *Interstate Commerce Com. v. Baltimore, etc., R. Co.*, 145 U. S. 277, 43 Fed. 45; *Pittsburgh, etc., R. Co. v. Baltimore, etc., R. Co.*, 2 Int. Com. Rep. 729, 3 Int. Com. C. Rep. 465; *Associated Wholesale Grocers v. Missouri Pac. R. Co.*, 1 Int. Com. Rep. 393, 1 Int. Com. C. Rep. 156.

tion of the provisions of the act an election to sue in the courts of the United States, or to seek redress by proceedings before the Interstate Commerce Commission. But both remedies cannot be pursued.² The remedies provided by the act are exclusive, and a party seeking damages for a violation of the act cannot bring action in a State court, such court having no jurisdiction.³ The procedure before the commission is provided for by the act. It has been conclusively determined by the courts that the Interstate Commerce Commission has no power to fix rates for the carriage of interstate freight, and a decree of a court for the enforcement of a rate so fixed by the commission is without authority nor has the court itself the power to determine in advance what is a reasonable rate, and to enjoin the future observance of such rate, such power being legislative, and not judicial in its character.⁴ In a suit to enforce its orders the Interstate Commerce Commission represents the public, and its right to relief is not affected by the fact that the complainants before it may themselves have participated in practices which were unlawful.⁵ The special remedies afforded by the act to prevent the imposition of unjust and unreasonable rates were intended to supplement, and not to supplant, the existing remedies furnished by the common law.⁶ Under its general chancery jurisdiction, a court of equity has power to remedy wrongs consisting of the violation by a carrier of the provisions of the interstate commerce law prohibiting discrimination between shippers.⁷ In determining whether the rates charged by a railroad company to and from a city are unjust and unreasonable in themselves, the greatest weight should be given to the opinions of expert witnesses, the effect of the rates charged

2. Interstate Commerce Com. v. Louisville, etc., R. Co., 73 Fed. 409; Copp v. Louisville, etc., R. Co., 43 La. Ann. 511, 26 Am. St. Rep. 198.

3. Copp v. Louisville, etc., R. Co., *supra*. See Murray v. Chicago, etc., R. Co., 62 Fed. 24, 4 Int. Com. Rep. 806.

4. Southern Pac. R. Co. v. Colorado Fuel & Iron Co., 101 Fed. 779, 42 C. C. A. 12.

5. Interstate Commerce Com. v. Southern Pac. Co., 132 Fed. 829.

6. Tift. v. Southern Ry. Co., 123 Fed. 789.

7. United States v. Michigan Cent. R. Co., 122 Fed. 544. The Elkins Act of 1903 extending the equity jurisdiction of the United States applies to every violation of the Interstate Commerce Act, whether previously or subsequently to the enactment of the former. *Id.* See also Missouri Pac. R. Co. v. United States, 189 U. S. 274.

on the growth and prosperity of the city, the cost of transportation as compared with the rates charged, and the rates in force at numerous other cities, where the circumstances are as nearly similar as may be to those prevailing at such city.⁸ While it may be true that traffic managers are better able, by reason of their knowledge and experience, than the courts to fix rates and decide what discriminations are justified by the circumstances, yet this cannot be considered, so far as it relates to the Interstate Commerce Commission, which, by reason of the experience of its members in this kind of controversy, and their great opportunity for full information, is, in a sense, an expert tribunal. The courts, moreover, are continually called upon to review the work of experts in all branches of business and science, and the intention of Congress that they should revise the work of railway-traffic experts, whether railway managers or commerce commissioners, is too clear to admit of dispute.⁹

§ 16. Railroad rate legislation.—The Act of Congress, approved June 29, 1906, popularly known as the Railroad Rate Act, and being an act amendatory of the Interstate Commerce Act of 1887 and all acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission, makes many important and radical changes in the law, which may properly be briefly referred to here.¹⁰ By this act it is attempted to vitalize the powers of the Interstate Commerce Commission and afford relief for every discrimination, injustice, and extortion, practised by a common carrier engaged in interstate commerce in so far as it is possible to do so by law. This legislation is the outgrowth of demands upon the part of shippers of merchandise throughout the country for the enlargement of the powers of the Interstate Commerce Commission, so that certain abuses frequently perpetrated by common carriers by rail can be prevented. It has been believed by a large portion of the shippers that railway rates were in many instances too high, and that favoritism through rebates and other forms of discrimin-

8. Interstate Commerce Com. v. Southern Ry. Co., 122 Fed. 800, 117 Fed. 74; Interstate Commerce Com. v. Louisville & N. R. Co., 118 Fed. 613.

9. East Tennessee, etc., R. Co. v. Interstate Commerce Com., 99 Fed. 52, 39 C. C. A. 413.
10. Public No. 337. See Appendix for text of the act.

ation were indulged in by various methods by the carriers. The ingenuity of some of the carriers and shippers is claimed to have resulted in their avoiding the provisions of the former act, and the more specific prohibitions relating to rebates, discriminations, and preferences contained in the Elkins Act of 1903. These results have been effected through the use of joint tariffs, involving, in some instances, a railroad and a mere switch owned by a shipper; through arrangements whereby excessive mileage was given to shippers of products who owned their own cars; through the use of refrigerator cars; through the permission given to independent corporations to render some service incident to the shipment, as the furnishing of ice in the bunkers of the car; by what is known as the "midnight tariff," a method involving an arrangement with a shipper to assemble his freights, have them ready for shipment at a particular date, whereupon the carrier would give the necessary three days' notice of a reduction in the rate; competing carriers and shippers knowing nothing about this arrangement, the freight of the favored shipper would be shipped at this new lower rate, and then there would be a restoration of the old rate; and by other means and devices. The recent act seeks to remedy these evils by amendments to existing law, preserving all of the former law that can be preserved, and amending it only by giving more power and making more plain some of its provisions.¹¹

The first section of the Act of 1906 contains many important amendments to section 1 of the Act of 1887. It contains an enlargement of the definition of the word "railroad" so as to include "all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property herein designated, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and an enlargement of the definition of the word "transportation" so as to include "cars and other vehicles and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation,

11. See Report No. 591 of House Committee on Interstate and Foreign Commerce, 59th Congress.

refrigeration or icing, storage, and handling of property transported." These provisions are intended to obviate the devices resorted to by carriers through the use of switches and cars owned by shippers and through the use of refrigerator cars.

This section also defines as common carriers, within the meaning and purpose of the act, express companies and sleeping car companies, and any corporations or persons engaged in the transportation of oil or other commodity, except water and natural or artificial gas, by means of pipe lines. The issuance of passes or free transportation in any form to all persons, except employes of carriers and their families and certain exempted classes, is forbidden, and a penalty of not less than \$100 nor more than \$2,000 is provided, not only for the person issuing such free transportation, but also for the person applying for and accepting it. Any railroad company is prohibited, on and after May 1, 1908, from transporting across any state or territorial line any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier. Common carriers subject to the provisions of the act are required to construct and operate upon reasonable terms sidetracks and switch lines and to provide cars for the movement of traffic without discrimination in favor of or against any shipper, and the Commission is given full power to enforce such requirements. These provisions will have a far-reaching effect and were the subject of much contention in both houses of Congress.

Section 2 contains certain amendments to section 6 of the Act of 1887, as amended by the Act of 1889, which are of great consequence to both carriers and shippers. Certain of these provisions are intended to secure more prompt obedience on the part of the carriers to the law relating to tariff schedules, and require storage, icing, and all other charges which the Commission may require to be stated in their schedules. Carriers must print and post in conspicuous places all tariffs and charges, and such tariffs and charges cannot be changed without thirty days' notice to the public and to the Interstate Commerce Commission, except where the Commission waives such notice. This

requirement was inserted for the purpose of doing away with the discriminations heretofore made through the so-called "midnight tariffs." Carriers are required in time of war or threatened war, on demand of the President, to give preference and precedence to the transportation of troops and munitions of war. Every person, company or corporation, whether carrier or shipper, is prohibited from offering, granting, giving, soliciting, accepting, or receiving any rebate, preference, or discrimination. Heavy penalties, and in some instances imprisonment, are prescribed for violation of the provisions of the act, individuals and corporations alike to be guilty of misdemeanor for any violation willfully committed, and the corporations and individuals are held responsible for the acts of any agent. Failure to publish tariffs entails a fine of not less than \$1,000 and not more than \$20,000. Granting or accepting of rebates or kindred discriminations entails a fine of not less than \$1,000 and not more than \$20,000, and the individual guilty of such act is liable to imprisonment for not more than two years, in addition to the fine, in the discretion of the court. Any shipper who knowingly accepts a rebate or discrimination must, in addition to the above penalties, pay to the United States three times the value of such rebate or discrimination, and the attorney-general is required to bring civil suit to recover this penalty whenever he believes such violation of law to have occurred.

Section 3 of the act amends section 14 of the Act of 1887, as amended by the Act of 1889, which provided that the Commission's report of an investigation shall "include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found." The amendment now provides that the Commission's report shall "state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made."

The most important changes in the law are contained in section 4, which contains marked modifications of section 15 of the Act

of 1887. While not giving the Commission the power to initiate rates, it confers upon it the power to establish a rate or declare what will be a proper charge in certain cases. It provides that "the commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon complaint made as provided in section 13, or upon complaint of a common carrier, it shall be of the opinion that any of the rates or charges whatsoever demanded, charged or collected by any common carrier or carriers, subject to the provisions of this act, for the transportation of persons or property as defined in the first section of this act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair and reasonable thereafter to be followed; and to make an order that the carrier shall cease and desist from such violation to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed." Such order is to go into effect in thirty days after notice to the carrier, and to remain in force for a period of not exceeding two years, as shall be prescribed in the order, unless it be suspended, modified, or set aside by the Commission, or set aside or suspended by a court of competent jurisdiction. This section further provides that if the owner of property transported, directly or indirectly, renders any service in connection with or furnishes any instrumentality, the charges for these shall be no more than is just and reasonable, and also gives to the Commission power upon complaint to determine what is a reasonable charge, as the maximum, to be paid by the carrier or carriers for the service or the use of the instrumentality. Under this provision those excessive charges, constituting rebates that are in some instances paid to shippers who own their own cars, may be controlled. The Commission may also establish through routes and fix maximum joint rates and determine upon the division of rates, when such di-

vision can not be agreed upon by the carriers, but this power is limited to cases when no reasonable or satisfactory through route exists. This provision applies where one of the parties to the joint rate is a water line.

The question is thus raised by section 4 of the act as to whether the power of Congress "to regulate commerce with foreign nations, and among the several States and with the Indian tribes,"¹² includes the power to prescribe interstate railway rates, either directly or through the agency of a commission. The recent statement of Mr. Justice Harlan of the United States Supreme Court, speaking for the Court, "Will it be said that Congress can meet such emergencies" (the elimination of competition through railway combinations) "by prescribing the rates by which interstate carriers shall be governed in the transportation of freight and passengers? If Congress has the power to fix such rates,—and upon that question we express no opinion,—it does not choose to exercise its powers in that way or to that extent,"¹³ would seem to indicate that the question is an open one, so far as that court is concerned. The Act of 1906 contains provisions which are claimed to be within the restrictions imposed by other provisions of the Constitution upon the exercise of this power to regulate foreign and interstate commerce. An important restriction upon the exercise of this power is the provision that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another."¹⁴ It is contended that this restriction was intended to prevent the application of the power to lay taxes or duties, or the power to regulate commerce, so as to discriminate between one part of the country and another,¹⁵ and that it applies to interstate as well as foreign commerce, to transportation by land, to and from ports, as well as to transportation by water.¹⁶ A distinction is made between a legislative act, like that of 1887, requiring carriers to make their rates to conform to the standard of reasonable-

12. Const., art. 1, § 8.

16. Gibbons v. Ogden, 9 Wheat.

13. Northern Securities Co. v. United States, 193 U. S. 343.

(U. S.) 191; Pennsylvania v. The Wheeling Bridge Co., 18 How. (U. S.) 421; Matter of Strauss, 197 U. S. 330, as to the broad construction to be given to constitutional provisions.

14. Const., art. 1, § 9.

15. Dooley v. United States, 183 U. S. 168.

ness, impartiality and justice, and one whereby the legislature, either directly or through the action of a commission, itself fixes these rates for the carrier according to its own judgment of what is just. The Constitutional prohibition applies to Congress and not to the carriers, the former must act in obedience to all limitations of the power which it is commissioned to use, and while it may prohibit the carriers from preferring unduly one port over another, it cannot require that they shall prefer the ports of one State over another. The principle of this distinction has been applied by the Supreme Court, in reference to the constitutional provision against depriving a person of his property without due process of law,¹⁷ and forms the basis of the contention that Congress can not prescribe for the carriers either minimum or absolute rates, or in prescribing rates, compel the carriers to fix their charges other than on a strictly mileage basis. As we have stated in a previous section,¹⁸ Congress has not unlimited power to interfere with carriers in their interstate transportation, or to exercise unlimited control over interstate railway companies in the use of their property, or in the transaction of their business. Its power in this respect is subject to the restrictions contained in other provisions of the Constitution and to the well-settled Constitutional principles that it cannot delegate its legislative powers, cannot confer judicial powers, except upon courts established in the manner provided by the Constitution, and cannot confer non-judicial powers upon a duly established court.

Section 5, which amends section 16 of the Act of 1887, as amended by the Act of 1889, makes radical changes in the methods of enforcing the provisions of the law through the Commission and the courts. Where the Interstate Commerce Commission orders a refund to a shipper or any award of damages to a complainant and the carrier fails so to refund or pay, the shipper or complainant may institute civil suit in the Circuit Court of the United States to recover; the findings and order of the Commission constitute *prima facie* evidence of the facts therein stated, and the petitioner is not liable for the costs in the Circuit Court or at any subsequent stage of the proceedings, unless they accrue upon his appeal, and if the petitioner finally

17. Lake Shore R. Co. v. Smith, 173 U. S. 697. 18. See § 2, *ante*.

prevails a reasonable attorney fee is allowed him as a part of the costs of the suit. For failure to obey an order of the Commission the carrier forfeits to the United States \$5,000 for each offense, and each day of a continuing violation is deemed a separate offense. The Interstate Commerce Commission or any person injured by failure of a carrier to comply with an order of the Commission, other than for the payment of money, may apply to the Circuit Court, and if the case is established the court shall issue a writ of injunction, mandatory or otherwise, to restrain such carrier from further disobedience, and from such action appeal by either party shall lie direct to the Supreme Court of the United States, where the case shall have priority of hearing and determination over all other causes except criminal cases.

This section further provides that, in suits brought against the Interstate Commerce Commission, the venue to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the Circuit Court of the district where the carrier has its principal operating office, and jurisdiction is vested in such courts. The provisions of the Expediting Act of February 11, 1903, are made to apply to such suits, including hearings on application for preliminary injunctions, which may be granted only on hearing after five days' notice to the Commission. Appeals from any interlocutory order or decree are to be made only to the Supreme Court of the United States. These constitute the provisions of the so-called Allison amendment, which were inserted in the act as a compromise of the conflicting views entertained in Congress as to the proper scope of the courts' power to review the acts of the Commission.¹⁹

19. The power of Congress to regulate railway rates being generally assumed, the main differences of opinion in regard to the proposed legislation related to the question of the necessity of provisions for a review of the acts of the Commission by the courts and as to the scope of such review, whether it should be limited to exclude adjudications, *de novo*, of the rate fixed by the Commission, or should be a full review

on all questions. Some of those who insisted on radical rate legislation would limit the scope of the judicial review by the courts of the rates fixed by the Commission, but would authorize a suspension of the rate pending the appeal. Others would give full court review but would not suspend the rate. It was sought by some and was maintained to be competent to provide in the bill that a rate fixed by the Commission

By section 6 of the act a new section, 16a, is added, which provides the procedure for rehearings before the Commission in any proceeding.

Section 7 of the act amends section 20 of the Act of 1887 so that the Commission is authorized to require the most comprehensive statistics from all common carriers regarding their business, under a penalty on the carriers of \$100 for every day in default. The Commission is also authorized to prescribe the form of all accounts kept by the carriers, and shall constantly have access to all records, accounts, and memoranda kept by them, refusal to grant such access entailing a penalty of \$500 for each offense or for each day such refusal is maintained. False entries made by any person keeping the books of a carrier are made punishable by a fine of from \$1,000 to \$5,000, or imprisonment from one to three years, or both. Carriers are required to issue bills of lading for all shipments accepted, and shall be liable in damages for the loss or injury of any property for which a bill of lading is given, and no contract, receipt, rule, or regulation shall exempt the carrier from liability.

Section 8 of the act adds a new section, 24, by which the Interstate Commerce Commission is enlarged from five to seven members, whose salaries are increased from \$7,500 to \$10,000 annually and their term of office from six to seven years. The act provides that it shall take effect and be in force from and after its passage, but by concurrent resolution of Congress it is provided that the act shall not take effect until sixty days after its passage.

shall not be suspended by interlocutory decree pending an appeal to the court as to its reasonableness and constitutionality. Others contended that the powers of a court of equity cannot be abridged and that the act could not provide such a limitation of the court's inherent power. Another proposition was that a suspen-

sion of the rate be provided for, but that if the rate be suspended during appeal, there shall be deposited by the carrier with the court an amount sufficient to cover the difference between the rate complained of and the rate fixed by the Commission or that may be adjudged to be reasonable by the court.

APPENDIX.

The Railroad Rate Act of 1906.

AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO REGULATE COMMERCE," APPROVED FEBRUARY 4, 1887, AND ALL ACTS AMENDATORY THEREOF, AND TO ENLARGE THE POWERS OF THE INTERSTATE COMMERCE COMMISSION.

[Approved June 29, 1906.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of an Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven,¹ be amended so as to read as follows:

"SEC. 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act,² and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one

1. See Chap. 27, §§ 1 and 2, and cases cited, as to the general purposes of that act. Sections 2, 3, 4 and 5 of the Act of 1887 contain the most important provisions of that act and are not amended by this act. The decisions of the courts on questions

arising under those sections and other provisions of the Act of 1887 are given in the chapter on Interstate Transportation, Chap. 27.

2. This is an entirely new provision.

State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.³

"The term 'common carrier' as used in this Act shall include express companies and sleeping car companies.⁴ The term 'railroad,' as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property;⁵ and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported;⁶ and it shall be the duty of every carrier subject to the provisions of this Act

3. See Chap. 27, § 3, and cases there cited.

4. The original act was held not to apply to these companies. See Chap. 27, § 3, and cases there cited.

5. See Chap. 27, § 16, as to object of enlargement of the definition of the term "railroad."

6. See Chap. 27, § 16.

to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.⁷

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.⁸

"No common carrier subject to the provisions of this Act, shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge and boards of managers of such Homes; to necessary care takers of live stock, poultry, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this

7. This clause is a new provision.

8. See Chap. 27, § 4, and cases there cited.

provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, and any amendment thereof.⁹

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.¹⁰

"Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to

9. This is an entirely new provision added to this section. See

Chap. 27, § 14, as to decisions under a similar provision in § 22 of the Act of 1887.

10. A new provision entirely.

the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.¹¹

Sec. 2. That said section six of said Act, as amended March second, eighteen hundred and eighty-nine, be amended so as to read as follows:

"**SEC. 6.** That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation.¹² The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee.¹³ Such schedules

11. An entirely new provision.

routes. See Chap. 27, § 11, and cases there cited.

12. A new provision as to through routes and joint rates and in its application to pipe lines and water

13. A new provision as to storage, icing, and all other charges, and as

shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.¹⁴

"Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

"No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in par-

to regulations affecting the value of
the services rendered by the carrier.

See Chap. 27, § 16.

14. The last clause is new.

ticular instances or by a general order applicable to special or peculiar circumstances or conditions.¹⁵

"The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.¹⁶

"Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

"The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient."¹⁷

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: *Provided*,

15. The former law required 10 days' notice of advances in rates, fares, and charges and 3 days' notice of reductions. Under the present act 30 days' public notice must be given of any changes in rates, fares, and charges. The provision allowing

changes on less notice, or modification of the Commission's requirements, in the discretion of the Commission, is new. See Chap. 27, § 16, as to objects of these amendments.

16. New.

17. New.

That wherever the word 'carrier' occurs in this Act it shall be held to mean 'common carrier.'¹⁸

"That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic."¹⁹

That section one of the Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, be amended so as to read as follows:

"That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate com-

merce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.²⁰

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

20. The amendments make the provide for imprisonment in addition provisions of this section applicable to fine, upon conviction, in the discretion of the court to shippers as well as carriers and

" Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney-General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be."²¹

Sec. 3. That section fourteen of said Act, as amended March second, eighteen hundred and eighty-nine, be amended so as to read as follows:

" SEC. 14. That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises,

ises; and in case damages are awarded such report shall include the findings of fact on which the award is made.²²

"All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

"The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports."

Sec. 4. That section fifteen of said Act be amended so as to read as follows:

"SEC. 15. That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect

22. This clause materially changes the provisions of the former act. See Chap. 27, § 16.

any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may after hearing make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.²³

"The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line.

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be

23. Section 15 of the former act is so amended as to be practically a new section. See Chap. 27, §§ 1, 2 and 15, and cases there cited, as to

proceedings to enforce the provisions of the former act. See Chap. 27, § 16, as to questions raised concerning certain provisions of this section.

enforced in like manner as the orders above provided for in this section.

"The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act."

Sec. 5. That section sixteen of said Act, as amended March second, eighteen hundred and eighty-nine, be amended so as to read as follows:

"**SEC. 16.** That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.²⁴

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the Circuit Court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit

24. The changes made in § 16 of the former act make it practically a new section. See Chap. 27, § 16.

Court within one year from the date of the order, and not after: *Provided*, That claims accrued prior to the passage of this Act may be presented within one year.

"In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

"Every order of the Commission shall be forthwith served by mailing to any one of the principal officers or agents of the carrier at his usual place of business a copy thereof; and the registry mail receipt shall be *prima facie* evidence of the receipt of such order by the carrier in due course of mail.

"The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

"It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

"Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act, shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

"The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

" It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. The Commission may, with the consent of the Attorney-General, employ special counsel in any proceeding under this Act, paying the expenses of such employment out of its own appropriation.

" If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the Circuit Court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus.

" From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from.

" The venue of suits brought in any of the Circuit Courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order

or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts. The provisions of 'An Act to expedite the hearing and determination of suits in equity, and so forth,' approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the Act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto. It shall be the duty of the Attorney-General in every such case to file the certificate provided for in said expediting Act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes: *Provided*, That no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the Commission shall be granted except on hearing after not less than five days' notice to the Commission. An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: *Provided further*, That the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes.

"The copies of schedules and tariffs of rates, fares, and charges, and of all contracts, agreements, or arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual reports of carriers made to the Commission, as required by the pro-

visions of this Act, shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as *prima facie* evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of or extracts from any of said schedules, tariffs, contracts, agreements, arrangements, or reports made public records as aforesaid, certified by the secretary under its seal, shall be received in evidence with like effect as the originals."

Sec. 6. That a new section be added to said Act immediately after section sixteen, to be numbered as section sixteen a, as follows:

"SEC. 16a. That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing or modifying the original determination shall be subject to the same provisions as an original order.²⁵

Sec. 7. That section twenty of said Act be amended so as to read as follows:

25. A new section.

" SEC. 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.²⁶

" Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, and shall be made out under oath and filed with the Commission, at its office in Washington, on or before the thirtieth day of September then next following, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this

26. The foregoing provisions of this section require additional details to those specified in the former law to be reported. The rest of the section is entirely new.

Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority to require said carriers to file monthly reports of earnings and expenses or special reports within a specified period, and if any such carrier shall fail to file such reports within the time fixed by the Commission it shall be subject to the forfeitures last above provided.

"Such forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

"The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

"The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

"In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the contin-

uance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

"Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment.

"Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

"That the Circuit and District Courts of the United States shall have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them.

"And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of

lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

Sec. 8. That a new section be added to said Act at the end thereof, to be numbered as section twenty-four, as follows:

"**SEC. 24.** That the Interstate Commerce Commission is hereby enlarged so as to consist of seven members with terms of seven years, and each shall receive ten thousand dollars compensation annually. The qualifications of the Commissioners and the manner of the payment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present Commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present Commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional Commissioners herein provided for shall be appointed for the full term of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall

succeed. Not more than four Commissioners shall be appointed from the same political party."²⁷

Sec. 9. That all existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the Act to regulate commerce and all Acts amendatory thereof shall apply to any and all proceedings and hearings under this Act.

Sec. 10. That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

Sec. 11. That this Act shall take effect and be in force from and after its passage.²⁸

27. A new section.

28. Changed by concurrent resolution to 60 days after its passage.

INDEX TO RAILROAD RATE ACT OF 1906.

(For General Index see page 985.)

A.

	Page.
Accounts:	
commission may prescribe forms of, to be kept by carriers.....	967
commission shall have access to, of carriers.....	967
forfeiture for refusal of carrier to keep or submit for inspection such.....	967
falsifying or altering, or records a misdemeanor.....	968
special agents or examiners to inspect.....	967
examiner divulging information of, subject to fine and imprisonment..	968
Act:	
to what common carriers, applies.....	949, 950
amendatory of what acts.....	949
what existing laws are applicable to proceedings under this..	952, 964, 970
laws in conflict with, repealed.....	970
provisions of, does not affect pending causes.....	970
when, takes effect.....	970
Agent:	
of carrier excepted from free pass provision.....	951
of a carrier failing or neglecting to obey order subject to forfeit.....	962
acts of, of carrier, deemed acts of carrier.....	957
Agreements:	
copy of, with other carriers to be filed with commission.....	955
copies of, filed with commission <i>prima facie</i> evidence.....	964, 965
Amend:	
act is to, "An act to regulate commerce" approved 1887.....	949
Annual Reports:	
printing and distribution of, of commission.....	959
statistics, tables, and figures in, of carrier <i>prima facie</i> evidence.....	964
commission may require, from all common carriers.....	966
what, of carriers shall show.....	966
forfeiture for each day's default in filing.....	967
Appeal:	
to Supreme Court from Circuit Court.....	963
priority of cases on, over all others except criminal causes.....	964
shall not vacate or suspend order appealed from.....	963

(For General Index see page 985.)

Apply—Application:

	Page.
to whom the provisions of this act.....	949, 950
when party to whom money is ordered to be paid may, to court.....	961
when party injured may, to court to enforce order of commission.....	963
when commission may, to court to enforce its order.....	963
for rehearing of matter before commission.....	965
rules governing, for rehearing.....	965

Arrangements:

copy of, with other carriers to be filed with commission.....	955
copies of, filed with commission, <i>prima facie</i> evidence.....	965

Attorney's Fee:

reasonable, allowed to petitioner, if he prevails.....	961
--	-----

B.**Branch Lines:**

carriers must provide and maintain switches to.....	952
---	-----

Bridges:

used or operated in connection with any railroad included in the the term "railroad".....	950
--	-----

C.**Carriage:** See Continuous Carriage.**Carriers:**

affected by the act.....	949
duties of, as to schedule of rates, fares and charges.....	953
transportation by, without filing tariff schedules, forbidden.....	955
copies of reports to be furnished to.....	958
willful failure of, to publish schedules is misdemeanor.....	956
determination of just and reasonable rates or charges of.....	959
giving rebates by, is a misdemeanor.....	957
suits against, for recovery of damages awarded against.....	961
or agents failing or neglecting to obey order subject to forfeit.....	962
acts of officers or agents of, deemed acts of.....	957

Cars:

included in term "transportation".....	950
--	-----

Certificate:

of Attorney General to expedite trial of cases.....	964
---	-----

Changes:

thirty days' notice to commission of, in tariffs required.....	954
thirty days' notice to commission of, in joint tariffs required.....	954
commission may allow, on less notice.....	954

Charges:

all, for any service must be just and reasonable.....	951
unjust and unreasonable, prohibited and declared unlawful.....	951
schedules must state separately icing	953
schedules must state separately terminal	953
schedules must state separately all other, which commission require.	953

INDEX TO RAILROAD RATE ACT.

973

(For General Index see page 985.)

Charges—(Continued) :	Page.
schedules showing, must be printed and posted.....	954
changes in, must be published and thirty days' notice given.....	954
less notice of changes in, in discretion of commission.....	954
thirty days' notice to commission of changes in, or joint charges required	954
commission may allow changes in, upon less notice.....	954
unlawful to receive greater or less, than schedule specifies.....	955
commission may determine just and reasonable maximum.....	959
commission may, by order, enforce just and reasonable maximum.....	959
order for, to go into effect after 30 days' notice.....	960
when commission may apportion.....	960
when commission may establish and enforce joint maximum.....	960
commission may determine reasonable maximum joint, for any service or instrumentality	960
Classification:	
schedules must contain, of freight in force.....	953
Collect:	
unlawful to, greater or less compensation than published schedule..	955
Commission:	
all charges which, may require to be separately stated.....	953
may allow changes in schedules upon less than 30 days' notice.....	954
may modify requirements as to publishing, posting, and filing schedules.....	954
schedules of tariffs to be filed with.....	953
copies of contracts, agreements, or arrangements with other carriers to be filed with.....	955
copies of all rates, fares and charges to be filed with.....	953
copies of joint tariffs to be filed with.....	953
thirty days' notice to, of changes in rates or joint tariffs required....	954
when, may allow less notice.....	954
evidence of concurrence or acceptance of joint tariffs to be filed with.	955
greater or less joint tariffs than schedule filed with, unlawful.....	955
may prescribe form in which schedules shall be kept for public inspection.....	955
transportation forbidden unless schedules are filed with.....	955
rate filed with, is to be deemed the legal rate.....	957
to make written report of investigation.....	958
report of, to state conclusions, decision, order, or requirement.....	958
damages awarded by, shall include findings of fact on which award is made	958
reports of, to be recorded and copies furnished.....	958
publication of reports and decisions of.....	958
authorized publications of, competent evidence.....	958
may, after hearing, determine just and reasonable maximum rate or charge.....	959
may, after hearing, determine just and reasonable regulation or practice.	959

(For General Index see page 985.)

Commission—(Continued):	Page.
may, by order, require carriers to conform thereto, after 30 days' notice.	960
order of, may be suspended or set aside, by, or courts.	960
may establish through routes and joint maximum rates.	960
may prescribe division of joint rates.	960
may prescribe terms and conditions for operation of through routes.	960
may determine reasonable maximum charge for any service or instrumentation.	960
enumeration of powers of, shall not exclude any other power.	961
shall order damages payable on or before a certain day.	961
such order enforceable like civil suit for damages.	961
findings and order of, <i>prima facie</i> evidence of facts.	961
complaints must be filed with, within two years.	961
petition for enforcement of order for payment of money, within one year.	961
parties to suits to enforce awards of.	962
service of orders of, may be by mail.	962
order of, to take effect in 30 days unless suspended, modified or set aside by, or suspended or set aside by court.	960
penalty for failure to comply with order of.	962
forfeiture recoverable by civil suit.	962
district attorneys to prosecute for recovery of forfeitures.	963
costs and expenses of such prosecution.	963
special counsel may be employed.	963
orders of, enforced by courts by mandamus or injunction.	963
venue of suits in the circuit courts to enforce orders of.	963
measures to expedite suits to enforce orders of.	964
notice to, of application for injunction or interlocutory order.	964
public records of, <i>prima facie</i> evidence of what they purport to be.	965
may grant rehearing of decision, order, or requirement.	965
may establish rules for rehearsals.	965
application for rehearing by, does not operate as a stay.	965
may revise, change, or modify original determination.	965
enlarged to seven members.	969
qualification of members of.	969
how, shall be enlarged.	969
terms of office of members of.	969
Commodities:	
railroads forbidden to transport, manufactured, mined, or produced by it other than timber, etc.	952
or which it owns or has any interest in.	952
Common Carriers: See Carriers.	
act applies to, wholly by railroad or partly by railroad and partly by water.	949
or partly by pipe line and partly by water.	949
corporation, liable for acts the same as their officers or agents.	956

INDEX TO RAILROAD RATE ACT.

975

(For General Index see page 985.)

	Page.
Common Control:	
of railroad and water transportation when essential to bring within provisions of the act.....	949
Compensation:	
unlawful to charge greater or less, than published schedule of rates, fares, and charges.....	955
Continuous Carriage:	
or shipment, when essential to bring within the provisions of the act.	949
Contracts:	
copy of, with other carriers to be filed with commission.....	955
copies of, filed with commission <i>prima facie</i> evidence.....	965
Corporations:	
violating the law guilty of misdemeanor.....	956
Costs:	
petitioner not liable for, in Circuit Court.....	961
petitioner only liable for, which accrue upon his appeal.....	961
of prosecuting for forfeitures payable by Government.....	963
Custom Duties:	
chargeable on freight shipped through a foreign country when through rate is not made public.....	954

D.

Decision:	
report of commission shall contain.....	958
authorized published, of commission competent evidence.....	959
rehearing of, and rules governing the same.....	965
Definition:	
“railroad”.....	950
“transportation”.....	950
“common carrier”	949, 950, 956
Delivering—Delivery:	
act does not apply to, of property wholly within one State.....	950
of property transported included in term “transportation”.....	950
Demand:	
unlawful to, greater or less compensation than published schedule...	955
Depot:	
copy schedules must be posted in every.....	954
freight, included within term “railroad”.....	950
Discriminations:	
offering or accepting, a misdemeanor.....	957

E.

Elevation:	
of property transported included in term “transportation”.....	950
Employees:	
of carrier, and their families may be transported free.....	951
interchange of passes for, of carriers not prohibited.....	951
of sleeping cars, express companies, telegraph and telephone companies may be carried free.....	951

(For General Index see page 985.)

Employees—(Continued):	Page.
acts of, of carrier are to be deemed acts of the carrier.....	957
carriers held liable for acts which if done by, would constitute mis- demeanor.....	956
acts of, of shippers are deemed acts of the shipper.....	957
Evidence:	
authorized publications competent, of reports and decisions of the commission.....	959
copies of schedules, tariffs of rates, fares and charges, contracts, agreements, or arrangements between carriers, statistics, tables, and figures in carriers' annual reports, are <i>prima facie</i>	964
registry mail receipt <i>prima facie</i> , of receipt of order.....	962
existing laws relating to production of, shall apply to all proceed- ings and hearings under this act.....	970
Expenses:	
of prosecuting for recovery of forfeitures payable by Government..	963
of employment of special counsel payable by commission.....	963
Express Companies:	
the term "Common Carrier" includes.....	950
passes may be granted to employees of.....	951
F.	
Facilities:	
all, of shipment or carriage included in term "transportation".....	950
Families:	
of carriers may be transported free.....	951
interchange of passes to, of carriers not prohibited.....	951
Fares:	
schedules showing, must be filed, printed and posted.....	953, 954
changes in, must be published and thirty days' notice given.....	954
less notice of changes of, in discretion of commission.....	954
greater or less, than published schedule unlawful.....	955
copies of tariffs of, <i>prima facie</i> evidence.....	964
Ferries:	
used or operated in connection with any railroad included in the term "railroad"	950
Findings:	
report of commission shall contain, of fact on which award is made.	959
of commission <i>prima facie</i> evidence of facts therein stated.....	961
Foreign Country:	
when act applies to shipments from or to.....	950
Forfeitures:	
for knowingly failing or neglecting to obey commission's order.....	962
recoverable by civil suit.....	962
payable to United States treasury.....	962
venue of suits for.....	962
for refusal of carrier to keep or permit examination of records.....	967

(For General Index see page 985.)

Free Ticket, Pass, or Transportation:

- issue or giving of any interstate, forbidden..... 951
 except to employes and other specified persons..... 951
 carrier violating provision guilty of misdemeanor..... 952
 person who uses, guilty of misdemeanor..... 952

Freight:

- schedules must contain classification of, in force..... 953
 schedules must show through, rates beyond a foreign country..... 954
 subject to customs duties where through rate is not made public.... 954

Freight Depots:

- included in term "railroad"..... 950

G.**Grounds:**

- used or necessary in the transportation or delivery of property included in term "railroad"..... 950

H.**Handling:**

- act does not apply to, of property wholly within one State..... 950
 of property transported included in term "transportation"..... 950

I.**Icing:**

- of property transported included in term "transportation"..... 950
 schedules must state separately, charges..... 953

Injunction:

- by court to restrain carrier from disobedience to order of commission. 963
 power of court to compel obedience to its writs of..... 963
 notice to commission of, restraining enforcement of order..... 964

Inspection:

- schedules of rates, fares, and charges must be kept open to public... 953
 schedules must be posted conveniently for public..... 954

Instrumentalities:

- all, of shipment or carriage included in term "transportation"..... 950

International:

- act applies to, transportation or shipments..... 950

Interstate:

- act applies to, transportation or shipments..... 950

Investigations: See Commission.

- procedure of commission on 959

(For General Index see page 985.)

J.

Joint Rates: See Joint Tariffs.**Joint Tariffs:**

	Page.
copy of, to be filed with commission.....	953
thirty days' notice to commission of changes in, required.....	954
unlawful to charge greater or less, than schedule specifies.....	955
when commission may establish just and reasonable maximum.....	960
Just: See Charges; Rates; Unjust.	
and reasonable through rates must be established upon reasonable request.....	951
all charges for any service must be, and reasonable.....	951
when commission may establish, and reasonable maximum rates.....	959

L.

Lessee:

of carrier failing or neglecting to obey order subject to forfeit.....	902
--	-----

M.

Mandamus:

by court to enforce obedience to order of commission.....	963, 964
power of court to compel obedience to its writs of.....	963, 964
by court to enforce compliance with provisions of act.....	968

Misdemeanor:

violation of provision against issuing free pass, etc., is a.....	951
provision against using free pass is a.....	951
acts committed by corporation when.....	956
willful failure to file and publish tariff schedules is a.....	956
knowingly accepting rebates, concessions, or discriminations is a.....	957
willfully making false entry in books of account is a.....	968

N.

Newsboys:

on trains may be carried free.....	951
------------------------------------	-----

Nurses:

attending persons injured in wrecks may be carried free.....	951
--	-----

O.

Office:

copy schedules must be posted in every.....	954
---	-----

Officers:

of carrier may be transported free.....	951
---	-----

Order:

report of commission to contain its.....	958
commission may by general, allow changes of tariffs upon less than 30 days' notice.....	954
or modify requirements as to publishing, printing or filing of tariffs.	954
of commission determining just and reasonable maximum rates.....	959

INDEX TO RAILROAD RATE ACT.

979

(For General Index see page 985.)

Order—(Continued):	Page.
that carrier shall cease and desist from violations.....	959
to go into effect after 30 days' notice to carrier.....	960
may be suspended, modified, or set aside by commission or court.....	960
supplemental order apportioning joint rates.....	960
establishing through routes and joint rates.....	960
determining reasonable maximum charge for service or use if instru- mentality of carrier.....	960
general power of commission to make.....	960
directing payment of damages to complainant.....	961
suits to recover damages ordered by commission.....	961
of commission <i>prima facie</i> evidence of facts therein stated.....	961
complaints to recover damages under, to be filed within two years..	961
petition to enforce, to be filed with court within one year.....	962
joinder of all parties to, as plaintiffs or defendants.....	962
service of, on parties.....	962
suspension or modification of, by commission.....	962
duty of common carrier to comply with.....	962
forfeiture for failure or neglect to comply with.....	962
prosecution for recovery of.....	962
commission may apply to court for enforcement of.....	963
enforcement of, by court.....	963
venue of suits to enforce.....	963
rehearing of, and rules governing the same.....	965

P.

Pass: See Free Ticket.

issue or giving of any interstate free, forbidden.....	951
--	-----

Passengers:

act applies to any common carrier engaged in the transportation of..	949
schedules must state places between which, will be carried.....	953

Pipe Lines:

term "Common Carrier" includes persons or corporations engaged in the transportation of oil or other commodity by.....	949
and partly by, and partly by railroad or water.....	949
for water and natural or artificial gas excepted.....	949

Places:

schedules must state, between which property and passengers will be carried	953
schedules must be posted in two public and conspicuous.....	954

Political Party:

not more than four commissioners to be appointed from the same....	969
--	-----

Posted:

copy schedules must be, in public and conspicuous places.....	954
---	-----

Preference:

in transportation of troops and munitions of war.....	957
---	-----

(For General Index see page 985.)

Printed:	Page.
schedules of rates, fares, and charges must be, in large type.....	954
Property:	
act applies to any common carrier engaged in the transportation of..	949
schedules must state places between which, will be carried.....	953
R.	
Railroad:	
act applies to transportation wholly or partly by.....	949
what the term, includes.....	950
forbidden to transport commodities manufactured, mined or produced by it, or which it owns or has any interest in.....	952
timber and manufactured products excepted.....	952
Rates:	
just and reasonable through, must be established upon reasonable re- quest.....	951
schedules showing, must be printed and posted and filed.....	953
changes in, must be filed and published and thirty days' notice given	954
less notice of changes of, in discretion of commission.....	954
greater or less, than published schedule unlawful.....	955
commission may determine just and reasonable maximum.....	959
commission may, by order, enforce just and reasonable maximum...	959
order for, to go into effect after 30 days' notice.....	960
when commission may apportion.. .	960
when commission may establish and enforce joint maximum.....	960
commission may determine reasonable maximum joint, for any ser- vice or instrumentality.....	960
copies of tariffs of, <i>prima facie</i> evidence.....	964
Reasonable: See Charges; Commission; Rates.	
transportation must be furnished upon, request therefor.....	951
through rates must be established upon reasonable request.....	951
all charges for any service must be just and.....	951
Rebates:	
giving of, forbidden.....	955
offering or accepting, a misdemeanor.....	957
Receiver:	
of carrier disobeying order subject to forfeit.....	962
Receiving—Receipt:	
act does not apply to, of property wholly within one State.....	950
of property transported included in term "transportation".....	950
greater or less compensation than published schedule unlawful.....	955
Records:	
commission may prescribe, to be kept by carriers.....	967
commission shall have access to such.....	967
may provide for inspection and examination of.....	967

(For General Index see page 985.)

	Page.
Records—(Continued):	
refusal of carrier to keep, or submit them for examination subjects to forfeiture	967
false entry in, or alteration of, a misdemeanor.....	968
examiner of, divulging information liable to fine or imprisonment....	968
Refrigeration:	
of property transported included in term "transportation".....	950
Regulations: See Rules and Regulations.	
Reports: See Commission; Annual Reports.	
of commission to be in writing.....	958
of commission to be recorded and copies served.....	959
authorized published, to be competent evidence.....	959
annual, may be printed for distribution.....	959
commission may require from carrier annual.....	966
commission may require monthly or special.....	966
forfeitures provided for failure to make such.....	967
what carrier's, shall contain.....	966
Requirement:	
report of commission to contain its, in the premises.....	958
rehearing of, by commission and rules governing the same.....	965
Rules and Regulations:	
schedules must state, separately, which change, affect, or determine any part of aggregate rates, fares, or charges.....	953
remedy for unjust or unreasonable practices.....	959
when commission may prescribe just and reasonable.....	959
 S.	
Schedules:	
of rates, fares, and charges, to be printed and kept open to public inspection and filed with commission.....	953
shall plainly state places between which property and passengers will be carried	953
shall contain the classification of freight in force.....	953
shall separately state terminal, icing, and all other charges.....	953
shall be printed in large type.....	954
shall be posted in two public and conspicuous places in every depot, station or office.....	954
of joint tariffs or through rates, to be filed with commission.....	954
what, shall contain.....	953
thirty days' notice to commission of changes of tariff or joint tariff, required.....	954
unlawful to receive greater or less compensation than tariff, specify..	955
transportation by carriers forbidden unless, are filed.....	955
refunding or rebating any part of tariffs specified in, forbidden.....	955
copies of, filed with commission <i>prima facie</i> evidence.....	964

(For General Index see page 985.)

	Page.
Services:	
all, in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported included in term "transportation".....	950
Side Tracks:	
carriers must provide and maintain switches to private.....	952
Shippers:	
unlawful for, to receive rebates or concessions.....	956
receiving rebates, etc., guilty of misdemeanor.....	957
act of agent of, deemed act of shipper.....	956, 957
Shipment: See Continuous Carriage.	
Sleeping Car Companies:	
the term "Common Carrier" includes.....	950
passes may be issued to employes of.....	951
Special Agents or Examiners:	
commission may employ, to inspect and examine accounts, records, or memoranda kept by carriers.....	967
refusal to submit such papers for inspection by, subjects to forfeiture.....	967
divulging information, subject to fine or imprisonment.....	968
have power to administer oaths, examine witnesses and receive evidence.....	968
Special Counsel:	
commission may employ.....	963
how payable	963
Spurs:	
included in term "railroad".....	950
State:	
act applies to transportation from one, or territory to another.....	950
Station:	
copy schedules must be posted in every.....	954
Storage:	
act does not apply to, of property wholly within one State.....	950
of property transported included in term "transportation".....	950
schedules must state, separately, charges.....	953
Suits:	
to enforce orders of commission to be brought in Circuit Courts.....	963
appeals in such, may be taken to Supreme Court.....	963
act of 1903 to expedite trial of, made applicable.....	964
Switches:	
included in term "railroad".....	950
carriers required to construct, maintain and operate, connecting with lateral branch line or private side track.....	952
may be compelled to by commission.....	953

(For General Index see page 985.)

T.

	Page.
Testimony:	
existing laws relating to compelling of, shall apply to all proceedings and hearings under this act.....	970
Terminal Charges:	
schedules must state separately.....	953
Terminal Facilities:	
of every kind used or necessary in the transportation of persons or property included in term "railroad".....	950
Territory:	
act applies to transportation from one place in a, to another place in the same.....	950
Through Routes:	
must be established upon reasonable request therefor.....	951
schedules must show, to all points beyond a foreign country.....	954
freight shipped through foreign country subject to customs duties where through rate is not made public.....	954
when commission may establish.....	960
Tracks:	
included in term "railroad".....	950
Transfer in Transit:	
of property transported included in term "transportation".....	950
Transportation: See Free Ticket.	
act applies to, of passengers or property wholly by railroad or partly by railroad and partly by water.....	949
and oil or other commodity by pipe lines.....	949
act applies to interstate or international.....	950
act does not apply to, of passengers or property wholly within one State.....	950
must be provided and furnished upon reasonable request therefor....	951
issue or giving of an interstate free, forbidden.....	951
by carriers forbidden unless tariff charges are filed and published..	955
Trustee:	
of carrier failing or neglecting to obey order subject to forfeit.....	962
U.	
United States:	
act applies to transportation from any place in the, to an adjacent foreign country	950
act applies to transportation from any place in the, through a foreign country to any other place in the.....	950
act applies to transshipments to and from the.....	950
Unjust:	
charge for any service prohibited and declared unlawful.....	951
remedy for, or unreasonable rates or charges.....	959
remedy for, or unreasonable regulations or practices.....	959
Unreasonable: See Unjust.	
charge for any service prohibited and declared unlawful.....	951

(For General Index see page 985.)

V.

	Page.
Vehicles:	
included in term "transportation".....	950
Ventilation:	
of property transported included in term "transportation".....	950
Venue:	
of suits in Circuit Court to enjoin, set aside, annul or suspend order or requirement of commission.....	963
Violation:	
every distinct, of an order is a separate offense.....	962
each day of a continuing, a separate offense.....	962

W.

War:	
preference and precedence to be given to transportation of troops and munitions in time of.....	956
Witnesses:	
existing laws relating to attendance of, applicable.....	970

Y.

Yards:	
included in term "railroad".....	950

INDEX.

(For Index to Railroad Rate Act of 1906, see page 971.)

A.

	Page.
Abandonment:	
of property as subject to legal process, presumed after notice.....	231
circumstances which show an, of carrier's lien.....	444
Abuse:	
liability of carrier for, by servants.....	636
Acceptance:	
liability of carrier attaches only from time of, of goods.....	132
acts constituting, of goods by carrier.....	133
may be implied from proper tender.....	135
liability of carrier attaches upon proper.....	138
what acts constitute, of a person as a passenger.....	545-553
Accident—Accidental Injuries:	
when excuses delay in transportation.....	240
carrier's liability for losses by, is as an insurer.....	347
interruption of transit by, does not terminate relation of passenger..	559
protection of passenger from.....	650
evidence of other and similar.....	804
Accumulation:	
of cars and freight as excuse for delay.....	252
Action:	
at law is the proper remedy for wrongful refusal to receive and trans-	
port goods	97
allegations in, for refusal to carry goods.....	102
illegal purpose of shipper as a defense to.....	117
against railroad for exclusion from freight facilities.....	119
against carrier for excessive charges.....	127
for conversion lies for delivery to wrong person.....	153, 179, 199
stoppage in transitu as defense to.....	169
imposition practiced by others not a defense to, for misdelivery....	180
similarity of names is no defense to, for misdelivery.....	182
waiver of right of, for wrongful delivery.....	208
when right of, for conversion lies.....	211-218
law of place of shipment usually governs in, for loss or damage... .	219
when action for delay in transporting is not maintainable.....	241
waiver of right of, for delay.....	249
impossibility of performance no defense to, for failure to perform,	
where there is a special contract.....	243
limitation of time in which to bring.....	331
limitation of liability as ground of defense to, pleading.....	338
presumptions and burden of proof.....	338
carrier may maintain, for injury to goods in its custody for trans-	
portation	363

	Page.
Action—(Continued):	
carrier may maintain, for conversion of goods taken from it wrongfully	384
mental suffering as a distinct cause of.....	894
Act of God:	
loss or damage by, excuses carrier.....	21, 219, 220, 222
must be proximate cause.....	224
delay concurring with.....	256
defense of loss by.....	391
Admissions: See Evidence; Declarations.	
by carrier's agents after loss do not bind carrier.....	370
of injured persons.....	807
of employes	810
of other persons	812
Admissibility of Evidence: See Evidence; Declarations.	
Admixture:	
of goods, liability of carrier for.....	203
Aged or Infirm Persons:	
duty of carrier to assist.....	682
contributory negligence of	825
Agent—Agents:	
actual or implied acceptance of goods by carrier's, necessary.....	133
delivery to carrier's	139
when presumed to have authority to receive goods.....	140
delivery must be made to consignee, or his.....	152
delivery of goods where there is no.....	184
power and authority of carrier's general freight.....	364
of carrier's local	158, 367
of other, and employes.....	372
Air Brakes:	
carrier must provide safe and proper.....	601
Alighting:	
contributory negligence of passenger in.....	843
at improper place or in improper manner.....	845
from train or car in motion.....	847
street car passenger injured in.....	852
Animals: See Carriers of Live Stock; Dogs.	
railroads in the transportation of, are liable as common carriers....	38
measure of damages for loss or injury of, escaping en route.....	400
liability of carrier for escaping of.....	537
liability of railroads for injury to.....	600
Appliances:	
defective	594
carrier must provide safe and proper	600
duty of carrier as to improved.....	603
injuries to passengers from defective, on street cars.....	602
degree of care in use of electrical.....	603
injuries to employes from defects in	603
duty of carrier to provide safe, for receipt and discharge of passengers	612

	Page.
Approaches:	
carrier bound to ordinary care only as to, to cars.....	595
liability of carrier for defects in.....	613
Arkansas:	
rioters held not to be public enemies in.....	227
Arm:	
riding with, projecting from window, when contributory negligence..	870
Arrest: See False Arrest; Passenger.	
liability of carrier for false, of passenger by servants.....	638
Articles: See Packages.	
Artisan:	
lien of	14, 15
Assault: See Passenger; Exemplary Damages.	
liability of carrier for, by servants.....	631
provocation as mitigation of damages for.....	635
liability of carrier for, by fellow-passengers.....	644
liability of carrier for, by other third persons.....	644
damages for, of passenger.....	887
Assignees:	
of railroad companies, when common carrier.....	40
Assumption of Risk:	
by express messengers and mail clerks.....	597, 599
by passengers on freight trains.....	694
Attachment:	
carrier's liability where goods are levied upon by.....	34
seizure under, relieves carrier from liability for non-delivery....	229, 237
Attorney's Fees:	
as part of damages.....	406
Averments: See Pleading.	
in actions for refusal to carry.....	102
in actions for refusal to furnish cars.....	111
Avoidable Accident—Avoidable Injury:	
carrier liable for, notwithstanding negligence of injured person....	815
Awakening Passenger:	
on arrival at destination, not the duty of the carrier.....	688
Axles:	
carrier must provide safe and proper.....	601
limitation of liability for losses due to breaking of.....	354
B.	
Baggage: See Common Carriers; Packages; Regulations.	
liability of railroad companies for, of passengers.....	39
offer to deliver, at a proper time, discharges the carrier.....	192
carriers of passengers are insurers as to.....	542
possession of, check as evidence that possessor was a passenger.....	548
carrier may make rules and regulations as to.....	588
carrier may establish agency for delivery of.....	622
carriers may exclude other agencies for delivery of.....	622
articles constituting personal.....	700

	Page.
Baggage—(Continued):	
articles not constituting personal.....	701
duty of carrier to carry passenger's.....	709
liability of carrier for loss or injury of.....	712
limitation of carrier's liability for.....	716
whether carrier's regulations as to, are reasonable is generally a question for the jury.....	718
checks merely receipts or vouchers.....	721
commencement of carrier's liability for.....	722
termination of carrier's liability for.....	722
carrier's liability as warehouseman for	726
liability of connecting carriers for.....	727
perishable, may be sold without notice.....	446
Baggage Checks:	
are merely receipts or vouchers.....	721
possession of, as evidence of relation of passenger.....	548
Bailee:	
foundation of liability of, is negligence.....	2
carrier's liability that of, after discharge of goods from ship.....	152
carrier liable only as, after proper tender of freight or baggage.....	192
carrier may limit its liability as a mere.....	328
carrier's liability for negligence is as an ordinary.....	347
Bailment:	
carriage of goods or baggage of passenger is a.....	2
Bailor: See Bailee.	
Barriers:	
carrier must provide safe and proper window.....	601
Baskets: See Packages.	
Bell:	
carrier must provide safe and proper, pulls.....	601
Berths:	
carrier by water must use ordinary skill in erection of.....	616
carrier liable for falling of, on a passenger.....	693
Bill of Lading:	
effect of issuance of, on delivery.....	134
not essential to constitute delivery.....	141
as evidence of delivery.....	142
is <i>prima facie</i> evidence of delivery.....	145
delivery to holder of.....	161
N. Y. statute as to delivery without production of.....	163
carrier entitled to demand.....	166
carrier's liability to innocent purchaser of.....	167
laches of holder of.....	167
where goods are received from connecting carrier.....	168
stoppage in transitu defeated by transfer of.....	169
holder of, has priority over creditors.....	170
effect of word "notify" in.....	170
attached to draft.....	171
effect of, as estoppel.....	173
duplicate .. .	176

	Page.
Bill of Lading—(Continued):	
necessity of indorsement of.....	177
as mode or form of limiting carrier's liability.....	329
limitation of time in which to bring suit.....	331
requirement of notice of loss or presentation of claim.....	333
to what damages stipulation does not apply.....	336
limitation of liability as ground of defense, pleading.....	338
presumptions and burden of proof.....	338
stipulation requiring claim to be made before removal of goods.....	339
limitation of liability to forwarder or warehouseman.....	340
limitation of amount of liability.....	341
stipulations that invoice or market value shall be measure of damages	349
construction of	351
when stipulations of, become inoperative.....	355
fraudulent concealment or misrepresentation of value by shipper.....	355
carrier's duty to inquire as to value of property.....	358
shipper's duty to state value and character of goods.....	359
Blind Persons:	
when carrier may refuse transportation to.....	621
Boarding Train or Car: See Entering Cars.	
contributory negligence of passenger in.....	832
contributory negligence of passenger in, in motion.....	836
passengers injured in boarding street cars.....	842
place of entering or.....	843
Boiler:	
limitation of liability for loss from accident to.....	354
Boom Companies:	
are not common carriers.....	72
Brakes: See Cars; Appliances.	
carrier must provide safe and proper.....	601
Brakeman: See Employes.	
must be careful, skillful, competent and sober.....	598, 616
Breach of Contract: See Action; Contract; Damages; Passenger.	
Bridges: See Toll Bridge.	
carrier must provide safe and properly constructed	596
liability of carrier using State.....	609
Building:	
right and duty of carrier to maintain depot.....	614
Bumper—Buffers:	
stepping on, when contributory negligence.....	869
Bundles: See Packages.	
Burden of Proof: See Evidence; Presumptions.	
on plaintiff to establish delivery to carrier.....	145
on carrier to show its responsibility as warehouseman only.....	277
where limitation of liability is ground of defense.....	338
on shipper to show that explosion was due to negligence.....	379
generally	386
as to state of goods when received.....	391
where defense is loss by act of God.....	391
where goods lost consist of several kinds.....	392

Burden of Proof—(Continued):	Page.
where liability is limited by special contract.....	392
as to loss by fire under contract limiting liability.....	395
when carrier is merely a warehouseman.....	396
in actions against connecting carriers.....	490
in actions against carriers of live stock.....	531
when, is on carrier to show that person is a trespasser.....	545
as to negligence of carriers of passengers.....	793
as to contributory negligence of carriers of passengers.....	795
 C.	
Cable Railroads:	
are common carriers of passengers.....	540
Cabmen:	
right of railroad company to exclude, from station grounds.....	614
California:	
code definition of common carrier.....	20
rule in, as to passengers stopping over at intermediate stations....	558
Canal Companies:	
are not common carriers.....	67
Canal Boats:	
owners of, are common carriers.....	48
Car Driver: See Driver.	
Car Wheel: See Wheels.	
Care: See Common Carrier; Conductors; Contributory Negligence; Employees; Motormen; Negligence.	
required of private carriers.....	4
required of private carriers without hire.....	7
required of private carriers for hire.....	12
required of carriers of goods in general.....	235
required of carriers of passengers in general.....	594
of carrier in the carriage of passengers.....	651
Carriers: See Common Carriers; Carriers of Goods; Carriers of Live Stock; Carriers of Passengers; Connecting Carriers.	
defined	1
classification of	1
lien of	428-447
and insurance company	373
Carriers by Land:	
liability of common carriers applies to.....	27
Carriers by Water:	
liability of common carrier applies to.....	27
are excepted from duty of personal delivery.....	193
delivery by	194
duties and liabilities of passenger.....	615
liability of, as to employment of servants.....	616
Carriers of Goods:	
are common carriers.....	21, 91
duty to receive and carry.....	92
duty to forward promptly.....	94

Carriers of Goods—(Continued):	Page.
must haul cars and freight of other carriers.....	95
may be compelled by mandamus.....	96
not entitled to extra hauling charge.....	96
when failure or refusal to carry is excusable.....	98
may demand prepayment of charges.....	101
when carrier may select mode of transportation.....	103
must have reasonable and necessary facilities for transportation.....	104
not bound to be prepared for unusual contingencies.....	105
special contracts for means of transportation.....	108
duty to furnish facilities declared by statute.....	111
must furnish suitable and safe cars.....	114
tender of goods by shipper.....	116
illegal purpose of shipper as a defense.....	117
proximate cause of loss or injury.....	118
discrimination in charges or facilities.....	119
equal rates and facilities not required.....	122
compensation of the carrier.....	125
excessive charges of, and actions therefor.....	127
commencement of liability of, by delivery to.....	130
acts constituting delivery to and acceptance by.....	133
deposit of goods elsewhere than at regular office or depot.....	137
delivery to agent of.....	139
bill of lading not essential to constitute delivery.....	141
loading goods on cars.....	143
proof of delivery to.....	144
termination of liability of, by delivery by.....	146
unloading and storing goods.....	149
liability for injury while goods are being unloaded.....	151
delivery must be made to consignee or agent.....	152
delivery may always be made to true owner.....	155
delivery to fraudulent purchaser.....	157
delivery of goods sent in care of local agent of.....	158
consignor's right to change of consignee.....	159
delivery to holder of bill of lading.....	161
entitled to demand bill of lading.....	166
liability of, to innocent purchaser of bill of lading.....	167
laches of holder of bill of lading.....	167
goods received from connecting carrier.....	168
stoppage in transitu as a defense for non-delivery.....	169
holder of bill of lading has priority over creditors.....	170
effect of word "notify" in bill of lading.....	170
delivery when bill of lading attached to draft.....	171
effect of bill of lading as estoppel.....	173
duplicate bills of lading.....	176
necessity of indorsement of bill of lading.....	177
carrier's liability for misdelivery.....	178
misdelivery through mistake.....	179
misdelivery through fraud and misrepresentation.....	180
delivery to one of two persons of same name.....	181

Carriers of Goods—(Continued):	Page.
place of delivery by.....	183
right of owner or consignee to change place of delivery.....	186
statutory requirements as to delivery of grain.....	189
delivery when place of destination is not on line of.....	190
time of delivery	191
when personal delivery is required.....	192
delivery by carriers by water.....	194
delivery where consignee refuses to receive.....	196
delivery of goods sent C. O. D.....	199
confusion of goods	203
statutory penalties for refusing to deliver promptly.....	205
demand of goods by consignee.....	207
waiver of right of action for wrongful.....	208
right of, to demand receipt upon delivery.....	209
conversion by	211
receiving goods from one in possession not conversion.....	216
not liable in conversion for non-feasance.....	216
liability for loss or damage.....	219
loss or damage by act of God, vis major or inevitable accident.....	220
loss or injury by the public enemy.....	225
seizure of goods under legal process, attachment.....	229
garnishment	232
police regulations	233
duty of, after disaster.....	234
loss or injury from inherent nature of goods.....	235
care required of, in general.....	235
liability for delay in transportation.....	238
where there is a special contract.....	242
where there are special instructions by shipper.....	245
under statutes requiring prompt forwarding.....	245
delay in delivering perishable goods.....	246
delay must have been proximate cause of injury.....	248
waiver of right of action for delay.....	249
excuses for delay generally.....	249
unusual floods and storms.....	251
accumulation of cars and freight.....	252
low water or freezing of waterway.....	253
strikes by employes	254
limitation of liability for delay.....	255
duty during delay	256
delay concurring with inevitable accident.....	256
liability as warehouseman before transportation.....	258
during transportation	260
as to goods awaiting transportation.....	261
Massachusetts rule	261
New Hampshire rule	263
English rule	264
origin of different rules.....	265
conflict of laws.....	266

Carriers of Goods—(Continued):	Page.
what is reasonable time for removal of goods.....	267
time extended by failure or refusal to deliver.....	271
notice to consignee held not essential.....	272
necessity of notice maintained.....	273
sufficiency of notice	275
notice to consignor.....	275
liability of connecting carriers.....	277
the burden of proof.....	277
effect of special contract or usage on rule.....	278
duty of carrier as warehouseman to store safely.....	280
liability as warehouseman for negligence.....	281
statute making railroad company liable for losses by fire.....	285
limitation of liability, generally.....	287
operation and effect of, in general.....	288
by public notice	290
by special contract	294
must be express and will not be presumed.....	298
need not be signed by shipper unless statute requires.....	299
when there are two contracts.....	299
conflict of oral and written.....	300
must have been fairly entered into.....	302
consideration necessary	302
signed by shipper without examination.....	305
must have been made at time of shipment.....	306
must be legible and intelligible.....	307
by what law validity is determined.....	308
who may make	312
for negligence not permitted.....	313
the New York rule.....	319
rule in Illinois and Wisconsin.....	322
the English and Canadian rule.....	323
reasons upon which rules are based.....	325
liabilities subject to.....	327
mode or form of, bill of lading or shipping receipt.....	329
limitation of time within which to bring suit.....	331
requirement of notice of loss or presentation of claim within fixed	
time	333
to what damages stipulation does not apply.....	336
limitation of liability as ground of defense—pleading.....	338
presumptions and burden of proof.....	338
stipulations requiring claim to be made before removal of goods....	339
limitation of liability to forwarder or warehouseman.....	340
limitation of amount of liability.....	341
stipulations that invoice value or market price shall be measure of	
damages	349
construction of special contracts.....	351
when stipulations of contract inoperative.....	355
fraudulent concealment or misrepresentation of value by shipper.....	355
carrier's duty to inquire as to value of property.....	358

Carriers of Goods—(Continued):	Page.
shipper's duty to state value and character of goods.....	359
carrier's relation to goods.....	362
power and authority, of general freight agents of.....	364
of local agents of.....	367
of other agents and employes of.....	372
and insurance company.....	373
negligence of, general rule of liability.....	374
must have been proximate cause of injury.....	377
in stowage of goods.....	378
contributory negligence of shipper.....	380-385
presumptions and burden of proof.....	386-397
damages	398-427
lien of	428-447
connecting carriers	448-494
interstate transportation by	905-940
Carriers of Live Stock:	
liability of	28, 496
are common carriers.....	496
duty to receive and carry.....	497
duty as to facilities and means of transportation.....	498
stock pens and yards.....	500
shipper's knowledge of defects in cars.....	502
duty to provide food, water, and rest for stock.....	504
when shipper assumes duty of caring for stock.....	505
other duties in respect to transportation.....	507
statutes limiting the confinement of cattle.....	508
liability of, for loss or injury.....	509
commencement and termination of liability.....	512
liability for delay in transportation or delivery.....	512
delivery to	516
delivery by	516
contributory negligence of owner.....	518
measure of damages	520
limitation of liability	522
stipulations of shipper to accompany stock, load and unload.....	523
injuries caused by viciousness of animals or defects in cars.....	524
stipulation as to claim for damages.....	525
limitation of liability to a specified amount.....	527
loss or injury due to negligence of.....	529
stipulation requiring shipper to report condition of stock.....	530
limitations rendered inoperative.....	531
presumptions and burden of proof.....	532
liability of connecting carriers.....	534
liability for improper loading or unloading.....	536
liability for animals escaping.....	537
Carriers of Passengers:	
liability of, for injuries depends upon negligence.....	3
may be common carriers.....	21
liability of	35

Carriers of Passengers—(Continued):	Page.
definition and nature of.....	539
relation between, and passengers.....	541
who are passengers.....	543
commencement of relation	545
purchase of ticket.....	548
entry into vehicle of carrier.....	549
payment of fare	552
termination of relation	554
leaving the vehicle of carrier.....	556
after leaving vehicle of carrier.....	556
stop-overs on continuous passage tickets.....	558
who are not passengers.....	560
limited and unlimited tickets.....	563
non-transferable tickets .. .	567
persons riding gratuitously.....	568
persons riding on passes.....	570
persons riding on drover's pass.....	571
persons riding on trains not generally used for passengers.....	574
persons riding on engine.....	575
persons riding on hand cars.....	577
employees of others carried under contract—mail clerks.....	577
employees of others carried under contract—express messengers.....	579
persons riding on freight trains.....	581
persons accompanying passengers.....	584
employees of carrier as passengers.....	586
rules and regulations of carrier.....	588
rules and regulations of street railways.....	592
care required of.....	594
as to obstructions on or near tracks.....	598
duty to fence tracks.....	599
as to locomotives, cars, and appliances.....	600
as to improved appliances and methods.....	603
duty of inspection.....	605
liability for, latent defects.....	606
negligence of persons engaged in construction or manufacture....	608
leased lines and cars of another company.....	609
injuries caused by inevitable accident.....	610
means and appliances for receiving passengers.....	612
by stage coaches.....	615
by water .. .	615
liability as to employment of servants.....	616
duty to receive and transport passengers.....	619
who may be refused transportation.....	621
when refusal must be made.....	624
duty to carry passengers on freight and special trains.....	624
duty to protect passengers.....	625
acts and omissions of employees.....	627
New York rule of liability for wrongful acts of servants.....	630
liability for, assaults by servants.....	631

Carriers of Passengers—(Continued):	Page.
insult and abuse by servants.....	636
expulsion by servants.....	637
false arrest of passenger.....	638
acts of fellow-passengers or others.....	641
assault by passengers or others.....	644
indecent language and conduct of fellow-passengers or others.....	647
acts of drunken passengers.....	647
duty to sick passengers.....	649, 684
protection from accidental injuries.....	650
care, in carriage of passengers.....	651
management of conveyance—sudden jerks and jolts.....	660
duty to announce stations.....	664
to stop at stations.....	666
to warn of departure of trains.....	669
to provide safe means of ingress and egress.....	670
to give reasonable time for ingress and egress.....	674
to warn, instruct and inform passengers.....	679
to assist aged, infirm, or helpless passengers.....	682
to carry to point of destination.....	685
liability for carrying beyond destination.....	687
duty to carry promptly.....	690
as to safety of passengers.....	692
on freight and other trains.....	694
to provide passengers with seats.....	695
liability for injuries caused by collision.....	696
duty for safety of sick passengers.....	700
articles constituting personal baggage.....	700
duty to carry baggage of passenger.....	709
liability for loss or injury of baggage.....	712
limitation of liability for loss or injury of baggage.....	716
baggage checks merely receipts or vouchers.....	721
commencement and termination of liability for baggage.....	722
liability as warehouseman for baggage.....	726
liability of connecting carrier for baggage.....	727
ejection of passengers and other persons.....	731-751
limitation of liability of, generally.....	752
essentials of contract limiting liability for negligence.....	756
the New York rule	763
the English rule.....	765
limitation as to particular classes of passengers.....	765
presumptions and burden of proof in actions against.....	769-800
evidence in actions against.....	801-813
contributory negligence of passengers.....	814-878
damages in actions against.....	879-904
interstate transportation by	905-940
Cars: See Street Cars.	
carrier must furnish suitable and safe.....	114, 600
accumulation of, as excuse for delay.....	252
liability of carrier using, of another company.....	609
defective .. .	594

	Page.
Car-switching Companies:	
are common carriers	86
Car Window: See Window.	
Cartmen: See Hackmen.	
are common carriers	63
Case: See Action; Declaration; Evidence.	
Cattle: See Animals.	
statutes limiting confinement of.....	508
presence of, on track presumptive evidence of negligence.....	699
Causa Proxima Non Remota: See Proximate Cause.	
Caution: See Care; Contributory Negligence; Negligence.	
Charges:	
carrier of goods may demand prepayment of.....	101
carrier's lien for.....	428-447
carrier's, must be just and reasonable.....	911
Chattel Mortgagee:	
when carrier not liable for delivery to a.....	216
when refusal to deliver goods demanded by, is not conversion.....	232
Check: See Baggage; Evidence.	
Child—Children: See Contributory Negligence; Negligence.	
ejection of custodian of, for refusal to pay fare.....	732
ejection of, for refusal to pay fare.....	732
contributory negligence of	822
contributory negligence of parents, guardians or custodians of.....	828
Circus:	
railroad company transporting, not common carrier.....	79
carrier may limit its liability for loss in transportation of a	329
Classification:	
carriers	1
carrier may make rules for, of goods.....	99
Coach: See Stage Coaches.	
passenger carriers by stage.....	615
C. O. D. Goods:	
delivery of	199
liability of carrier for.....	200
power of factor to waive collection on.....	201
when carrier may refuse inspection of	203
limitation of liability for, to that of warehouseman.....	340
Co-employees: See Master and Servant.	
Coin: See Tender.	
measure of damages for loss of gold.....	400
payment of fare need not be in.....	552
Collect On Delivery: See Carriers of Goods; C. O. D. Goods; Goods Sent C. O. D.	
Collision: See Contributory Negligence; Negligence.	
liability of carrier for injuries caused by.....	696
Color: See Passengers.	
carrier cannot refuse passage to a person on account of.....	623

Commencement:	Page.
of liability of carrier of goods.....	130
of relation of passenger.....	545
Common Carriers: See Carriers.	
foundation of liability of, is not negligence.....	2
insurers of safety of goods.....	3
lien of	14-16, 428-447
what constitutes	18
undertake generally	19
statutory definitions	20
true test of character of	21
liability of, is that of an insurer.....	23
liability of, based upon reasons of public policy.....	25
liability of, in the carrying of live stock.....	28
liability of, where loss results from inherent nature of goods.....	29
liability of, where loss results from acts of the shipper.....	29
liability of, where loss is the result of delay.....	33
liability of, where loss is caused by exercise of public authority.....	34
liability of, as carriers of passengers.....	35
express companies are	35
railroad companies are	37
receivers and assignees of railroad companies, when are.....	40
street railroads are	44
when railroad transporting cars of another is.....	45
transportation or dispatch companies are.....	47
express freight lines, when liable as.....	47
owners of canal boats are	48
owners of tow boats on Mississippi are.....	48
owners of tow boats generally are not.....	49
ferrymen, when are, and when not.....	51
hackmen, when are and when not.....	53
omnibus proprietors are.....	54
stage coach proprietors are	55
palace and sleeping car companies are not.....	55
pipe lines made, by statute.....	61
wagoners are	61
carriers by river craft are.....	62
truckmen, freightmen, draymen, cartmen and porters are.....	63
furniture mover is not.....	64
master and owners of ships and steamboats are.....	65
owners of a toll bridge are not.....	66
canal companies are not	67
forwarding merchants are not	68
warehousemen are not	69
wharfingers are not	69
postmasters, contractors and mail carriers are not.....	71
log-carrying, log-driving or boom companies are not.....	72
telegraph companies held not liable as.....	73

	Page.
Common Carriers—(Continued):	
railroad company transporting a circus is not.....	79
railroad company in South Carolina only over its own line is.....	80
railroad company carrying a dog for accommodation is not.....	80
carrier under contract exempting "river risks" is not.....	82
owners of passenger elevators, not liable as.....	82
owners of passenger elevators, liable as.....	84
car-switching companies are.....	86
telegraph messenger companies are.....	86
irrigation company is not.....	88
transfer companies are.....	89
owners of grain elevators are analogous to.....	90
carriers of goods are.....	91
carriers of passengers are.....	21, 539
carriers of live stock are.....	496
Compensation: See Private Carriers.	
when it may be implied.....	9
of carrier of goods.....	125
carriers can only recover, for goods actually delivered.....	126
Compensatory Damages: See Carriers of Goods; Carriers of Passengers; Damages.	
Complaint: See Pleading:.	
Concurrent Negligence: See Negligence.	
Condition:	
evidence as to, of means of transportation.....	802
Conduct:	
when evidence of, of third persons is admissible.....	812
Conductor: See Employes; Negligence; Master and Servant.	
must be careful, skillful, competent, and sober.....	598, 616
police powers of.....	641
Conflict:	
of laws	266
of oral and written agreements.....	300
Confusion of Goods:	
liability of carrier for failure to deliver by reason of.....	203
Connecting Carriers:	
liability of, as warehousemen.....	277
lien of last of.....	437
who are	448
relation of, to shipper and to each other.....	449
not bound to carry beyond own line.....	450
delivery by, to succeeding carrier.....	450
notice of arrival of goods, to succeeding carrier.....	453
duty to receive goods from.....	453
liability for delay	454
liability of initial carrier limited to its own line.....	457
liability of initial carrier extends over whole route.....	462
liability of intermediate	464
liability of terminal	468

	Page.
Connecting Carriers—(Continued):	
liability of, for miscarriage or diversion of goods.....	469
special contracts for through transportation	471
what is sufficient to establish a through contract by.....	473
charging and collecting entire freight in advance.....	475
collection of entire charges by terminal carrier.....	476
accepting goods, to be transported or delivered at a certain point....	477
as forwarders or warehousemen	478
limitation of liability of, to own line.....	479
when, entitled to benefit of limitation.....	484
what constitutes delivery to	487
notice to, of arrival of goods.....	488
presumptions and burden of proof.....	490
as partners	491
rights of, as to charges	494
liability of, of live stock	534
liability of, for baggage	727
Conservator of the Peace: See Conductor; Police Power.	
statute making conductor, does not relieve carrier from liability for false imprisonment	640
Consideration:	
necessity of, for special contract limiting liability.....	302
Consignee:	
delivery must be made to, or his agent.....	152
right to change of, by consignor	159
must demand goods of carriers by railway or water.....	207
when delivery to, will discharge carrier.....	166
carrier is liable for delivery to wrong, where there are two persons of same name	181
right of, to change place of delivery.....	186
right of carriers to treat as owner the.....	188
delivery where there is a refusal to receive by.....	196
demand of goods by.....	207
carrier's liability where unloading is the duty of the.....	270
what is reasonable time for, to remove goods.....	267, 270
what is not reasonable time for, to remove goods.....	271
time of, extended by failure or refusal to deliver.....	271
sufficiency of notice to, of arrival of goods.....	275
lien of carrier where, fails or refuses to receive.....	436
Consignor:	
right of, to change of consignee.....	159
carrier's contract is with, when he is known to be the owner.....	154
right of, to change place of delivery.....	187
notice to, of non-acceptance of goods.....	275
Construction:	
liability of carrier for negligence of persons engaged in.....	608
of special contracts limiting liability.....	351
Construction Company: See Contractors.	
Contagious Disease:	
carrier not obliged to carry persons infected with.....	621

	Page.
Contingent Damages: See Damages.	
Contract: See Carrier; Carriers of Goods; Carriers of Passengers; Carrier without Hire; Private Carrier for Hire; Common Carrier; Baggage; Bill of Lading; Special Contracts.	
mutuality of agreement necessary to.....	110
of sale as measure of damages.....	423
of carriage may be rescinded because of acts of passengers.....	555
essentials of, limiting liability of carrier of passengers.....	756
tickets as evidence of, of transportation.....	806
Contractors:	
mail, are not common carriers.....	71
relation of carriers of passengers to employes of.....	544
Contributory Negligence: See Aged and Infirm Persons; Children; Driver; Imputed Contributory Negligence; Negligence; Passengers.	
when shipper's, excuses carrier from liability.....	32
of shipper generally	380
defective packing or marking.....	381
goods improperly loaded	382
liability of shipper or consignee to carrier for negligence in unloading	383
liability of shipper for injury caused by goods of dangerous character	383
of owner of live stock	518
of passengers .. .	795-874
Contributory Negligence of Passengers:	
burden of proof as to.....	795
must be proximate cause of injury.....	814
acts in disregard of warning or disobedience of carrier's rules.....	815
acts by permission or direction of carrier's employes.....	817
sudden peril—acts in emergencies.....	818
of children	822
of aged or infirm persons	825
of parents, guardians, or custodians	828
intoxication as evidence of	828
as a question of law or fact.....	829
traveling in violation of statute is not.....	830
in entering conveyance.....	832
in boarding car or train in motion.....	836
in boarding street cars.....	842
as to place of entering cars or trains.....	843
in leaving conveyance.....	843
in alighting at improper place or in improper manner.....	845
in alighting from train or car in motion.....	847
alighting from street cars.....	852
in riding in dangerous position	853
in riding on platform, running 'board, or steps.....	856
in standing up in car	866
in passing from one car to another.....	868
in riding with part of person projecting from window.....	870

Contributory Negligence of Passenger—(Continued):	Page.
in awaiting and seeking transportation.....	872
in standing near or between tracks and crossing intervening tracks..	874
Conversion:	
by carrier	153, 179, 197, 207, 211
securing goods from one in possession not.....	216
carriers not liable in, for non-feasance.....	216
when carrier may maintain action for.....	364
Counterclaim:	
damages to goods or for breach of contract are, to freight charges....	125
what is proper, in action of carrier for freight.....	446
Counterfeit Money:	
passing, in payment of fare.....	639
Coupling Apparatus:	
carrier must provide safe and proper.....	602
Crossings:	
care of carrier at railroad.....	595
Crowding Cars: See Front Platform; Open Car; Rear Platform.	
carrier assumes risks of passenger's position due to.....	861
Culverts:	
carrier must provide safe.....	597
Custodian: See Children; Contributory Negligence; Parents.	
contributory negligence of.....	828
Custody:	
shipper must relinquish, of goods to complete delivery.....	133
actual, by carrier necessary.....	134
Custom: See Usage of Trade.	
may establish constructive delivery of goods.....	137
will not excuse carrier for misdelivery.....	180
of carrier may establish waiver of rules.....	591
evidence of, of carrier or passenger.....	805
Customary Stopping Place: See Platforms; Stations; Stopping Place; Usual Stopping Places.	
D.	
Dakota:	
statute limiting time to present claim.....	277
Damages: See Action; Exemplary Damages; Measure of Damages.	
measure of, in case of loss of goods.....	398
interest as part of	403
freight charges, advances, and attorney's fees.....	406
where goods are only injured.....	408
in case of delay in transportation of goods.....	410
under penalty contracts.....	412
for refusal or failure to carry goods.....	417
for refusal to deliver goods.....	419
for misdelivery of goods	419
where goods have no market value.....	420
for mental suffering.....	421
remote and speculative	422

	Page.
Damages—(Continued):	
contract of sale as measure of	423
where goods are intended for a specific purpose.....	424
prospective, contingent, or possible consequences.....	426
measure of, in shipment of live stock.....	520
stipulations as to claims for.....	525
limitation of liability to a specified amount.....	527
for carrying passenger beyond destination.....	687
compensation is the general rule as to measure.....	879
for failure to carry promptly.....	690
injury aggravated by passenger's negligence or imprudence.....	882
injury aggravated by existing disease or injury.....	883
for failure to carry passenger.....	884
for setting down passenger at place other than station.....	886
for ejection or assault of passenger.....	887
for personal injuries	891
mental suffering as distinct cause of action or element of	894
exemplary, for malice or willfulness.....	895
exemplary, for gross negligence.....	898
exemplary, for carrier's acts.....	899
exemplary, for acts of servants.....	900
elements affecting the amount of.....	902
excessive or inadequate	904
carrier cannot recover for conjectural or unproved.....	691
Danger: See Contributory Negligence.	
extraordinary will excuse carrier for refusal to carry goods.....	100
limitation of liability, for loss from, fire, collision and navigation....	353
unavoidable, of river navigation.....	353
Dangerous Goods:	
carrier may refuse to carry.....	100
liability of shipper for injury caused by.....	383
Dangerous Position: See Passenger; Contributory Negligence.	
passenger riding in, contributory negligence.....	853
Dangers of the Sea:	
limitation of liability for loss from.....	353
"Dead Head:"	
is not a passenger.....	560
Death: See Carriers of Passengers; Damages.	
Deceit:	
of third person will not excuse carrier for misdelivery.....	179
Declaration: See Pleading.	
Declarations: See Evidence.	
of injured persons	807
of employes	810
of third persons	812
Defect: See Appliances; Bridges; Roadbed; Street Cars; Tracks.	
knowledge of shipper of, in cars.....	502
injuries to animals caused by, in cars.....	524
liability of carrier for latent.....	606

	Page.
Defective:	
packing or marking of goods.....	100, 182, 380, 381
roadbeds, machinery, cars, and appliances.....	594
platforms and stations, liability of carrier for.....	595
injuries to passengers by, appliances on street cars.....	602
or invalid ticket, ejection for tendering.....	742
Defense:	
usage not a good defense for adoption of unsafe methods.....	116
illegal purpose of shipper as a.....	117
stoppage in transitu as a.....	169
similarity of names is no, to an action for misdelivery.....	182
impossibility of performance no, to action for failure to perform when there is a special contract.....	243
limitation of liability as ground of, pleading.....	338
limitation of liability as ground of, presumptions and burden of proof	338
Definition:	
carrier	1
reasonable time for removal of goods.....	267
wanton or willful negligence.....	375
proximate cause	377
"clear" bill of lading.....	378
market value	398
carriers of passengers	539
res gestae	807
Delay:	
carrier's liability limited where loss is result of.....	33
carrier excusable for losses from, due to acts of strikers.....	228
liability for, in transportation.....	238
where there is a special contract.....	242
where there are special instructions by shipper.....	245
under statutes requiring prompt forwarding of freight.....	245
in delivering perishable freight	246
must have been proximate cause of injury.....	248
waiver of right of action for.....	249
excuses for, generally	249
unusual floods and storms as excuses for.....	251
accumulation of freight and cars.....	252
low water or freezing of waterway.....	253
strikes by employes	255
limitation of liability for	255
carrier's duty during delay	256
concurring with inevitable accident.....	256
measure of damages in case of.....	410
damages where, causes loss of engagement.....	412
where goods are intended for specific purpose.....	424
liability of connecting carriers for.....	454
liability of carriers of live stock for.....	512
Delivery:	
acts constituting, and acceptance of goods.....	133
acceptance may be implied from proper tender.....	135

Delivery—(Continued):	Page.
constructive delivery, may be established by custom or usage.....	137
to agent of carrier.....	139
bill of lading not essential to constitute.....	141
bill of lading as evidence of.....	142
proof of, to carrier.....	144
liability of carrier commences with, to carrier.....	130
liability of carrier terminates with, by carrier.....	146
must be made to consignee or agent.....	152
may always be made to true owner of goods.....	155
to fraudulent purchaser.....	157
of goods sent in care of carrier's local agent.....	158
to holder of bill of lading.....	161
carrier entitled to demand bill of lading before.....	166
when carrier liable to innocent purchaser of bill of lading.....	167
laches of holder of bill of lading in demanding.....	167
of goods received from connecting carrier.....	168
stoppage in transitu as a defense for refusal to.....	169
holder of bill of lading has priority to, over creditors.....	170
effect of word "notify" in bill of lading.....	170
when bill of lading is attached to draft.....	171
effect of bill of lading as estoppel.....	173
duplicate bills of lading.....	176
necessity of endorsement of bill of lading.....	177
carrier's liability for misdelivery.....	178
misdelivery through mistake.....	179
misdelivery through fraud and misrepresentation.....	180
to one of two persons of same name.....	181
place of	183
right of owner or consignee to change place of.....	186
statutory requirements as to, of grain.....	189
when place of destination is not on carrier's line.....	190
time of	191
when personal, required	192
by carriers by water.....	194
where consignee refuses to receive.....	196
of goods sent C. O. D.....	199
confusion of goods in	203
statutory penalties for refusing promptly to.....	205
demand of goods by consignee.....	207
waiver of right of action for wrongful.....	208
right of carrier to demand receipt upon	209
misdelivery by carrier is a conversion.....	211
refusal of, of goods, damages for.....	419
wrong, damages for	419
of goods, effect of on carrier's lien.....	435
by connecting carrier to succeeding carrier.....	450
what constitutes, to a connecting carrier.....	487
to carriers of live stock.....	510
by carriers of live stock.....	510

E.

	Page.
Earning Power:	
loss of, as element of damages.....	893
Earnings:	
loss of, as damages.....	884
Egress:	
carriers must provide passengers with safe and convenient means of..	612
Ejection:	
of passengers for failure or refusal to procure ticket or pay fare....	731
of passengers from street railroads.....	732
passenger entitled to reasonable time to pay fare or produce ticket before	733
for refusal to pay extra fare when paid on train.....	733
tender or payment of fare to avoid.....	735
of intoxicated passengers.....	736
of disorderly passengers	739
for violation of reasonable rules of the carrier.....	740
of passengers tendering invalid or defective tickets or transfers.....	742
of persons riding on freight trains.....	746
manner of, must not be negligent.....	747
place of, must be proper one.....	749
damages for, of passenger.....	887
Electric Railroads:	
are common carriers of passengers.....	540
Electrical Appliances:	
carrier is bound to the highest degree of care in use of.....	820
Electricity: See Electric Railroads.	
care to protect passengers in the use of.....	603
Elevated Railroads:	
where persons become passengers on.....	546
Elevators: See Passenger Elevators; Grain Elevators.	
status and character of owners of.....	82, 540, 656
Embankments:	
carrier must provide safe and properly constructed.....	597
Emergency:	
carrier's duty in, causing delay.....	256
acts of passengers in, not contributory negligence.....	818
Employes: See Brakeman; Conductor; Motormen.	
strikes by, as excuse for delay.....	254
wages of employes as part of damages.....	425
power and authority of carrier's.....	364, 367, 372
of others carried under contract—mail clerks.....	577
of others carried under contract—express messengers.....	579
of carrier as passengers.....	586
must be careful, skillful, competent and sober.....	598, 616
injuries to, from defects in cars, tracks, and appliances.....	603
liability of carrier for acts or omissions of.....	627
the New York rule.....	630
liability of carrier for assaults by.....	631
provocation as mitigation of damages for assault by.....	635

	Page.
Dog:	
railroad company carrying, for accommodation of passenger, not common carrier	80
liability of carrier in the carriage of.....	81
Door:	
carrier must provide safe and proper vestibule.....	602
injury from defective device for opening and shutting.....	602
Draymen:	
are common carriers	63
Driver of Street Cars: See Contributory Negligence; Motormen; Negligence.	
must be careful, skilful, competent, and sober.....	598, 616
Drivers of Stage Coaches:	
owners responsible for negligence of.....	615
Drover's:	
persons riding on, pass.....	571
Drunkenness—Drunken Passenger: See Intoxicated Passenger.	
duty of carrier to protect from acts of.....	647
carrier liable for negligently ejecting.....	689
Dummy Railroads:	
are common carriers of passengers.....	540
Duties: See Conductor; Employes; Motormen; Negligence.	
Duty:	
of carrier to receive and carry goods.....	92, 135
of carrier to forward goods promptly.....	94
of carrier generally to load goods on cars.....	143
of carrier to receive goods from connecting carrier.....	453
of carrier after disaster.....	234
of carrier to receive and transport passengers.....	619
of carrier during delay.....	256
to carry passengers on freight and special trains.....	624
of carrier to protect passengers.....	625
of carrier to protect from acts of drunken passenger.....	647
of carrier to sick passengers.....	649
of carrier to announce stations.....	664
of carrier to stop at stations.....	666
of carrier to give warning of departure of trains.....	669
of carrier to provide safe means of ingress and egress.....	670
of carrier to give reasonable time for ingress and egress.....	674
of carrier to warn, instruct, or inform passengers.....	679
of carrier to assist aged, infirm and helpless passengers.....	682
of carrier to carry to point of destination.....	685
of carrier not to carry passengers beyond destination.....	687
of carrier to carry promptly.....	690
of carrier to carry passengers safely.....	692
of carrier to provide passengers with seats.....	695
of carrier for safety of sick passengers.....	700
of carrier to inquire as to value of property.....	358
of shipper to state value and character of property.....	359

	Page.
Demand:	
effect of excessive, for freight charges.....	102
of prepayment of freight charges, when necessary.....	103
of bill of lading by carrier, when proper.....	166
of goods by consignee.....	207
of receipt upon delivery, right of carrier.....	209
Demurrage:	
carrier's lien for, charges.....	429, 430, 444
Deposit:	
of goods for shipment must be made at accustomed place.....	136
of goods elsewhere than at regular office or depot.....	137
of goods at usual place, with notice, is good delivery.....	185
Depot: See Station.	
carrier may refuse to carry goods not offered at regular.....	99
effect of deposit of goods elsewhere than at regular.....	137
delivery of goods where there is no, and where there are two.....	184
limitation of liability for injury received while at.....	354
relation of passenger continues until passenger has left.....	554
right and duty of carrier to maintain, buildings.....	614
right of carrier to exclude hackmen from, grounds.....	614
Derailment:	
presumptions arising from, of trains or cars.....	778
Despatch Companies:	
are common carriers	47
Destination:	
duty of carrier to carry to point of.....	685
liability of carrier for carrying passenger beyond.....	687
Deviation:	
duty of common carrier to convey goods without unnecessary.....	250
Diligence: See Care; Contributory Negligence; Negligence.	
Disabilities, Physical: See Aged and Infirm Persons; Blind Persons; Intoxication.	
Discharge:	
of carrier's lien for charges.....	441
offer to deliver freight or passenger's baggage at a proper time is a, of carrier from liability.....	192
means and appliances for, of passengers.....	612
Discrimination:	
carrier liable for unreasonable, in charges or facilities.....	93, 119
unjust, in interstate transportation.....	914
unjust, in specific cases.....	918
Disorderly Passengers:	
duty of carrier as to.....	620
ejection of	739
Disorderly Conduct—Disorderly Person:	
carrier not bound to carry.....	620
carrier may eject persons for.....	739
Dispatch Companies: See Despatch Companies.	

	Page.
Employees—(Continued):	
liability of carrier for insult and abuse by.....	636
liability of carrier for false arrest of passenger by.....	638
acts of passengers by permission or direction of carrier's.....	817
carriers of passengers are liable for wilful misconduct or negligence of.....	543
relation of carrier of passengers to its.....	544
to sleeping car companies'.....	544
to railroad contractors'.....	544
to shippers of goods'.....	544
when persons become passengers by permission, consent, or invitation of carriers	550
police powers of carrier's.....	641, 739
evidence as to authority, competency, and negligence of.....	801
Enemy: See Public Enemy.	
Enforcement:	
of carrier's lien for charges.....	445
Engine, Locomotive:	
persons riding on	573
Engineers:	
must be careful, skillful, competent, and sober.....	598, 616
supervision of competent, will not excuse carrier for negligence.....	608
English:	
rule as to carrier's liability as warehouseman as to goods awaiting delivery	263
rule as to limitation of carrier's liability.....	287-291, 765
English Railway and Canal Traffic Act:	
duties and obligations of carriers under.....	113
discrimination in rates or facilities forbidden by.....	121
Entering Cars: See Carriers of Passengers; Crowding Cars; Passen- gers; Regulations; Street Cars.	
when it creates relation of carrier and passenger.....	549
carriers must provide safe facilities for passengers.....	613
contributory negligence of passenger in.....	832
in motion, when contributory negligence.....	836
passengers injured in entering street cars.....	842
place of boarding or.....	843
carrier must provide safe facilities for.....	613
Equipment: See Appliances; Roadbed; Tracks.	
Estoppel:	
effect of bill of lading as.....	173
Evidence: See Damages; Burden of Proof; Ordinances; Presumptions; Speed.	
bill of lading as, of delivery.....	142
of customary mode of storage admissible, on question of negligence..	379
of authority, competency, and negligence of servants.....	801
as to condition of means of transportation.....	802
as to other and similar accidents.....	804
as to subsequent repairs and precautions.....	805
as to custom or habit of carrier or passenger.....	805
tickets as, of contract of transportation.....	806

	Page.
Evidence—(Continued):	
as to declarations and admissions of injured passengers.....	807
as to declarations and admissions of employes.....	810
as to declarations and conduct of other persons.....	812
intoxication as, of contributory negligence.....	828
Excavation:	
dangerous proximity of, to tracks.....	598
Excessive Charges:	
and actions therefor	127
Excessive Damages: See Damages.	
Exclamations: See Declarations; Evidence.	
Excuses:	
for delay generally.....	249-254
Execution:	
carrier's liability where goods are levied upon by.....	34
seizure under, relieves from liability for non-delivery.....	229
Exemplary Damages: See Assault; Damages; Ejection; Wilful Acts.	
for willful refusal to carry goods.....	93
are recoverable for willful misdelivery.....	184
Exits:	
carrier must provide safe, for passengers.....	612
Expenses: See Damages.	
Experts:	
may testify as to future course of disability.....	894
Explosion:	
liability of shipper for, of articles shipped.....	383
carrier not liable as warehouseman for loss by.....	283
burden is on shipper to prove that, was due to negligence.....	379
Explosive:	
carrier may refuse to carry goods of an, character.....	100
carrier may limit its liability for loss by dangerous.....	329
Express Companies:	
are common carriers and liable as such.....	35
cannot change character by calling themselves forwarders.....	36
freight, liable as common carriers.....	47
power and authority of agents of.....	370
Express Messengers:	
relation of, to carriers.....	579
Expulsion of Passengers: See Conductor; Ejection; Passengers.	
Extra Charge:	
for overweight of baggage.....	707
carrier entitled to, for extra weight.....	710
Extra Fare:	
ejection for refusal to pay, on train.....	733
Extra Hauling Charge:	
carrier not entitled to.....	96

F.

	Page.
Facilities:	
carriers bound to nave reasonable, for transportation.....	104
duty declared by statute to furnish.....	111
carrier not required to furnish the same, to all.....	122
duty of carriers of live stock as to, for transportation.....	498
Fact: See Law or Fact; Questions for Court; Questions for Jury.	
Failure: See Action; Contract; Damages; Passengers.	
to carry goods, damages for.....	417
to procure ticket, ejection for.....	731
False Arrest: See Arrest.	
liability of carrier for, of passenger by servants.....	638
False Imprisonment: See Arrest; False Arrest.	
carrier's liability for, of passenger.....	640
Fare: See Payment of Fare; Rates.	
ejection for refusal to pay.....	731
ejection for refusal to pay extra.....	733
payment or tender of, to avoid ejection.....	735
Fast Freight Line: See Common Carriers.	
Fellow Passengers: See Passengers.	
liability of carriers for acts of.....	641
liability of carrier for assaults by.....	644
liability of carrier for indecent language and conduct of.....	647
duty of carrier to protect from acts of drunken.....	647
Fellow Servants: See Master and Servant.	
Fences:	
duty of railroad company to construct.....	599
protect passengers as well as owners of cattle.....	600
presence of cattle on track presumptive evidence of negligence....	699
Ferae Naturae:	
dogs no longer held to be.....	81
Ferries—Ferrymen: See Common Carriers.	
when common carriers and when not.....	51, 540
liability of, commences with custody of goods.....	131
Fire Engine:	
carrier not required to place cars within reach of.....	237
Fire Extinguisher:	
carrier not required to place cars within reach of.....	237
Firemen:	
carrier liable for neglect of, of engines to get up steam.....	691
Fires:	
loss of goods placed on wharf by.....	132
statute making railroad companies liable for losses by.....	285
carrier not liable as warehouseman for, wilfully started by employe.	283
limitation of liability for loss of cotton by.....	353
Flaw: See Appliances; Street Cars.	
Floods:	
extraordinary, excuse carrier for loss or damage to goods.....	220
unusual, and storms as excuses for delay.....	251

	Page.
Footboard: See Contributory Negligence; Open Car; Riding on Steps or Footboard.	
courts will not draw distinctions between, and seats, as places of relative danger and safety.....	864
Force: See Carriers of Passengers; Conductor; Ejection; Employes; Passenger.	
Forfeiture:	
of person's rights as a passenger.....	554
Forwarders—Forwarding Merchants:	
are not common carriers.....	68
limitation of liability to that of.....	340
Fraud:	
of third person will not excuse carrier for misdelivery.....	178
shipper not bound by special contract limiting liability obtained by.....	297
concealment or misrepresentation of value by.....	355
may be practiced by silence as well as by positive representation.....	357
Fraudulent Purchaser:	
delivery of goods to.....	157
Free Passengers: See Children; Gratuitous Passengers; Passengers; Trespassers.	
duty owing by carrier to.....	568
Freezing:	
of goods of perishable nature while en route is the act of God.....	222
of water-way or low water, as excuse for delay.....	253
when carrier is liable, and when not, for loss of goods by.....	223, 224
Freight:	
carrier of goods may demand prepayment of.....	101
undertaking for reasonable charges, implied.....	125
excessive charges for, and actions therefor.....	127
statutes requiring prompt forwarding of.....	245
delay in delivering perishable.....	246
delivery of, when destined to switches or side tracks.....	184
accumulation of.....	252
charges usually deducted from market value.....	406
carrier's lien for freight charges.....	428-447
delivery of goods and payment of.....	435
rights of connecting carriers as to charges for.....	494
limitation of liability for, after it has reached destination.....	352
Freight Agents:	
power and authority of carrier's general.....	364
Freightmen:	
are common carriers.....	63
Freight Trains:	
persons riding on.....	581
duty to carry passengers on, and special trains.....	624
ejection of persons riding on.....	746
Freshet: See Floods.	
Fright: See Contributory Negligence; Damages.	
as element of damages.....	894, 895

Front Platform: See Platform.	
Furnaces:	Page.
carrier must provide safe and proper.....	602
Furniture Mover:	
not a common carrier.....	64
Fuse:	
explosion of.	650
 G.	
Garnishment:	
when property in hands of carrier subject to.....	232
Gates:	
carrier must provide safe and proper platform.....	601
injury from defective platform.....	603
General Lien: See Lien.	
can only exist by special contract.....	431
Georgia:	
code definition of common carrier.....	20
contract limiting liability must have express assent of shipper in... .	297
rule as to burden of proof of contributory negligence.....	796
Goods: See Carriers of Goods; Freight; Packages.	
Goods Sent C. O. D.:	
delivery of.	199
Grain:	
statutory requirements as to delivery of.....	189
Grain Elevators:	
owners of, analogous to common carriers.....	90
rule of liability for confusion of goods not applicable to.....	203
carrier not responsible after delivery to.....	270
Gratuitous—Gratuitously:	
where transportation is	7
when person carried, becomes a passenger.....	547
persons riding.	569
Gratuitous Bailees—Gratuitous Bailments:	
private carriers without hire are.....	4
Gratuitous Passengers: See Free Passengers.	
duty owing by carrier to.....	547, 568
Gripmen: See Motormen.	
Grips: See Appliances; Brakes.	
Gross Negligence: See Negligence.	
of private carriers without hire.....	4
mandatory liable only for.....	5
what is, determined by circumstances.....	6
Guards: See Front Platform; Gates.	
carrier must provide safe and proper platform.....	601
Guardian: See Imputed Contributory Negligence; Parent and Child.	
contributory negligence of.....	828
Guests: See Baggage; Innkeepers.	

H.

	Page.
Habit:	
evidence of, of carrier or passenger.....	805
Hackney: See Coach.	
Hackmen: See Cartmen; Common Carriers; Owners of Wagons.	
when common carriers and when not.....	53, 540
right of railroad to exclude, from station grounds.....	614
Halls:	
carrier bound to only ordinary care as to.....	595
liability of carrier for defects in.....	613
Hand Cars:	
persons riding on.....	577
Handrail:	
contributory negligence of passenger in seizing or not seizing.....	835
Headlights:	
carrier must provide safe and proper.....	602
Helpless Passengers:	
duty of carrier to assist.....	682
Hiring:	
carriage of goods or baggage for pay is a.....	2
Horse Cars: See Cars; Street Cars; Street Railroads.	
Horse Railroads:	
are common carriers of passengers.....	540
Horses:	
damages for injury to valuable.....	409
damages for delay in transporting.....	415
Hotel: See Innkeepers.	
Household Goods:	
damages for injury to.....	408, 414
as baggage.	705
Husband and Wife:	
when agency presumed for purpose of delivery of goods.....	154
notice to, of arrival of goods.....	275

I.

Ice: See Cars; Negligence; Tracks.	
blockade not an act of God excusing carrier.....	611
Illegal Act: See Contributory Negligence.	
Illinois:	
rule in, as to delays caused by strikers.....	228
rule in, as to limitation of liability for negligence.....	322, 761
express assent of shipper to limitation of liability must be shown in. 297	
rule in, as to interest as part of damages.....	405
Imposition:	
of third person will not excuse carrier for misdelivery.....	179
Improvements:	
duty of carrier as to, in appliances and methods.....	603
adoption by carriers of.....	604

	Page.
Imputed Contributory Negligence: See Contributory Negligence; Children; Negligence; Parent and Child.	
passenger boarding crowded car by permission is not.....	861
Indecent Language: See Disorderly Passengers.	
and conduct of fellow passengers or intruders.....	647
Indiana:	
rioters held not to be public enemies in.....	227
rule in, as to burden of proving contributory negligence.....	796
Indorsement:	
necessity of, of bill of lading.....	177
Inevitable Accident: See Accident; Act of God.	
loss by, effect on freight charges.....	126
loss or damages by	220
must be proximate cause.....	224
will not excuse carrier where there is a special contract.....	242
delay concurring with	256
liability of carriers of passengers for injuries caused by.....	610
Infants: See Children; Contributory Negligence; Parent and Child.	
Infirm Persons: See Aged and Infirm Persons.	
duty of carrier to assist.....	682
contributory negligence of	825
Ingress:	
carrier must provide passengers with safe and convenient means of..	612
Injury: See Damages; Negligence.	
carrier liable for, in loading goods.....	144
carrier liable for, in unloading goods.....	151
duty of carrier to repair, or arrest progress of.....	234, 236
or loss from inherent nature of goods.....	235
damages for, to goods.....	408
Innkeepers:	
lien of	14, 15, 16
Insane Persons: See Lunatic.	
duty of carrier in carriage of	620
Inspection:	
when carrier may refuse, of C. O. D. goods.....	203
of cars, appliances, etc., duty of carriers.....	605
Insult:	
duty of carrier to protect passengers from.....	626
liability of carrier for, by servants.....	636
Insurance:	
company and carriers	373
Insurer:	
warranty of carrier as, is broken by non-delivery or misdelivery ..	147, 180
liability of common carrier is that of an.....	219
liability of carrier of goods is that of an.....	219
carrier's liability for losses by accident or mistake is as an.....	347
Interest: See Damages.	
as part of damages.....	403

	Page.
Interruption:	
temporary, when excuse for delay.....	240
Intersections: See Crossings; Street Crossings.	
Interstate Commerce Act:	
contracts in violation of, as a defence.....	118
principal objects of the.....	120, 906
does not give commission or courts power to compel carriers to make through rates or through billing.....	449
carriers subject to the.....	909
enforcement of the.....	938
amendments to, by Act of 1906.....	940, 948
See Appendix, pp. 947-970, for Railroad Rate Act of 1906.	
Interstate Transportation:	
State cannot exclude subjects of or regulate.....	205
regulation of	905
congress by the Interstate Commerce Act assumed control of.....	906
what carriers engaged in, are subject to the act.....	909
charges for, must be reasonable and just.....	911
reasonableness affected by distance carried.....	912
classification of freights for.....	912
through and local rates for.....	912
unjust discrimination in rates for, forbidden.....	914
unjust discrimination in, in specific cases.....	918
undue or unreasonable preference or advantagee in, forbidden.....	922
undue preference in, in particular cases.....	926
carriers must afford equal facilities for interchange of traffic.....	928
greater charge for shorter than for longer haul forbidden.....	932
schedules of rates, fares, and charges in.....	935
pooling or dividing of freights or earnings of, unlawful.....	936
interruption of continuous carriage in, unlawful.....	937
issuance of mileage, excursion, or commutation tickets for.....	938
enforcement of act for regulation of.....	938
railroad rate legislation.....	940
Railroad Rate Act of 1906, Appendix.....	949-970
Intoxicated Person—Intoxicated Passenger:	
duty of carrier as to.....	620
ejection of	736
duty of carrier to protect from acts of.....	647
Intoxicating Liquors:	
carrier may refuse to carry.....	100
Intoxication:	
as evidence of contributory negligence.....	828
Invalid:	
ticket, ejection for tendering.....	742
Inventions:	
adoption by carriers of new.....	604
Invitation:	
when entry of vehicle by, of carrier's employe, constitutes one a passenger.....	550
Irrigation Company:	
is not a common carrier.....	88

J.

Joint Liability:	Page.
of two railroad companies for a collision.....	698
Joint Tort-Feasors:	
liability when carriers are.....	630
Judicial Notice:	
courts will not take, that any line of railroad is part of a general system.....	493
courts will take, of the functions of railway officers.....	789
Jury: See Questions for Jury.	
Jus Tertii:	
can be set up by carrier when delivery is made to true owner.....	156

K.

Kansas:	
rule in, as to presumption arising from instinct of self-preservation..	791
Kentucky:	
rule in, as to limitation of carrier's liability by public notice.....	293
notice limiting time to present claim is unconstitutional in.....	337
Knowledge: See Notice.	

L.

Laches:	
of holder of bill of lading.....	167
Lamps: See Headlights.	
Landslide:	
caused by rain of not unusual violence, carrier liable for.....	221
Land-worthy:	
carriers guaranty their roads to be.....	598
Latent Defects: See Appliances; Defects.	
liability of carriers of passengers for.....	606
Law or Fact: See Questions for Court; Questions for Jury.	
contributory negligence as a question of.....	829
Leakage:	
carrier not liable as warehouseman for loss by	283
Leased Lines:	
liability of carriers employing.....	609
Leaving Cars: See Alighting; Carrier; Crowding Cars; Passengers; Regulation; Street Cars.	
carriers must provide safe facilities for passengers.....	613
Leaving Conveyance:	
contributory negligence of passengers in.....	843
alighting at improper place or in improper manner in.....	845
alighting from train or car in motion.....	847
street car passengers injured while.....	852
Legal Holiday:	
delivery may be made on, unless made unlawful by statute.....	192

	Page.
Legal Process:	
seizure of goods under, attachment.....	229
seizure of goods under, garnishment.....	232
seizure of goods under, police regulations.....	233
Legal Tender: See Tender.	
notes are sufficient in payment of fare.....	553
Liability:	
commencement of, of carrier of goods.....	130
termination of, of carriers of goods.....	146
of carrier of goods for loss or damage.....	219
of carrier of goods for delay in transportation.....	238-256
carrier's, as warehouseman.....	258-285
of carrier may be changed to that of warehouseman by acts of the parties.....	268
of connecting carriers.....	457-494
of carriers of live stock.....	509-538
of carriers of passengers.....	593-768
Licensee:	
relation of carrier of passengers and.....	544
Lien: See Common Carrier; Innkeeper.	
of the private carrier.....	14
of carrier for charges.....	428
for general balance due.....	431
what carriers are entitled to.....	432
what property, applies to.....	433
when it attaches.....	435
delivery of goods and payment of freight.....	435
when consignee fails or refuses to receive.....	436
of the last of connecting carriers.....	437
priority of carrier's, over other liens.....	439
how lost, satisfied, or discharged.....	441
waiver of, by express agreement or inconsistent stipulation.....	445
how enforced	445
Lights: See Headlights.	
Limit:	
carriers may fix, of time within which ticket may be used.....	563
when, of time is not waived.....	566
Limitation:	
in bill of lading of time in which to bring suit.....	331
Limitation of Liability: See Carriers of Goods; Carriers of Passengrs.	
special contracts for.....	13
of carrier of goods for delay.....	255
of carrier of goods generally.....	286-362
of connecting carriers.....	479-487
of carriers of live stock.....	522-531
of carriers of passengers.....	752-768
Live Stock: See Carriers of Live Stock.	
Living Animals: See Animals.	

	Page.
Loading Cars:	
when duty devolves on carrier and shipper.....	143
contributory negligence of shipper in improperly.....	382
improperly, liability of carrier of live stock.....	536
Loan:	
underwriter entitled to recover from carrier money advanced on insurance policy as a.....	373
Local Agents:	
power and authority of carrier's.....	367
Locomotives:	
safety of, must be established by proper tests.....	600
Locomotive Steam Power: See Engine.	
Log-carrying or Log-driving Companies:	
are not common carriers.....	72
Look: See Contributory Negligence; Negligence.	
Lookout: See Motormen; Negligence.	
Less:	
of goods, measure of damages for.....	398
where intended for a specific purpose.....	424
Low Water:	
or freezing of water-way as excuse for delay.....	253
Luggage: See Baggage.	
Lunatics:	
duty of carrier in carriage of.....	621
 M.	
Machinery; See Appliances; Cars; Contributory Negligence; Negli- gence; Master and Servant.	
defective.	594
Mail Agents: See Postmasters.	
are not common carriers.....	71
relation of, to carriers.....	577
Mail Carriers:	
are not common carriers.....	71
Mail Clerks:	
relation of, to carriers.....	577
Mail Contractors:	
are not common carriers.....	71
Maine:	
rule in, as to limitation of carrier's liability by public notice....	293
rule in, as to burden of proving contributory negligence.....	796
rule in, as to traveling in violation of statute.....	831
Malicious Acts: See Willful Acts.	
Malicious Prosecution:	
arrest must be followed by judicial proceeding to constitute.....	641
Management:	
when carrier liable for injury caused by, of conveyance.....	660
Mandamus:	
carrier compellable by, to carry freight and passengers.....	96

	Page.
Mandatory:	
liable only for gross negligence.....	5
private carrier without hire liable only as.....	4
Mandatum: See Bailment.	
gratuitous carriage of goods or baggage is.....	2
Manner:	
of ejection of passengers.....	747
Manufacture—Manufacturers:	
liability of carrier for negligence of persons engaged in.....	608
employment of reputable, will not excuse for discoverable defects....	608
Market Value:	
what is	398
evidence of	401, 409, 413
damages where goods have no.....	420
Massachusetts:	
carrier not liable in, where negligent delay is not proximate cause of injury	257
rule as to carrier's liability as warehouseman as to goods awaiting delivery,	261
notice to consignee of arrival of goods not essential where, rule prevails.	272
statute as to ejection of child for refusal to pay fare.....	732
rule in, as to traveling in violation of statute.....	831
Master and Servant:	
responsibilities attaching to relation of, applied to carriers....	627, 641
Master of Vessel: See Common Carrier.	
liability of, commences with acceptance of goods.....	131
must safely store goods, on refusal of consignee to accept them....	237
lien of, for freight.....	435
Materials:	
carrier's duty in disposing of, brought upon its grounds or removed by it	598
Means:	
duty of carriers to provide safe, for receipt and discharge of pas- sengers.	612
Measure of Care: See Care.	
Measure of Damages: See Damages.	
stipulations that invoice or market value shall be.....	349
contract of sale as.....	423
Menagerie:	
railroad company transporting, not common carrier.....	79
Mental Suffering:	
damages for	421
as a distinct cause of action or element of damage.....	894
Merchandise: See Goods.	
Minnesota:	
rule in, as to stipulations as to measure of damages.....	350
rule as to contributory negligence in crossing track.....	876
Minor: See Children; Infants.	

	Page.
Miscarriage:	
liability of connecting carriers for, of goods.....	469
Misdelivery:	
carrier's liability for.....	178
through mistake	179
through fraud and misrepresentation.....	180
by carrier is conversion.....	211
damages for	419
Misfeasance:	
carrier may not limit its liability for willful.....	314, 328
Mississippi:	
rule in, as to interest as part of damages.....	405
Missouri:	
rule in, as to interest as part of damages.....	405
rule in, as to contributory negligence in riding on foot board.....	858
Mistake:	
innocent mistake will not excuse carrier for misdelivery.....	178, 179
carrier's liability for losses by, is as an insurer.....	347
Mitigation of Damages:	
provocation for assault as.....	635
Mobs:	
losses by	225
not public enemies.....	227
duty of carrier when goods endangered by acts of.....	237
Money: See Baggage.	
distinction between, as baggage and as freight.....	357
Mortgagee:	
when carrier not liable for delivery to a.....	216
when refusal to deliver goods demanded by, is not conversion.....	232
Motive Power:	
in use of, of dangerous possibilities, a high degree of care is required.	657
in use to be considered on question of degree of care.....	658
Motor: See Motive Power.	
Motorman: See Employes; Contributory Negligence; Negligence.	
Moving Car: See Alighting; Entering Car; Passengers.	

N.

Nature—Natural Laws:	
loss or injury from inherent, of goods.....	235
Negligence: See Bailment; Carrier; Carrier Without Hire; Common Carriers; Carriers of Goods; Carriers of Live Stock; Carriers of Passengers.	
foundation of bailee's liability.....	2
liability of common carrier not based on.....	3
liability of carriers of passengers generally based on.....	3
liability of private carriers determined by degree of.....	4
distinctions in degrees of, impracticable.....	5
essentially always a question of fact.....	7

Negligence—(Continued):	Page.
carrier liable for, in loading goods.....	144
carrier liable for, in unloading goods.....	151
carrier's liability as warehouseman for.....	281
carrier cannot limit its liability for delay due to.....	256
carrier cannot limit its liability for.....	287, 313, 328
the New York rule as to limitation of liability for.....	320
limitation of amount of liability not enforceable where loss results from.....	343
carrier is answerable as an ordinary bailee for.....	347
what is wanton or willful.....	375
carrier is always liable for loss resulting from its own.....	391
carriers of passengers are not insurers, but responsible for.....	542
general rule of liability of carrier of goods for.....	374
must have been proximate cause of injury.....	377
in stowage of goods.....	378
loss or injury due to, of carrier of live stock.....	529
carrier's liability for, of persons engaged in construction or manufacture.....	608
limitation of liability of carriers of passengers for.....	759
the New York rule.....	763
the English rule.....	765
as to particular classes of passengers.....	765
presumption and burden of proof as to.....	769-800
Negligence, Contributory: See Contributory Negligence.	
Negligence of the Carrier:	
must be shown to render it liable as warehouseman.....	272
Negligence of Passengers: See Contributory Negligence; Passengers.	
Negroes: See Carriers of Passengers; Discrimination.	
New Hampshire:	
rule as to carrier's liability as warehouseman as to goods awaiting delivery.....	263
notice of arrival of goods necessary where, rule prevails.....	273
New Jersey:	
rule as to limitation of liability for negligence.....	764
New York:	
rule in, as to limitation of liability for negligence.....	319
statute as to delivery of goods by carrier.....	163, 166
rule as to effect of bill of lading as an estoppel.....	173
rule in, as to delay caused by strikers.....	227
statute as to delivery of perishable freight.....	246
when public notice will not operate as a limitation of liability in....	291
limitation of carrier's liability by special contract in.....	294
rule in, as to limitation of time in which to present claims.....	333
rule in, as to interest as part of damages.....	404
rule in, as to passenger stopping over at intermediate station.....	558
rule as to liability of carrier for acts of its servants.....	630
rule as to limitation of carrier's liability.....	763

	Page.
New York Railroad Law:	
definition of common carrier.....	20
repealing provision as to delivery of perishable freight.....	246
duty of carrier to receive and discharge passengers at usual stopping places.	685
Non-acceptance of Goods:	
notice to consignor of.....	275
Non-delivery of Goods: See Conversion; Delivery.	
Non-feasance:	
carrier not liable in conversion for.....	217
Non-payment of Fare. See Payment of Fare.	
Non Sui Juris:	
when children are.....	822
Non-repair: See Repair.	
North Carolina:	
statute for prompt forwarding of freight.....	246
rule in, as to limitation of carrier's liability by public notice.....	293
rule in, as to stopping trains at stations.....	668
rule in, as to burden of proving freedom from contributory negligence.	790
Notice:	
to proper person necessary to constitute.....	132
actual, of deposit necessary, in absence of agreement or usage.....	138
to consignor upon refusal of carrier to receive goods.....	148
duty of carrier to give, of obstruction to traffic.....	251
to connecting carrier that goods are ready for delivery.....	260
to consignee of arrival of goods held not essential.....	272
necessity of, maintained.....	273
sufficiency of	275
to consignor of non-acceptance of goods.....	275
limitation of liability of carrier of goods by public.....	290
when public, will operate as a limitation in New York.....	291
carriers by water must give reasonable, of landing of goods.....	195
to consignor and consignee of attachment discharges carrier.....	231
of loss or presentation of claim.....	333
perishable goods or baggage may be sold without.....	446
failure to give, of approaching train, when negligence.....	693
limitation of liability of carriers of passengers by.....	752
by connecting carrier to succeeding carrier of arrival of goods..	453, 488
Notify:	
effect of the word, in a bill of lading.....	170

O.

Obscene Language: See Indecent Language.	
Obstruction:	
as excuse for delay.....	240, 251
on or near track, liability of carrier for.....	598
Occupying Cars: See Boarding Cars; Carriers of Passengers; Crowd-ing Cars; Regulation; Street Cars.	

	Page.
Offset:	
damages for breach of contract or loss of goods are, to freight charges.	125
Ohio:	
express assent of shipper to limitation of liability must be shown in rule in, as to passenger stopping over at intermediate station.....	297 558
Omnibus:	
proprietors of, are common carriers.....	54, 540
Onus Probandi: See Burden of Proof; Evidence.	
Open Car: See Contributory Negligence; Crowding Cars.	
not contributory negligence to stand on steps of a crowded.....	859
Opinion Evidence: See Evidence.	
of witness is admissible as to extent of injury, but not as to amount. .	402
Option:	
carrier which has an, as to mode of shipment must exercise it reasonably.	237
Oral Contract:	
not merged in written contract, after breach.....	110
conflict of, and written contract.....	300
Ordinary Care: See Care.	
Ordinary Negligence: See Negligence.	
Owner:	
delivery of goods may always be made to the true.....	155
right of, to change place of delivery.....	186
 P.	
Packages: See Parcels.	
when carrier may demand examination of.....	100
carrier not liable as warehouseman for loss by explosion of.....	283
Palace Car Companies:	
when liable as common carriers and when not.....	55, 540
duties and liabilities of.....	55-61
and their employes servants of railroad company.....	610
Parallel Tracks:	
dangerous proximity of, carrier's liability for.....	598
Parcels: See Packages.	
forcible removal of, from a passenger, is a conversion.....	218
carrier may not be responsible for falling of, from rack.....	693
Parent and Child: See Children; Parents.	
Parents:	
contributory negligence of.....	828
Particular or Specific Lien: See Lien.	
Partners—Partnership:	
connecting lines as.....	491
proof insufficient to show	728
Passenger Carriers: See Carriers of Passengers.	
Passenger Elevators:	
courts differ as to status and character of.....	82, 540
Passenger Rates: See Rates.	

Passengers: See Carriers of Passengers.	Page.
relation between carrier and passenger.....	541
who are	543
commencement of relation.....	545
purchase of ticket	548
entry into vehicle of carrier.....	549
payment of fare.....	552
termination of relation	554
may forfeit their rights as passengers.....	555
leaving vehicle of carrier.....	556
after leaving vehicle of carrier.....	556
stop-overs on continuous passage tickets.....	558
who are not	560
limited and unlimited tickets.....	563
non-transferable tickets	567
persons riding gratuitously.....	568
persons riding on passes.....	570
person riding on drover's pass.....	571
persons riding on trains not generally used for passengers.....	574
persons riding on engine.....	575
persons riding on hand cars.....	577
employees of others carried under contract—mail clerks.....	577
employees of others carried under contract—express messengers.....	579
persons riding on freight trains.....	581
persons accompanying passengers.....	584
employees of carrier as.....	586
rules and regulations of the carrier.....	588
rules and regulations of street railways.....	592
care required of carriers of.....	594
as to obstructions on or near track.....	598
as to fencing tracks.....	599
as to locomotives, cars, and appliances.....	600
as to improved appliances and methods.....	603
as to inspection of cars, appliances, etc.....	605
liability of carriers of, for latent defects.....	606
for negligence of persons engaged in construction or manufacture.....	608
for leased lines and cars of another carrier.....	609
for injuries caused by inevitable accident.....	610
for safe means and appliances for receiving.....	612
liability of carriers by stage coach.....	615
liability of carriers by water.....	615
liability of carriers of, as to employment of servants.....	616
in receiving and transporting.....	619
who may be refused transportation.....	621
when refusal must be made.....	624
when must be carried on freight and special trains.....	624
when carrier's duty to protect.....	625
liability of carriers of, for acts and omissions of employees.....	627
New York rule of liability for wrongful acts of servants.....	630
liability of carriers of, for assault by servants.....	631



Passengers—(Continued) :	Page.
for insult and abuse by servants.....	636
for expulsion by servants.....	637
for false arrest of passenger.....	638
liability of carriers of, for acts of fellow passengers or others.....	641
for assaults by passengers or others.....	644
for indecent language or conduct of fellow passenger or others... ..	647
for acts of drunken passengers.....	647
duty of carrier to sick passengers.....	649
protection of, from accidental injuries.....	650
care of carrier, in carriage of.....	651
in management of conveyance—sudden jerks and jolts.....	660
duty of carrier to announce stations to.....	664
to stop at stations for.....	666
to warn, of departure of trains.....	669
to provide safe means of ingress and egress for.....	670
to give reasonable time for ingress and egress by.....	674
to warn, instruct, and inform.....	679
to assist, aged, infirm, or helpless.....	682
to carry to point of destination of.....	685
not to carry beyond destination of.....	687
to carry promptly.....	690
as to safety of, generally.....	692
on freight and other trains.....	694
to provide seats for.....	695
liability of carrier, for injuries caused by collision.....	696
for safety of sick passenger.....	700
articles constituting personal baggage of.....	700
duty of carrier to carry baggage of.....	709
liability for loss or injury of baggage of.....	712
limitation of liability for such loss or injury.....	716
baggage checks merely receipts or vouchers.....	721
commencement and termination of liability for baggage of.....	722
liability as warehouseman for baggage of.....	726
liability of connecting carrier for baggage of.....	727
ejection of, for failure or refusal to procure ticket or pay fare.....	731
ejection of, from street railroads.....	732
entitled to reasonable time to pay fare or produce ticket.....	733
ejection of, for refusal to pay extra fare in train.....	733
tender or payment of fare by, to avoid ejection.....	735
ejection of intoxicated.....	736
ejection of disorderly.....	739
ejection for violation of reasonable rules of the carrier.....	740
ejection of, for tendering invalid ticket or transfer.....	742
manner of ejection of.....	747
place of ejection of.....	749
limitation of liability of carriers of.....	752-768
burden of proof as to contributory negligence of.....	795
presumptions and burden of proof in actions by.....	769-800
evidence in actions by.....	801-813

Passengers—(Continued):	Page
contributory negligence of, must be proximate cause of injury.....	814
acts in disregard of warning or disobedience of carrier's rules.....	815
acts by permission or direction of carrier's employes.....	817
acts in emergency—sudden peril.....	818
children	822
aged or infirm persons.....	825
parents, guardians, or custodians.....	828
intoxication as evidence of.....	228
as a question of law or fact.....	829
traveling in violation of statute is not.....	830
entering conveyance	832
boarding train or car in motion.....	836
place of entering cars or train.....	842
leaving conveyance	843
alighting at improper place or in improper manner.....	845
alighting from trains or cars in motion.....	847
alighting from street cars.....	852
riding in dangerous position.....	853
riding on platform, steps, or running board.....	856
standing up in car.....	866
passing from one car to another.....	868
riding with part of person projecting from window.....	870
awaiting and seeking transportation.....	872
standing near or between tracks.....	874
crossing intervening tracks.....	874
damages in actions by.....	879-904
interstate transportation of.....	905-940
Passes: See Free Passengers; Gratuitous Passengers.	
persons riding on.....	570
persons riding on drover's.....	571
Passing from One Car to Another:	
when contributory negligence.....	868
Payment of Fare: See Fare; Rates.	
creates relation of carrier and passenger.....	552
may be demanded in advance.....	552
ejection for refusal of.....	731, 733
or tender to avoid ejection.....	735
Payment of Freight:	
charges by consignee after notice amounts to delivery.....	150
Penalty:	
damages under, contracts.....	412
Pennsylvania:	
canal company not liable as common carrier or insurer.....	66
carrier not liable in, where negligent delay is not proximate cause of injury	257
rule in, as to presumption arising from instinct of self-preservation..	791
Peril:	
acts of passengers in sudden, not contributory negligence.....	818
limitation of liability for loss from, of sea.....	353

	Page.
Perishable Goods:	
when carrier may refuse to receive.....	101
duty of carrier to furnish refrigerator cars for.....	115
delay in delivering	246
limitations of liability for losses on.....	354
goods or baggage may be sold without notice.....	446
Persons: See Passengers.	
who are not passengers.....	560
riding on trains not generally used for passengers.....	574
riding gratuitously	568
accompanying passengers	584
riding on passes.....	570
who may be refused transportation.....	621
riding on drover's pass.....	571
when refusal to transport, must be made.....	624
riding on engine.....	575
liability of carrier for acts of third.....	641
riding on hand car.....	577
liability of carrier for assaults by third.....	644
riding on freight trains.....	581
liability of carrier for negligence of, engaged in construction or manu-	
facture	608
ejection of, riding on freight trains.....	746
Personal Delivery:	
when required	192
railroads are excepted from the duty of.....	193
carriers by water are excepted from the duty of.....	193
Petition: See Pleading.	
Phrases: See Definition.	
Physical Disabilities: See Aged and Infirm Persons; Blind Persons;	
Intoxication.	
Physician:	
carriers not liable for negligence of.....	618
carriers must employ a reasonably competent.....	618
Pipe Line:	
for carrying oil, declared common carrier.....	61
Pirates:	
the common enemy of mankind.....	225
confederates not, but public enemies.....	226
Placards: See Notice.	
Place: See Alighting.	
of ejection of passengers.....	749
of delivery of goods by carrier.....	183
right of owner or consignee to change, of delivery.....	186
delivery when, of destination is not on carrier's line.....	190
carrier must provide safe, for entering and leaving cars.....	613
of entering cars or train.....	843
Platform:	
riding on, when contributory negligence.....	856

	Page.
Platforms or Stations:	
carrier must provide reasonably safe.....	613
liability of carrier for defects in.....	695, 613
carrier must provide safe, for entering and leaving cars.....	613
Platform Guards or Gates:	
carrier must provide safe and proper.....	601
Pleading:	
in actions for refusal to carry goods.....	102
where limitation of liability is ground of defense.....	338
Police Power—Police Regulation:	
statutes to compel railroads to deliver freight promptly is valid	
exercise of	205
seizure of goods under.....	233
of conductors or other servants of carriers.....	641, 739
Porters:	
are common carriers.....	63
Position of Apparent Peril: See Peril.	
Possession:	
change of, from shipper to carrier, necessary to complete delivery..	133
receiving goods from one in, is not conversion.....	216
Postal Service—Post Office Department: See Mail Agents; Mail Carriers.	
organization of, and character of officials.....	71
Postmasters:	
are not liable as common carriers.....	71
Power: See Motive Power; Police Power.	
Precaution: See Care.	
evidence of subsequent.....	805
Preference:	
undue or unreasonable, unlawful.....	922
undue, in particular cases.....	926
Pregnant Woman: See Miscarriage.	
injury to, by collision.....	685
Prepayment of Charges:	
carrier of goods may demand.....	101
carrier of passengers may demand.....	552
Preponderance: See Evidence.	
Presumptions:	
no, as to existence of special contracts limiting liability.....	298
where limitation of liability is a ground of defense.....	338
generally	386
as to state of goods when received.....	391
where goods lost consist of several kinds.....	392
where there is a loss by fire under contract limiting liability.....	395
when carrier is merely a warehouseman.....	396
in actions against connecting carriers.....	490
in actions against carriers of live stock.....	531
as to negligence from mere proof of injury.....	769
from acts of servants and defects in instrumentalities.....	774
arising from collisions.....	777

	Page.
Presumptions—(Continued):	
arising from derailment of train or car.....	778
arising from defects in means of transportation.....	780
of negligence as to injuries to persons other than passengers.....	782
reasons for, of negligence.....	786
rebutting	787
other	788
as to contributory negligence	789
arising from instinct of self-preservation.....	791
as to person being a passenger or trespasser.....	545
Prima Facie:	
bill of lading is, evidence of delivery.....	142
shipping receipts are, evidence of facts recited therein.....	145
Principal and Agent:	
responsibilities attaching to relation of, applied to carriers.....	627, 641
Prior Negligence of Plaintiff: See Contributory Negligence.	
Private Carriers:	
not subject to duties and liabilities of common carriers.....	3
duties and liabilities of.....	4
when compensation may be implied.....	9
lien of	14
Private Carriers for Hire:	
when compensation may be implied.....	9
definition of .. .	10
who are .. .	11
common carrier may by special contract become.....	11
liability of .. .	12
special contracts of, increasing or diminishing liability.....	13
lien of .. .	14
Private Carriers Without Hire:	
are gratuitous bailees or mandataries.....	4
when transportation is gratuitous.....	7
when compensation may be implied.....	9
proof of negligence of.....	9
Profanity: See Disorderly Passengers.	
Projection:	
riding with part of body projecting from window.....	870
of body from moving car.....	872
Proof: See Evidence; Pleading.	
Pro Rata:	
when consignee liable for freight.....	126
Protection:	
duty of carrier as to, of goods from injury.....	237
Prospective Damages: See Damages.	
Provocation:	
as mitigation of damages for assault by employes.....	635
Proximate Cause:	
refusal or failure to carry must be shown to have been.....	94
of loss or injury.....	118, 224
delay must have been, of injury.....	248

Proximate Cause—(Continued):	Page.
where delay is not, but is a concurring cause.....	256
negligence must have been.....	377
question of, is generally for the jury.....	378
whether negligence of shipper or carrier was, of loss is a question for the jury	381
contributory negligence of passenger must be, of injury.....	814
Public Enemy: See Common Carriers.	
loss or damage by, excuses carrier.....	219
loss or injury by.....	225
Punitive Damages: See Exemplary Damages.	
are recoverable for wilful misdelivery.....	184
Purchase of Tickets: See Tickets; Payment of Fare; Tender.	
as creating relation of carrier and passenger.....	548

Q.**Questions for the Court:**

as to delivery to the carrier, where facts are admitted.....	135
what is reasonable time for removal of goods, when there is no dis- pute as to the facts.....	267
reasonableness of rules and regulations of carrier when.....	588-590
contributory negligence when the facts are undisputed.....	829

Questions for the Jury:

as to delivery to carrier, where evidence is conflicting.....	135
whether loss of goods is due to inevitable necessity.....	225
whether goods are delivered within a reasonable time.....	191
what is a reasonable time for the removal of goods, when there is a conflict of evidence	268
what is a reasonable time within which delivery should be made....	241
what is unreasonable delay in transportation.....	241
whether a delay of three days was cause of loss of perishable goods..	249
reasonableness of time limit to presentation of claims.....	335
whether or not loss or damage is the result of carrier's negligence...	376
whether negligence was the proximate cause.....	378
what will or will not constitute negligent stowage.....	378
whether negligence of shipper or carrier was proximate cause of loss	381
whether negligence of shipper in packing or marking contributed to loss	382
the amount of loss or damage.....	402
what is sufficient to establish a through contract.....	473
reasonableness of rules and regulations of carrier, when.....	590
what is reasonable amount of money for passenger's traveling ex- penses .. .	705
whether regulations as to baggage are reasonable.....	718
what is reasonable time to produce ticket or pay fare.....	733
whether or not death or injury was due to wrongful ejection.....	737
contributory negligence where the facts are disputed.....	829
whether rates are reasonable or unreasonable.....	912

R.

Page.

Railroad Companies: See Common Carriers; Carriers of Goods.	
are common carriers and liable as such.....	37, 540
liability of, for baggage of passengers.....	39, 542
receivers and assignees of, when common carriers.....	40
bound to have all reasonable and necessary facilities.....	105
not bound to be prepared for unusual contingencies.....	105
loading goods on cars is generally the duty of.....	143
are excepted from the duty of personal delivery.....	193
statute making, liable for losses by fire.....	285
duty of, to fence tracks.....	599
duty of, in providing locomotives, cars and appliances.....	600
power and authority of general freight agents of.....	364
power and authority of station agents of.....	367
power of congress to regulate rates of.....	940
See Railroad Rate Act of 1906, in Appendix, 949-970.	
Railroad Contractors:	
relation of carrier of passengers to employes of.....	544
Rails: See Tracks.	
carrier must provide sound.....	597
must be safely spiked or fastened.....	597
Rate of Speed: See Speed.	
high, is not per se negligence.....	699
Rates:	
carriers liable for unreasonable discrimination in.....	93, 119
carriers not required to give the same, to all.....	122
neither Interstate Commerce Commission nor courts can fix.....	907
must be just and reasonable.....	911
reasonableness of, as affected by distance.....	912
through and local	912
unjust discrimination in.....	914-922
undue preference in	923-928
for long and short hauls.....	932
schedules of	935
legislation as to.....	940
See Railroad Rate Act of 1906, in Appendix, 949-970.	
Ratification:	
of unauthorized delivery by consignee is a waiver of right of action..	208
Rear Platform: See Platform.	
Reasonable:	
evidence of title to goods may be required by carrier before delivery.	181
carrier must deliver goods within, time.....	240
time, what is, and how determined	240, 241
time, what is for removal of goods generally.. .	267, 270
what is not	271
time, to procure ticket or pay fare, passenger entitled to.....	733
rules of carrier, ejection for violation of.....	740
Rebates:	
are unjust discrimination and unlawful.....	920

	Page.
Receipt: See Baggage Checks; Carriers of Goods; Carriers of Passengers; Tickets.	
for goods implies agreement to carry	93
means and appliances for, of passengers.....	612
tickets are in the nature of, for passage money.....	806
Receivers:	
of railroad companies when common carriers.....	40
Refusal:	
to deliver goods held under carrier's lien, is not a conversion.....	218
to carry goods, damages for.....	417
to deliver goods, damages for	419
to procure ticket, ejection for.....	731
Regulations: See Carriers of Goods; Carriers of Passengers; Carriers of Live Stock; Common Carriers; Rules.	
failure to comply with, may justify rescinding contract of carriage	555
carriers of passengers may make and enforce reasonable.....	588
of street railways.	592
Regular Station: See Station.	
what is, or depot	137
effect of deposit of goods elsewhere than at	137
Regular Stopping Place: See Platforms; Stations; Stopping Place.	
Remote Cause: See Proximate Cause.	
Remote Damages: See Damages.	
Remote Negligence: See Negligence; Contributory Negligence; Proximate Cause.	
Repair:	
duty of carrier to make reasonable effort to, injury.....	234, 236
Repairs:	
evidence of subsequent.	805
Res Gestae:	
when declarations or admissions are admissible as.....	807-813
when evidence of conduct of third persons is admissible as.....	812
Res Ipsa Loquitur:	
sudden and violent lurch or jerk of street car, maxim applied....	663
injury from explosion of a fuse, principle applied.....	650
cases where the rule of, applies.....	769-786
reasons for the rule.....	773, 786
Responsibility of Carrier: See Carriers of Goods; Carriers of Passengers; Carriers of Live Stock; Common Carriers; Private Carriers Without Hire; Private Carriers for Hire.	
Resistance:	
to expulsion, by passenger rightfully on train.....	749
Respondeat Superior: See Master and Servant; Principal and Agent.	
doctrine of, held to be unimportant in its application to carriers..	628
principle of, does not make carrier liable for acts of disorderly passenger.	641

	Page.
Riding:	
in dangerous position is contributory negligence.....	853
on platform, running board or steps	856
with part of person projecting from window.....	870
Rights and Liabilities: See Responsibility of Carrier.	
Riots:	
losses by	225
Roadbed:	
defective.	594
Robbery:	
losses by.	225
Rudeness:	
carrier not liable for mere, of fellow passengers or strangers.....	642
Rules: See Regulations.	
must be reasonable and made in good faith.....	94, 99
carriers of passengers may make and enforce reasonable.....	588
of street railways.....	592
ejection of passengers for violation of reasonable, of carrier.....	740
acts of passengers in disobedience of carrier's, contributory negligence	815
Running-Boards: See Platform; Open Cars.	
riding on, when contributory negligence.....	856-864
 S. 	
Safeguards: See Guards.	
Safety: See Appliances; Fuse.	
of the vehicle is always guaranteed by the common carrier.....	598
beams which are safe and proper must be provided.....	601
duty of carriers as to, of passengers.....	692
of passengers on freights and other trains.....	694
Sale—Sales:	
carriers cannot make, of goods so as to divert the title of the con-signee.	362
carriers may make, of perishable goods....	362
carriers may make, of goods under their lien for charges.....	362
carriers may regulate, of books, papers, etc., on vehicles.....	622
carriers may exclude third persons from carrying on such.....	622
Satchel: See Packages.	
Satisfaction:	
of carrier's lien for charges	441
Schedule:	
carrier liable for negligence in not running trains on time.....	690
Seats:	
carrier must provide safe and proper.....	601
duty of carrier to provide passengers with.....	695
duty of passenger to go inside although there are no vacant.....	861
courts will not draw distinctions between footboards and, as places of relative danger and safety.....	864
Seaworthy—Seaworthiness:	
carriers by water must provide, boats and ships.....	615

	Page.
Seizure:	
of goods under legal process, attachment	229, 237
of goods under legal process, garnishment.....	232
of goods under police regulations.....	233
Self-Defense:	
carrier not liable for injury done by employe in.....	635
Servants: See Carriers of Passengers; Employes; Motormen; Master and Servant.	
liability of carriers of passengers in employment of.....	616
carriers must employ sufficient suitable and competent.....	618
carriers need not employ sufficient, to act as a police force.....	619
police powers of carrier's.....	641
evidence as to authority, competency, and negligence of.....	801
Ship-Owner:	
and master are common carriers.....	65
Shipper: See Consignor.	
loading of goods on cars by.....	143
liability of carrier where there are special instructions by.....	245
not bound by special contract limiting liability obtained by fraud..	297
need not sign special contract unless statute requires.....	299
fraudulent concealment or misrepresentation of value by.....	355
carrier's duty to inquire of, as to value of property.....	358
duty of, to state value and character of goods.....	359
contributory negligence of.....	380-385
relation of connecting carriers to.....	449
knowledge of, of defects in cars	502
assuming duty of caring for stock.....	505
stipulations that, will accompany stock, load and unload.....	523
report condition of stock.....	530
relation of carriers of passengers to employes of.....	544
Shipping Receipt: See Bill of Lading.	
is prima facie evidence of facts recited therein.....	145
as mode or form of limiting carrier's liability.....	329
where, and release limiting liability are separate contracts.....	299
Sick Passengers:	
duty of carrier to.....	649, 684, 700
Side Track:	
delivery of freight destined to.....	184
Signals—Signal Lights:	
carrier must provide safe and proper.....	602
Skill: See Care.	
Slaves:	
liability of carrier in the carriage of.....	28
Sleeping Car Companies:	
when liable as common carriers and when not.....	55, 540
duties and liabilities of	56, 61
and their employes, servants of railroad company.....	610
relation of carriers of passengers to employes of.....	544

Slight Negligence: See Bailment; Negligence; Contributory Negligence; Proximate Cause.	
bailee liable for, when	4
what is, determined by circumstances.....	6
Snow:	
storm of violence will excuse carrier for loss or damage.....	221
storm as excuse for delay.....	251
South Carolina:	
railroad company in, liable as common carrier only over its own line	80
Spark Arresters:	
carrier must provide safe and proper.....	602
Special Act: See Statute.	
Special Contract: See Bill of Lading; Limitation of Liability.	
increasing or diminishing liability.....	13
need not be alleged or proved in action for refusal to carry.....	93
for means of transportation.....	108
existence of, determined by circumstances.....	110
delivery may be sufficient when pursuant to.....	139
liability for delay where there is a	242
effect of, on rule as to carrier's liability as warehouseman.....	278
limitation of liability of carrier of goods by.....	294
must be express and will not be presumed.....	298
need not be signed by shipper unless statute requires.....	299
when there are two, limiting liability.....	299
conflict of oral and written.....	300
must have been fairly entered into.....	302
necessity of consideration for.....	302
when signed by shipper without examination.....	305
must have been made at time of shipment.....	306
must be legible and intelligible.....	307
by what law validity of, is determined.....	308
who may make.....	312
carrier may not limit liability for negligence by.....	313
New York rule.....	319
the Illinois and Wisconsin rule.....	322
the English and Canadian rule.....	323
reasons upon which rules are based.....	325
liabilities subject to limitation by.....	327
mode or form of limitation by, bill of lading or shipping receipt..	329
limitation of time in which to bring suit.....	331
requirement of notice of loss or presentation of claim.....	333
to what damages stipulation does not apply.....	336
limitations of liability as ground of defense, pleading.....	338
presumptions and burden of proof.....	338
stipulation requiring claims to be made before removal of goods..	339
limitation of liability to forwarder or warehouseman.....	340
limitation of amount of liability.....	341
stipulations that invoice or market value shall be measure of damages	349
construction of.	351

	Page.
Special Contract—(Continued):	
when stipulations of become inoperative	355
fraudulent concealment or misrepresentation of value by shipper..	355
carrier's duty to inquire as to value of property.....	358
shipper's duty to state value and character of goods.....	359
general lien can only exist by	431
carrier not bound to carry beyond its own line in absence of.....	450
for through transportation by connecting carriers.....	471
what is sufficient to establish a through.....	473-479
Special Damages: See Damages.	
Special Deposit: See Deposit.	
Special Trains:	
duty to carry passengers on.....	624
Speculative Damages: See Damages.	
Speed: See Rate of Speed.	
care required as affected by, of vehicles.....	658
high rate of, not per se negligence.....	699
Stage Coaches: See Omnibus.	
proprietors of, are common carriers.....	55, 540
when delivery to driver of, is insufficient.....	139
liabilities of proprietors of, for injuries to passengers.....	615
Stairways:	
carrier bound only to ordinary care as to.....	595
care required of carrier as to slippery steps of.....	602
liability of carrier for defects in.....	613
Standing in Car:	
when contributory negligence.....	866
Standing Near or Between Tracks:	
when contributory negligence	874
Station Agent:	
has authority to make special contract for cars.....	110
when presumed to have authority to receive goods.....	140
powers and authority of.....	367
Stations: See Depot.	
may refuse to carry goods not offered at regular.....	99
deposit of goods elsewhere than at regular.....	137
must be maintained for safety and convenience of passengers....	595, 614
carrier may exclude hackmen and cabmen from.....	614
duty of carrier to announce.....	664
duty of carrier to stop at.....	666
duty of carrier to warn of departure of trains from.....	669
duty of carrier to provide safe ingress and egress at.....	670
duty of carrier to give reasonable time for ingress and egress at....	674
relation of passenger continues until passenger has left.....	554
Station Platforms:	
care required of carrier as to.....	595, 602
Statutes:	
compelling railroads to deliver freight promptly.....	205
liability of carrier under, requiring prompt forwarding of freight... ..	245
as to notice to consignee of arrival of goods.....	273

Statutes—(Continued):	Page.
making railroad companies liable for losses by fire.....	285
limiting confinement of cattle.....	508
traveling in violation of, not contributory negligence.....	830
prohibiting ejection of passengers at other than usual stopping places	750
Steamboats—Steamboat Companies:	
masters and owners of, are common carriers.....	65, 540
duties and liabilities of carriers of passengers by.....	615
Steam Railroads: See Railroads.	
bound to construct roadway and track with all possible care.....	598
bound to employ competent and skillful servants.....	598
Steps: See Crowding Car; Front Platform; Rear Platform.	
care required of carrier as to slippery, to elevated trains.....	602
care required as to icy car.....	602
riding on, when contributory negligence.....	856
Stock Pens and Yards: See Carriers of Live Stock.	
duties of carriers of live stock as to.....	500
Stop:	
duty of carrier to, at stations.....	660
Stop-overs:	
on continuous passage tickets.....	558
under contract permitting them does not terminate relation of passenger	559
Stopping Place: See Platform; Stations.	
duty of carrier to receive and discharge passengers at.....	685
Stoppage in Transitu: See Carriers of Goods.	
as a defense for failure to deliver.....	169
not necessary to recovery for delivery to wrong consignee.....	182
carrier's lien for freight charges is superior to consignor's right of..	440
Storage: See Bill of Lading; Carriers of Goods; Common Carriers.	
unloading and, when constitutes delivery.....	149
duty of carrier as warehouseman to provide safe.....	280
Storms:	
unusual, and floods as excuse for delay.....	251
Stoves:	
carrier must provide safe and proper.....	602
Stowage: See Bill of Lading; Carrier of Goods; Common Carriers.	
negligence in, liability of carrier for.....	378
limitation of liability for losses from.....	353
Street Cars:	
passengers injured in entering.....	842
passengers injured while alighting from.....	852, 853
Street Crossings: See Crossings.	
Street Railroad Companies:	
are common carriers and liable as such.....	44, 540
rules and regulations of.....	592
care of, at crossings.....	595
are bound to use reasonable care.....	629
when not guilty of negligence in attempting to operate cars during a strike	642

Strikers—Strikes: See Carriers of Goods.	Page.
do not excuse failure of carrier to perform its duties.....	97
carriers not liable for acts of.....	228
duty of carrier when goods endangered by acts of.....	237
by employes as excuse for delay.....	254
attempt of street railroad to operate cars during.....	642
Structures:	
dangerous proximity of, to tracks.....	598
Sudden Jerks and Jolts:	
when carrier liable for injury caused by.....	660
street railway not liable for injury caused by, unless unusual.....	661
Sudden Peril:	
acts of passengers in, not contributory negligence.....	818
Sufficiency of Evidence: See Declarations; Evidence.	
Sui Juris:	
when children are.....	822
Sunday:	
contract made on, when not invalid.....	118
delivery may be made on, in absence of statute.....	192
violation of, statute does not relieve carrier from its duty.....	376
traveling on, not contributory negligence.....	831
traveling on, does not affect relation of carrier and passenger.....	555
Surgeon:	
carriers must employ reasonably competent.....	618
carrier not liable for negligence of.....	618
Switchmen:	
must be careful, skillful, competent and sober.....	598, 616
Switches:	
discontinuance of connection to.....	92
must not be defective or out of repair.....	597
delivery of freight destined to.....	184

T.

Teamsters:	
are common carriers.....	63
Telegraph Companies:	
held not liable as common carriers.....	73
held liable as common carriers.....	75
duties and liabilities of.....	76
Telegraph Messenger Companies:	
are common carriers.....	86
Telephone Companies:	
are not common carriers.....	78
Tender:	
and refusal to carry must be shown.....	93
of freight charges in action for refusal to carry.....	102
of goods by shipper.....	116
acceptance may be implied from proper.....	135
of goods must be made at accustomed place.....	136

	Page.
Tender—(Continued):	
of goods must be made at reasonable time, place, etc.....	191
of fare to avoid ejection.....	735
of invalid or defective ticket, ejection for.....	742
of amount of charges justly due discharges carrier's lien.....	443
Termination:	
of liability of carrier of goods.....	148
of relation of passenger.....	554
Testimony: See Evidence; Witness.	
Texas:	
statute limiting time in which to bring suit.....	332
statute prohibiting carriers to limit common law liability.....	337
rule in, as to stipulation as to measure of damages.....	350
Thief—Thieves:	
losses by.....	225
limitation of liability for losses by.....	352
Third Persons:	
carrier liable for delivery of goods to.....	152, 153
liability of carrier for acts of.....	641
liability of carrier for assaults by.....	644
fraud or deceit of, will not excuse carrier for misdelivery.....	179
Through Transportation:	
carrier may make contracts for.....	449
neither commission nor courts can compel contracts for.....	449
special contracts by railroad corporations for, are not ultra vires.....	471
what is sufficient to establish a contract for.....	473
charging and collecting entire freight charges for, in advance.....	475
collection of entire charges for, by terminal carrier.....	476
accepting goods to be transported to or delivered at a certain point.....	477
where carrier acts as forwarder or warehouseman.....	478
limitation of carrier's liability to its own line.....	479
when connecting carriers entitled to benefit of limitation.....	484
Tickets: See Carriers of Passengers.	
purchase of, creates relation of carrier and passenger.....	548
stop-overs on continuous passage.....	558
limited and unlimited	563
non-transferable	567
ejection for refusal to procure.....	731
ejection for tendering defective or invalid.....	742
excursion	565
conductors' checks	566
round-trip	566
commutation	567
as evidence of contract of transportation.....	806
Ties:	
carrier must provide sound.....	597
Time:	
of delivery of goods.....	191
carrier must deliver goods within reasonable.....	240
what is reasonable, and how determined.....	240, 241

	Page.
Time—(Continued):	
what is reasonable, for removal of goods generally.....	269, 270, 271
extended by failure or refusal to deliver.....	271
limitation in bill of lading of, in which to bring suit.....	331
Time Table:	
carrier liable for negligence in not running trains according to.....	691
Tools: See Appliances.	
Toll Bridge:	
owners of, are not common carriers.....	66
Torts:	
carrier may not limit its liability for.....	314
Tow-boats—Owners of Tow-boats:	
on Mississippi, are common carriers.....	48
generally, are not common carriers.....	49
Tracks:	
obstruction on or near.....	598
standing near or between, when contributory negligence.....	874
crossing intervening, when contributory negligence.....	874
delivery of freight destined to side.....	184
Tramp:	
when not a passenger.....	560
Transfer—Transfers:	
ejection for tendering defective or invalid.....	742
negligence in the issue of.....	746
Transfer Companies:	
are common carriers	89
Transportation: See Carriers of Goods; Carriers of Passengers; Interstate Transportation; Passengers.	
when it is gratuitous	7
when compensation implied	9
contributory negligence in awaiting and seeking.....	872
Transportation Companies:	
are common carriers	47
Trespassers:	
relation of carrier of passengers to.....	544
the burden is on the carrier to show that a person on its conveyance is a	545
persons refusing to pay fare become.....	553
are not passengers	560
when persons riding are not.....	583
manner of ejection of.....	747
place of ejection of.....	749
Trestle:	
care required in running trains over.....	630
Trees: See Obstructions.	
Trolley: See Appliances.	
Trolley Wires: See Electrical Appliances.	
Trover: See Conversion.	
Truckmen:	
are common carriers	63

	Page.
Trustees:	
of railroads when common carriers.....	42
Turnouts: See Switches.	
U.	
Ultra Vires:	
special contracts by railroads for through transportation are not..	471
a corporation may be liable as a common carrier, although its con-	
tracts were	540
breach of, city ordinances, as evidence of negligence.....	785
by carriers, forbidden.....	110
Undue Preference: See Interstate Transportation.	
Unloading:	
of goods, when constitutes delivery.....	149
liability for injury while goods are being.....	151
constituting negligence of shipper in.....	383
is ordinarily the carrier's duty.....	269
Unreasonable: See Reasonable.	
Unusual Floods and Storms:	
as excuses for delay.....	251
Use:	
liability of carrier while in, of cars of another carrier.....	609
liability of carrier while in, of State canal bridges.....	609
Usage:	
is not a good defense for adoption of unsafe method.....	116
effect of, on rule as to carrier's liability as warehouseman.....	278
may establish constructive delivery.....	137
Usage of Trade: See Custom.	
delivery may be sufficient when pursuant to.....	139
in delivery of goods.....	154
will not excuse carrier for misdelivery.....	180
Usual Stopping Places:	
duty to receive and discharge passengers at.....	685
ejection of passengers at other than, prohibited by statute.....	750
V.	
Value:	
fraudulent concealment or misrepresentation of, by shipper.....	356
carrier's duty to inquire as to, of property.....	358
shipper's duty to state, of property.....	359
Vehicle—Vehicles.	
when entry into, creates relation of carrier and passenger.....	549
leaving, of the carrier, rights of passenger.....	556
after leaving, of the carrier, rights of passengers.....	556
Vermont:	
rule in, as to travelling in violation of statute	831
Vessels: See Steamboats.	
Vestibule: See Door; Hall.	
carrier must provide safe and proper, doors.....	602

	Page.
Vigilance: See Care.	
Violence: See Ejection.	
duty of carrier to protect passengers from, of employes and others	626, 636
Vis Major:	
loss or damage by	220
must be proximate cause	224
seizure of goods in carrier's hands under legal process is	229
Vouchers:	
tickets are in the nature of, for passage money	806

W.

Wagon: See Vehicles.	
Wagoners:	
are common carriers	61
when delivery to, is not sufficient	139
Waiver:	
what is not a, of prepayment of freight charges	102
of right of action for wrongful delivery	208
of right of action for delay	249
of time limit, on presentation of claims	335
of carrier's lien by express agreement or inconsistent stipulation	445
what is not, of time limit in ticket	566
of rules and regulations of carrier	591
Walls:	
carrier must provide safe and properly constructed	597
Wantonness: See Exemplary Damages; Wilful Acts.	
Warehouse:	
delivery of goods where there is no	184
Warehousemen:	
lien of	14, 15, 16
are not common carriers	69
when carrier is liable only as	130, 131
carrier responsible as, only for negligence	181
liability of carrier as, before transportation	258
during transportation	260
as to goods awaiting delivery	261
Massachusetts rule	261
New Hampshire rule	263
English rule	264
origin of different rules	265
conflict of laws	266
what is reasonable time for removal of goods	267
time extended by failure or refusal to deliver	271
notice to consignee held not essential	272
necessity of notice maintained	273
sufficiency of notice	275
notice to consignor	275
liability of connecting carriers	277

	Page.
Warehousemen—(Continued):	
the burden of proof.....	777
effect of special contract or usage on rule.....	278
duty of carrier as warehouseman to store safely.....	280
liability for negligence	281
statute making railroad liable for losses by fire.....	285
limitation of liability to that of.....	340
carrier's liability as, for baggage.....	726
Warning: See Lookout; Signals.	
acts by passengers in disregard of, contributory negligence.....	315
Washout:	
relation of passenger does not terminate where transit is inter- rupted by	559
Waterway:	
freezing of waterway will excuse delay.....	253
Wharf:	
responsibility for loss by fire of goods placed on.....	132
landing of goods upon, and reasonable notice completes delivery.....	194
Wharfingers:	
lien of	14, 15, 16
are not common carriers.....	69
delivery to, in accordance with usage.....	154
Wheels:	
carrier must provide safe and proper car.....	601
Willful Acts:	
carrier may not limit its liability for.....	314, 328
carriers of passengers are responsible for, of employes.....	543
duty of carrier to protect passengers from, of employes.....	626
Wind:	
fall of sign in a not unusual, is not an act of God.....	221
Window:	
carrier must provide safe and proper barriers or guards.....	601
riding with part of person projecting from.....	870
Wisconsin:	
statute requiring carriers to furnish suitable cars.....	112
rule in, as to limitation of liability for negligence.....	322
Workmen: See Employes.	
Wreck:	
relation of passenger does not terminate when transit is inter- rupted by.....	559

